Institution:	Inter-American Commission on Human Rights
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Session:	Hundred and Eleventh Special Session (3 – 6 April 2001)
Title/Style of Cause:	Michael Edwards, Omar Hall, Brian Schroeter and Jeronimo Bowleg v. Bahamas
Doc. Type:	Report
Decided by:	Chairman: Claudio Grossman; First Vice-Chairman: Juan Mendez; Second Vice-Chairman: Marta Altolaguirre; Commissioners: Robert K. Goldman, Peter Laurie, Julio Prado Vallejo, Helio Bicudo.
Dated:	4 April 2001
Citation:	Edwards v. Bahamas, Case 12.067, Inter-Am. C.H.R., Report No. 48/01, OEA/Ser.L/V/II.111, doc. 20, rev. (2000)
Represented by:	APPLICANTS: Burton Copeland, Cameron McKenna and Lovell White Durant
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I. SUMMARY

1. This Report concerns three petitions which were presented to the Inter-American Commission on Human Rights (hereinafter referred to as "the Commission") by Messrs. Burton Copeland Cameron McKenna, and Lovell White Durant, Solicitors from London, United Kingdom, (hereinafter referred to individually and collectively as "the Petitioners") on behalf of Messrs. Michael Edwards, Omar Hall, Brian Schroeter and Jeronimo Bowleg, (hereinafter referred as the "condemned men") by letters dated November 5, 1998, December 3, 1998, and January 7, 1999. The three petitions allege that the Commonwealth of The Bahamas (hereinafter referred to as "the State" or "The Bahamas") violated the human rights of the condemned men under the American Declaration of the Rights and Duties of Man (hereinafter referred to as "the Declaration").

2. The table below depicts the names of the condemned men, the names of the Petitioners, the dates on which the Commission opened the cases in respect of the condemned men, and Articles of the Declaration alleged to have been violated, and the dates on which the Commission found the cases to be admissible.

	Case number	**Petitioners**	**Victim**	**Date case opened**	**Date found Admissible**	**Articles of Declaration**
1	12.067	Burton	Michael	December	March 7,2000,	I, II, XVIII,

		Copeland	Edwards	10, 1998	106th Session, Report Nº24/00 [FN1]	XXVI
2	12.068	Cameron McKenna	Omar Hall	December 10, 1998	March 7, 2000, 106th Session, Report Nº 25/00 [FN2]	I, II, XVII, XVIII, XXVI
3	12.086	Lovell White Durant	Brian Schroeter, Jeronimo Bowleg	January 19,1999	September 27, 1999, 104th Sessions, Report Nº 123/99 [FN3]	I, II, XVII, XVIII, XI, XXV, and XXVI

[FN1] Annual Report of the Inter-American Commission on Human Rights 1999, Volume I, p. 117, OEA/Ser.L/V/II.106, April 13, 2000.
[FN2] Id. Annual Report, of the Inter-American Commission on Human Rights 1999 p. 184.
[FN3] Id. Annual Report of the Inter-American Commission on Human Rights 1999 p. 190.

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3. In these three cases, the condemned men were tried, convicted, and sentenced to death by hanging by The Bahamas, pursuant to Sections 11 and 312 of its Penal Code.[FN4] The Petitioners in these cases alleged that the State violated the condemned men's rights under the American Declaration on one or more of the following grounds, further particulars of which are provided in Part III.A of this Report:

[FN4] The Statute Law of The Bahamas, Revised Edition 1987, Prepared under the authority of The Law Reform and Revision Act 1975, Chapter 77, p. 1124.
Section 11(3) provides: "If a person does and act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event."
Section 311 provides: "Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse, as in this Title hereafter mentioned."
Section 312 provides: "Whoever commits murder shall be liable to suffer death:
Provided that the sentence of death shall not be pronounced on or recorded against a person who, in the opinion of the court, was at the time when the murder was committed under eighteen years of age; but, in lieu of such punishment, the court shall sentence such person to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Code or the provisions of any other Act, be liable to be detained in such place and under such conditions as the Governor-General may direct, and whilst so detained shall be deemed to be in legal custody."

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a. Violations of Articles I, II, XVII, XVIII, and XXVI of the Declaration respecting their rights to life, equality before the law, to recognition of juridical personality and civil rights, to humane treatment, to a fair trial and to due process of law; relating to the mandatory nature of the death penalty for the crime of murder in The Bahamas, and the procedure for granting amnesty, pardon or commutation of sentence in the State.
b. Violations of Articles XVIII, XI, XXV, and XXVI of the Declaration, with respect to their rights to a fair trial and due process of law in relation to both pre-trial and post trial detention.
c. Violations of Articles XXV and XXVI of the Declaration, regarding their rights to humane treatment, concerning their conditions of detention.
d. Violations of Articles XVIII, and XXVI, with respect to their rights to a fair trial, relating to the adequacy and preparation of their legal representation and the manner in which their criminal proceedings were conducted.
e. Violations of Articles XVIII and XXVI, concerning their rights to a fair trial, in respect of the unavailability of legal aid for Constitutional Motions in The Bahamas.

4. The Commission declared that it was competent to examine these three cases, and declared the cases admissible pursuant to Articles 37 and 38 of its Regulations, at its 104th and 106th Regular Sessions respectively. Messrs. Schroeter's and Bowleg's case, Nº 12.086, Report Nº 123/99,[FN5] was declared admissible at the Commission's 104th Regular Sessions. Mr. Edwards' case Nº 12.067, Report Nº 24/00,[FN6] and Mr. Hall's case Nº 12.068, Report Nº 25/00[FN7] were declared admissible at the Commission's 106th Regular Sessions.

[FN5] Annual Report of the Inter-American Commission on Human Rights 1999 p. 190
[FN6] Annual report of the Inter-American Commission on Human Rights 1999, Volume I, p. 117.
[FN7] Annual Report, of the Inter-American Commission on Human Rights 1999 p. 184.

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5. As a preliminary matter, the Commission decided to consolidate these three cases for the purposes of this Report pursuant to Article 40(2) of the Commission's Regulations because the cases involve similar facts and substantially the same issues under the Declaration.

CONCLUSIONS

The Commission, on the basis of the information presented, and the due analysis under the American Declaration, concludes as follows:

1. The State is responsible for violating Articles I, XVIII, XXV, and XXVI of the American Declaration, by sentencing Messrs. Edwards, Hall, Schroeter and Bowleg, to a mandatory death penalty.
2. The State is responsible for violating Messrs. Edwards', Hall's, Schroeter's and Bowleg's rights under Article XXIV, of the American Declaration, by failing to provide the condemned men with an effective right to petition for amnesty, pardon or commutation of sentence.

3. The State is responsible for violating Messrs. Hall's, Schroeter's and Bowleg's rights under Articles XI, XXV, and XXVI of the American Declaration, because of the inhumane conditions of detention to which the condemned men were subjected.
4. The State is responsible for violating Messrs. Edwards', Hall's, Schroeter and Bowleg's rights under Articles XVIII, and XXVI of the American Declaration, by failing to make legal aid available to the condemned men to pursue Constitutional Motions.
5. The State is responsible for violating Messrs. Schroeter's and Bowleg's rights to be tried without undue delay under Article XXV of the Declaration.
6. The Commission finds no violation of Articles XXV and XXVI of the Declaration relating to Mr. Edwards' claims concerning inhumane conditions of detention, incompetent and ineffective benefit of counsel, and the State's failure to disclose documents relating to Mr. Edwards' identification parade,
7. The Commission does not find that the State is in violation of Mr. Hall's right to an impartial trial pursuant to Article XXVI of the Declaration, relating to unfair media reporting and publicity.
8. The Commission does not find that the State violated Messrs. Schroeter's and Bowleg's rights to an impartial trial pursuant to Article XXVI of the Declaration relating to the conduct of their trial, in particular the trial judge's summing-up to the jury concerning their involuntary confessions.

II. PROCEEDINGS BEFORE COMMISSION

A. Proceedings in Relation to Michael Edwards, Case 12.067

6.Mr. Edwards' petition was presented to the Commission on November 5, 1998. Included in Mr. Edwards' petition was a request for precautionary measures pursuant to Article 29 of the Commission's Regulations. The Commission opened Case Nº 12.067, on December 10, 1998, and pursuant to Article 34 of its Regulations, the Commission forwarded the pertinent parts of the petition to the State and requested its observations within 90 days with regard to the exhaustion of domestic remedies and the claims raised in the petition. The Commission also requested that the State stay Mr. Edward's execution pending the Commission's investigation of the alleged facts.

7. On December 11, 1998, the Commission received the State's Reply to the petition which is referred to in Chapter III of this Report.

8. On December 21, 1998, the Commission forwarded the pertinent parts of the State's Reply to the Petitioners and requested that they provide the Commission with their observations within 30 days.

9. On January 20, 1999, the Commission received a request from the Petitioners for an extension of time to file their response to the State's observations because the Petitioners stated that they were "still awaiting information from Mr. Edwards regarding the preparation of his defense, namely, that he was deprived of a fair trial, and the prison conditions in which he is currently being held." On February 5, 1999, the Petitioners responded to the State's Reply to the petition. In addition, the Petitioners stated that there were practical difficulties in obtaining

information with regard to Mr. Edwards' prison conditions and reserved the right to develop this ground of his petition once relevant information was received. The Petitioners also reiterated their request that the Commission issue precautionary measures in respect of Mr. Edwards.

10. On February 19, 1999, the Commission forwarded the Petitioners' observations to the State asking that it provide the Commission with information that it deemed relevant to the case within 30 days. On October 19, 1999, the Commission reiterated its request to the State, asking that the State provide it with information with regard to the Petitioners response to the State's Reply to the petition, within 30 days.

11. The Commission has not received any additional communication or information from the State since its Reply to the petition on December 11, 1998.

B. Proceedings in Relation to Omar Hall, Case 12.068

12. Mr. Hall's petition was presented to the Commission on December 3, 1998. Included in Mr. Hall's petition were several requests from the Petitioners. The Petitioners requested that the Commission recommend to the State that it commute Mr. Hall's death sentence so that he could be removed from the death row regime in Foxhill Prison. The Petitioners also invited the Commission to recommend to the State that it amend its penal code to restrict the death penalty to the most heinous forms of murder and to institute a sentencing hearing in which aggravating or mitigating factors can be examined. In addition, the Petitioners asked the Commission to reach a decision in the case as soon possible and requested that the Commission make the strongest possible representations to the State to stay the execution of Mr. Hall and not to execute him while this matter is pending determination by the Commission.

13. On December 10, 1998, the Commission opened Case Nº 12.068, and forwarded the pertinent parts of the petition to the State and requested its observations within 90 days with regard to the exhaustion of domestic remedies and the claims raised in the petition. The Commission also requested that the State stay Mr. Hall's execution pending the Commission's investigation of the alleged facts. On October 19, 1999, the Commission reiterated its request to the State for its observations within 30 days with regard to the claims raised in the petition.

14. To date, the Commission has not received any response from the State in respect of the Petitioners' petition, despite the Commission's requests for information dated December 10, 1998, and October 19, 1999.

C. Proceedings in Relation to Brian Schroeter and Jeronimo Bowleg,

Case 12.086

15. Messrs. Schroeter's and Bowleg's petitions were presented to the Commission on January 7, 1999. In their petition, the Petitioners requested that the Commission issue Precautionary Measures pursuant to Article 29.2 of its Regulations against the State, and indicated that the Commission should request that the State take no steps to execute Messrs.

Schroeter and Bowleg to avoid irreparable damage to them while their cases were pending determination before the Commission.

16. The Petitioners also requested that the Commission declare that the State has violated the rights of Messrs. Schroeter's and Bowleg's as established by the American Declaration. In addition, the Petitioners requested that Messrs. Schroeter and Bowleg be provided with an effective remedy entailing their release from detention. Moreover, the Petitioners requested that the Commission schedule an oral hearing in the case, and conduct an on-site visit to death row at Fox Hill Prison, The Bahamas, to investigate Messrs. Schroeter's and Bowleg's conditions of detention.

17. Pursuant to Article 40(2) of the Commissions Regulations, the Commission consolidated and processed the petitions as one case, because they dealt with the same facts, issues, and persons. The Commission opened case Nº 12.086, and pursuant to Article 34 of the Commission's Regulations the Commission forwarded the pertinent parts of the petition to the State on the January 19, 1999, and requested that the State provide it with information within 90 days on the issue of exhaustion of domestic remedies, pursuant to Article 37 of its Regulations, and with information with respect to the claims raised in the petition, and any additional information which would enable the Commission to determine whether the internal legal remedies and procedures have been exhausted. The Commission also requested that the State stay the executions of Messrs. Schroeter and Bowleg pending an investigation by it of the alleged facts.

18. On January 25, 1999 the Petitioners forwarded additional information to Commission on the issue of timeliness of the petition, and argued that the rules of the American Declaration should apply in this case. The pertinent parts of this information were forwarded to the State on the same date.

19. The case file before the Commission does not reflect any responses from the State in respect of the Commission's communications and the pertinent parts of the petition which were forwarded to the State on January 19, and 25, 1999 respectively.

D.Commission's Decision on Admissibility of the three cases 12.067, 12.068, and 12.086 at 104th and 106th Regular Sessions

20. The Commission declared that it was competent to examine these three cases, and declared the cases admissible pursuant to Articles 37 and 38 of its Regulations, at its 104th and 106th Regular Sessions respectively. Messrs. Schroeter's and Bowleg's case, Nº 12.086, Report Nº 123/99,[FN8] was declared admissible on September 27, 1999, at the Commission's 104th Regular Sessions. Mr. Edwards' case Nº 12.067, Report Nº 24/00,[FN9] and Mr. Hall's case Nº 12.068, Report Nº 25/00[FN10] were declared admissible on March 7, 2000, at the Commission's 106th Regular Sessions.[FN11]

[FN8] Annual Report of the Inter-American Commission on Human Rights 1999 p. 190.

[FN9] Annual Report of the Inter-American Commission on Human Rights 1999, Volume I, p. 117.
[FN10] Annual Report, of the Inter-American Commission on Human Rights 1999 p. 184.
[FN11] The details of the proceedings before the Commission can be found in the Reports referred to and pages cited in the Commission's 1999 Annual Report.
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21. In the Commission's decisions declaring the cases admissible, the Commission also decided inter alia to place itself at the disposal of the parties concerned with a view to reaching a friendly settlement in the cases, and maintained in effect the precautionary measures issued in the three cases under review.

22. The Commission decided to consolidate these three cases for the purposes of this Report pursuant to Article 40(2) of the Commission's Regulations because the cases involve similar facts and substantially the same issues under the Declaration.
23. The Commission forwarded a copy of Case Nº 12.086, Report Nº123/99 concerning Messrs. Schroeter and Bowleg to the State and Petitioners on November 30, 1999. On March 10, 2000, the Commission forwarded a copy of Case Nº 12.067, Report Nº 24/00, relating to Mr. Edwards, and Case Nº 12.068, Report Nº 25/00 in respect of Mr. Hall to the State and the Petitioners.

24. Since forwarding the Reports to the State and the Petitioners, the Commission has not received any additional information from either the State or the Petitioners concerning the same.

III. POSITION OF THE PARTIES ON THE MERITS OF THE PETITIONS

A. Michael Edwards' Claims

1. Position of the Petitioners

25. The Petitioners claim that Michael Edwards, a national of The Bahamas was charged with the murder of Gerald Cash, ("the deceased") owner of Lucky Food Store in The Bahamas which occurred on October 20, 1994. The Petitioners indicate that the deceased was shot with a single bullet, and was robbed of $800 in cash. The Petitioners maintain that three store employees, ages 14, 16, and 21, prosecution witnesses, testified that a robbery occurred in the store, during which one or two shots were fired causing the deceased's death, but no none saw the actual gun being fired. The Petitioners claim that a fourth prosecution witness testified that a robbery had occurred, and stated that during the course of the robbery he was asked to fill a bag with money from the "shop's till," but failed to identify the robber at the identification parade. The Petitioners contend that there had been collusion between the witnesses at the identification parade and that it was improperly conducted.

26. The Petitioners report that Mr. Edwards gave sworn testimony and his defense was that of misidentification, he relied on alibi evidence, which was supported by five other witnesses. The Petitioners claim that one of Mr. Edwards' five witnesses testified that she was in the store when the robbery occurred and that the gunman did not have the appearance of Mr. Edwards.

27. The Petitioners state that Mr. Edwards was convicted of armed robbery and murder on May 8, 1996, and a mandatory death sentence was imposed on him. According to the Petitioners, Mr. Edwards appealed his convictions and sentence to the Court of Appeal of The Bahamas, which dismissed his appeal on January 20, 1997. Mr. Edwards then petitioned the Judicial Committee of the Privy Council (hereinafter referred to as "the Privy Council") for Special Leave to Appeal his convictions and sentence, the Privy Council dismissed his petition on October 29, 1998.

a. Articles I, II, XVIII, and XXVI of the Declaration - The Mandatory Death Penalty and the Prerogative of Mercy

i. The Mandatory Death Penalty

28. The Petitioners allege violations of Articles I, II, XVIII, and XXVI of the Declaration, in connection with the trial, conviction and sentencing of Mr. Edwards for the crime of murder in The Bahamas. More particularly, the Petitioners argue that the mandatory death sentence imposed by the State pursuant to its penal law on every person convicted of murder, and the pardon and commutation regime of the State violate Mr. Edwards' rights to life, equality before the law, a fair trial, and humane treatment under Articles I, II, XVIII, and XXVI, of the Declaration.

29. The Petitioners contend that the death penalty is mandatory in character, and does not allow for consideration to be taken of the particular circumstances of Mr. Edwards or the offence. The Petitioners also argue that the pardon/commutation procedure is extra-legal in nature for the following reasons, namely, (I) there is no criteria in existence in The Bahamas for the exercise of the discretion of whether to pardon or to execute; (ii) no information is available as to whether such discretion is exercised on the basis of an accurate account of legally admissible evidence; and (iii) there is no right to make either written or oral representations, and no opportunity is provided to respond to any remarks of the trial judge (or anybody else) as to whether the death sentence should be implemented.

30. The Petitioners referred to the legislative history of the death penalty in The Bahamas. The Petitioners state that until July 10, 1973, the Commonwealth of The Bahamas was a British Colony whose penal law consisted of the common law as developed in England and Wales and local penal codes, and that pursuant to the Offences Against the Persons Act of 1861, the penalty for every offence of murder was death. The Petitioners claim that in the United Kingdom, the Homicide Act of 1957 reduced certain killings to manslaughter, and also created a scheme which carefully distinguished between capital and non-capital murders. The Petitioners maintain that the Homicide Act was not extended to the Commonwealth of The Bahamas, although separate provision was made in its Penal Code for the defenses of provocation, diminished responsibility and other forms of manslaughter. The Petitioners state that prior to 1957 no distinction was made between capital and non-capital murder. The Petitioners indicate that this is the position in The Bahamas, and that pursuant to Section 312 of the Penal Code of The Bahamas, an adult murderer is automatically sentenced to death for the offence of murder.

31. The Petitioners claim that although the United Kingdom has now abolished the death penalty for murder, the distinction created by the 1957 Homicide Act between capital and non-capital murder was illustrative of a more general trend in the international sphere towards a recognition that the death penalty – insofar as it is to be maintained at all–should be administered according to criteria which take into account the individual circumstances of each case.

32. In support of their position, the Petitioners refer to the practice in other states. They argue, for example, that in the case of Woodson v. North Carolina[FN12] the United States Supreme Court held that the automatic imposition of the death sentence on all those convicted of a specific offence is inconsistent with "the evolving standards of decency that are the hallmark of a maturing society." The Petitioners argue that the Supreme Court made it plain that the application of the mandatory death sentence imposed in all cases of murder without objective criteria for its application in particular cases after a fair hearing, was unconstitutional. In addition, the Petitioners indicate that the Supreme Court held further that:

[FN12] Woodson v. North Carolina, 49 L Ed 2d 944(1976).

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[i]n capital cases the fundamental respect for humanity underlying the eight amendment … requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[FN13]

[FN13] Id., at 961.

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33. In addition, the Petitioners contend that the South African Constitutional Court has gone further and followed the Hungarian Constitutional Court in declaring the death penalty to be unconstitutional per se in Decision 23/1990(X.31). Conversely, in the case of Bachan Singh v. The State of the Punjab, the Supreme Court of India determined that the death penalty is not unconstitutional per se,[FN14] in part because there was a judicial discretion as to whether it should be imposed. Based upon these domestic authorities, the Petitioners argue that states retaining the death penalty must distinguish between capital and non-capital murder, and must provide due process guarantees and a proper sentencing procedure for considering whether the death penalty should be imposed in capital cases.

[FN14] Bachan Singh v. the State of the Punjab, (1980) 2 SCC 684).

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34. In this connection, the Petitioners make reference to a 1992 amendment to Jamaica's Offences Against the Person Act 1861, which distinguishes capital from non- capital murder. Finally, the Petitioners claim that the law of Belize has introduced judicial discretion in the application of the death penalty.

35. The Petitioners claim that Mr. Edwards' due process rights were violated and his right not to be subjected to cruel, infamous or unusual punishment pursuant to Article XXVI of the Declaration for the following reasons: (i) Mr. Edwards was sentenced to death under a statute which did not distinguish between different kinds of murder, and he was prevented from advancing any effective mitigation; (ii). the dehumanizing effect of being punished for the category of crime rather than the person he is; and (iii) the capricious and arbitrary nature of the pardon/commutation procedure, which denies him any meaningful input into the most important decision that can now be taken about his life. The Petitioners argue that the imposition of capital punishment may give rise to a violation of Article XXVI even if the death penalty in itself does not constitute a violation of that Article. In support of this contention, the Petitioners rely on the cases of Soering v. United Kingdom,[FN15] Pratt and Morgan v. Attorney-General of Jamaica,[FN16] and Guerra v. Baptiste,[FN17] which interpreted the equivalent provisions of the European Convention of Human Rights, the Jamaican Constitution and the Trinidad and Tobago's Constitution respectively.

[FN15] 11 EHRR 439.
[FN16] 2 AC 1, (1994).
[FN17] 1 AC 397 (1996).

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36. The Petitioners claim that Mr. Edwards' right to equal protection of the law was violated by both the mandatory nature of the death sentence imposed on him and by the arbitrary nature of the pardon/commutation procedure. The Petitioners argue that the mandatory death sentence for the crime of murder in The Bahamas fails to allow any meaningful consideration of Mr. Edwards character and record. Accordingly, the Petitioners contend that Mr. Edwards was denied the right to receive a sentence that reflects his individual circumstances and those of the offence for which he was convicted. The Petitioners claim that Mr. Edwards committed a robbery which went tragically wrong and renders him liable to the same punishment that a sadistic multiple killer, or a calculating contract killer, would receive. The Petitioners maintain that a formal equal penalty for unequally wicked crimes and criminals amounts to substantive inequality, and thus violates Article II of the Declaration.

37. The Petitioners maintain that there is a defect in the clemency procedure because Mr. Edwards has no right to a hearing when the question of mercy or clemency is considered. The Petitioners contend that because there is no information on how a mercy or clemency decision is reached, it is impossible for Mr. Edwards to prove that he has been the victim of unequal treatment, and that the State should not be able to rely on the secrecy of its procedures to assert a non-violation of Article II of the Declaration. The Petitioners maintain that because the discretion to actually implement the sentence is so broad and unaccountable the commutation discretion must be presumed to operate with arbitrary effect. In addition, the Petitioners argue that race, sex, age, wealth, political or personal connections may well influence the commutation decision. Moreover, the Petitioners contend that it is for the party seeking to deprive Mr. Edwards of his life to show absence of inequality and discrimination in the operation of its capital punishment machinery.

38. Finally, the Petitioners argue that for the reasons outlined above, the automatic imposition of a death sentence on Mr. Edwards violates his due process rights and would thereby also violate his right to life under Article I of the Declaration.

b. Prerogative of Mercy

39. The Petitioners claim that the procedures established by the Bahamian Constitution for pardon and mercy do not mitigate the deficiencies of the country's death penalty regime, but instead give rise to a separate and serious violation. Specifically, the Petitioners maintain that they lack the qualities of legal certainty which violate Article XVIII of the Declaration, in conjunction with the non-discrimination provisions of Article 26 of the Bahamian Constitution.[FN18] The Petitioners indicate that Article 90 of the Bahamian Constitution grants the Governor-General various powers to pardon offenders, and to remit punishments, but no limitation or criteria for the exercise of those powers is stated, save that it is specified that the powers should be exercised in accordance with the advice of a designated Minister.[FN19]

[FN18] Article 26(1) of the Constitution of The Bahamas provides: Subject to the provisions of paragraphs (4)(5) and (9) of this Article, no law shall make any provision which is discriminatory either of itself or in its effect.
Article 26(2) states: Subject to the provisions of paragraphs (6)(9) and (10) of this Article, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
Article 26(3) provides: In this Article, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of another such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description. [FN19] Article 90(1) of the Constitution of The Bahamas provides that the Governor-General may, in Her Majesty's name and on Her Majesty's behalf –
(a) grant to any person convicted of any offence against the law of The Bahamas a pardon, either free or subject to lawful conditions;
(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
(c) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or
(d) remit the whole or any part of any sentence passed for such offence or any penalty or forfeiture otherwise due to Her Majesty on account of such an offence.
(e) Article 90(2) provides that the powers of the Governor-General under paragraph (1) of this Article shall be exercised by him in accordance with the advice of the Prime Minister.
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40. The Petitioners maintain that even insofar as the rigors of the mandatory death penalty might theoretically be mitigated by the powers of pardon and mercy, these powers are entirely extra-legal and non-enforceable by the courts, and do not give rise to any legal rights. The

Petitioners indicate that according to the Privy Council's decision in Reckley v. Minister of Public Safety (Nº2),[FN20] under Article 92 of the Constitution of The Bahamas,[FN21] a condemned man has no right to make representations or attend a hearing when the question of mercy or clemency is being considered, nor a right to see or comment on the trial judge's written report. The Petitioners state that the Privy Council opined in Reckley Nº 2 that: "Of its very nature, the Minister's discretion if exercised in favor of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or as it used to be said as an act of grace."

[FN20] 2 WLR 281(1996).

[FN21] Article 92 of the Constitution of The Bahamas provides:

(1) Where an offender has been sentenced to death by any court for an offence under the law of The Bahamas, the Minister shall cause a written report of the case from the trial Justice of the Supreme Court, together with such other information derived from the record of the case or elsewhere as the Minister may require to be taken into consideration at a meeting of the Advisory Committee.

(2) The Minister may consult with the Advisory Committee before tendering any advice to the Governor-General under paragraph (2) of Article 90 of this Constitution in any case not falling within paragraph (1) of this Article.

(3) The Minister shall not be obliged in any case to act in accordance with the advice of the Advisory Committee.

(4) The Advisory Committee may regulate its own procedure.

(5) In this Article "the Minister" means the Minister referred to in paragraph (2) of Article 90 of this Constitution.

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41. The Petitioners argue that Mr. Edwards has no right to see or comment on the trial judge's written report, and that there are no public criteria for commutation, nor any procedure for evaluating whether all relevant matters have been considered and irrelevant ones disregarded. The Petitioners contend that there are no effective domestic legal challenges to the deliberations of the Governor-General or Advisory Committee. The Petitioners maintain that Article 26(1) of the Bahamian Constitution renders nugatory any law which is discriminatory either of itself or in its effect. According to the Petitioners Article 2(2) of the Bahamian Constitution further stipulates that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority." The Petitioners contend that discrimination is defined broadly to include differential treatment on the basis of "race, place of origin, political opinions, color or creed."

42. Moreover, the Petitioners contend that the prohibition on discrimination in Article 26 of the Bahamian Constitution is merely a restatement of a fundamental principle of fairness – namely that decisions which will have adverse effects on citizens should be taken on rational, non-arbitrary grounds. The Petitioners claim that the reason why the prohibition in Article 26(1) of the Constitution of The Bahamas extends beyond deliberate discrimination to measures which have the effect of being discriminatory is because it has been recognized that arbitrary treatment is often hard to prove. According to the Petitioners, in the absence of transparent deliberations

and a reasoned decision, there must be a serious risk that Mr. Edwards has been treated in a way that violates the non-discrimination clause of the Bahamian Constitution.

43. Finally, the Petitioners argue that in all these circumstances, Mr. Edwards' inability to do anything but await passively a decision on his mercy application amounts to a violation of his right to resort to the courts to ensure respect for his legal rights pursuant to Article XVIII of the Declaration.

c. Article XXVI of the Declaration - Right to an Impartial Trial, Right to Counsel and Procedural Irregularities

44. The Petitioners allege that Mr. Edwards was denied the benefit of effective and competent counsel and that the State failed to disclose documents relating to the conduct of his identification parade. The Petitioners stated they were awaiting further information in relation to these grounds and in due course these grounds would either be amplified or withdrawn.

45. The Petitioners also contend that the State may claim that Mr. Edwards has a remedy under the Constitution of The Bahamas to pursue a Constitutional Motion, however, this remedy cannot be considered either available or effective. The Petitioners argue that Mr. Edwards is unable to pursue a Constitutional Motion in The Bahamas to challenge his mandatory death sentence as being inhuman or degrading punishment or treatment because he is indigent, and the State's domestic law does not provide private funds nor legal aid to indigent persons to pursue such Motions. The Petitioners claim that his petition to the Commission is being made on a pro bono basis, and that the State's practice is to refuse legal aid for Constitutional Motions. The Petitioners maintain that the legal complexity of a Constitutional Motion, combined with Mr. Edwards' relative lack of education, makes it unrealistic and unfair to expect him to present a Constitutional Motion without professional legal assistance. Finally, the Petitioners maintain that it is difficult for Mr. Edwards to find a Bahamian lawyer who is willing to prepare and argue a Constitutional Motion pro bono.

46. In support of their position, the Petitioners rely upon the jurisprudence of the United Nations Human Rights Committee (HRC), in particular its decision in the case of Champagnie, Palmer & Chisolm v. Jamaica,[FN22] in which the Committee stated as follows:

[FN22] U.N.H.R.C., Champagnie, Palmer & Chisolm v. Jamaica, Communication Nº 445/1991.

With respect to the authors' possibility of filing a Constitutional Motion, the Committee considers that, in the absence of Legal Aid, a Constitutional Motion does not constitute an available remedy in the case. In light of the above, the Committee finds that it is not precluded by Article 5(2)(b) of the Optional Protocol from considering the communication.[FN23]

[FN23] Article 5(2) of the United Nations Optional Protocol provides: "The Committee shall not consider any communication from an individual unless it has ascertained that: (b) The individual

has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged."

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47. In the original petition dated November 5, 1998, the Petitioners contended that Mr. Edwards' right to a fair trial pursuant to Article XXVI of the Declaration was violated because he was denied the benefit of effective and competent counsel. In their later submission of February 5, 1999, the Petitioners withdrew this claim. The Petitioners also maintain that Mr. Edwards' did not have a fair trial pursuant to Article XXVI of the Declaration because the State failed to disclose documents relating to the conduct of his identification parade.

d. Article XXVI of the Declaration - Right to Humane Treatment

48. The Petitioners claim that the conditions under which Mr. Edward is being detained violate Article XXVI of the Declaration, and that they would amplify this ground or withdraw it in due course.

e. Petitioners' Response to the State's Reply to the Petition

49. On February 5, 1999, the Petitioners responded to the State's Reply to the petition. First, the Petitioners argue in response to the State's position that Mr. Edwards' petition to the Privy Council was dismissed on October 30, 1998, the Petitioners reaffirmed that Mr. Edwards' petition to the Privy Council was heard and dismissed on October 29, 1998, and not October 30, 1998, as suggested by the State.

50. Second, the Petitioners stated that they were withdrawing their allegation of a violation of Mr. Edwards' right to a fair trial as pursuant to Article XXVI of the Declaration, relating to the incompetence of counsel at trial. Third, with regard to the Petitioners allegation concerning the failure of the State to provide disclosure of documents relating to the conduct of the identification parade in Mr. Edward's case, the Petitioners indicate that the State used the words "established" and "formal." The Petitioners invited the State to clarify if there existed any documents of an informal nature. The Petitioners argue that the evidence of DCI Gibson at pp.692-6 of the trial transcript suggests that some documents did exist, and that until this ambiguity is clarified, Mr. Edwards' is not in a position to develop this part of his petition.

51. In response to the State's Reply to the petition with regard to the Petitioners' allegation concerning the violations of the Declaration by the State's imposition of a mandatory death penalty on Mr. Edwards, the Petitioners claim that the State failed entirely to address the issues raised in Mr. Edwards' petition before the Commission. The Petitioners claim that the State's argument addresses the constitutionality of the death penalty under Bahamian law, rather than the violations of the Declaration alleged by Mr. Edwards. The Petitioners maintain that Mr. Edwards has not sought to argue the contrary, but has addressed his petition to the violations of the Declaration. The Petitioners state that they wish to remind the Commission that Mr. Edwards does not claim that the death penalty itself violates the Declaration. The Petitioners also reiterated their argument regarding the violations of the Declaration in relation to imposition of capital punishment.

52. The Petitioners also claim that the State did not present any arguments on Mr. Edwards' allegation that the existence and operation of the Advisory Committee on the Prerogative of Mercy violates Article II of the Declaration, and that the points raised by Mr. Edwards' in his petition concerning the same remains unanswered. In addition, the Petitioners contend that the State's reliance on the dissenting judgment in Woodson v. North Carolina is misplaced. The Petitioners argue that the majority decision in Woodson v. North Carolina has remained good law in the United States for over twenty years and in the absence of compelling arguments, there can be no basis for preferring the minority view over that of the majority. The Petitioners indicate that the State did not make any reasoned arguments in support of its assertion that "the matters considered therein have no relevance having regard to the history and law of The Bahamas."

53. The Petitioners argue that because the mandatory death penalty was part of Bahamian law at Independence, does not mean that its mandatory nature could not violate the Declaration, and if it did, the Inter-American Commission system would be merely declaratory of existing practice. The Petitioners contend that the Declaration is intended to be normative rather than declaratory, and that it should keep in step with evolving human rights standards elsewhere in the world. The Petitioners maintain that the relevant question remains that specified by the majority in Woodson, namely, whether the mandatory nature of the death penalty in The Bahamas is inconsistent with the "evolving standards of decency that are the hallmark of a maturing society." The Petitioners also indicate that the State has not provided examples of where mandatory death sentences are imposed, and that the State's remarks concerning the Advisory Committee do not address any of the points raised by Mr. Edwards in his petition.

54. In their response to the State's Reply to the petition, the Petitioners stated that they were still awaiting information from Mr. Edwards regarding the prison conditions in which he is being held, and that the Petitioners reserved the right to develop this ground of his petition further once relevant information is received.

2. Position of the State

55. In its Reply which was received by the Commission on December 11, 1998, the State did not contest the admissibility of the petition, and only addressed the substantive issues relating to the merits of the petition. The State wrote the following:

The Government of The Bahamas has been informed that a Petition has been filed with the Commission on behalf of the above captioned convict, who has been sentenced to death. With respect to the alleged Breaches as contained in a copy of the Petition lodged with our United Kingdom Solicitors Messrs. Charles Russell, We respond as follows:-

the application for special leave to appeal the applicant's conviction to the Privy Council was heard and dismissed according to our records on the 30th October, 1998, as opposed to the 29th October. The other relevant dates referred to in the History are agreed. The Government does not take issue with the Background or the Defense Case as stated in paragraph 2.

56. The following is the State's Reply to the Petitioners allegation that Mr. Edwards was denied the benefit of effective and competent counsel in violation of the Declaration:

It should be pointed out that the allegation that the applicant was 'denied effective and competent counsel' can in no way be supported either by reference to the record of the proceedings before the Learned Trial Judge or by Personal reference to the defense counsel in question. Mr. Malcolm Adderley, the attorney of record is a very senior lawyer who has served in the past as Justice of the Supreme Court of the Commonwealth of The Bahamas (in an acting capacity). He presently serves as a judicial member of the Industrial Tribunal.

That there was no established procedure in place at the time of this investigation in the Royal Bahamas Police Force to fill out documents prior to holding an identification parade. That practice has now been in place for the past five years. Therefore at the time of trial there were no formal documents to disclose to counsel for the defense relative to the conduct of the identification Parade.

57. The following is the State's Reply to the Petitioners argument concerning the mandatory nature of the death penalty:

The Privy Council having held in Jones & Others vs. Attorney General Of The Bahamas, 1995 4AER, pg.2 that the Death Penalty was mandatory and not discretionary. It is submitted that it cannot be properly stated that the mandatory Death Sentence is cruel, infamous or unusual punishment and we further quote from the decision of Mr. Justice Osadebay dismissing the motion for Constitutional Relief:-

The Plaintiff in his submissions questioned the validity or constitutionality of the death penalty in The Bahamas, Suffice it to say that that had already been determined in the decision of Jones & Ors. Vs. The Attorney General of The Bahamas (1995) 46 West Indian Reports Pg. 8. It was again raised in Thomas Reckley Vs. Minister of Immigration & Ors. But without success.

The wording of Article 17 of the Constitution of The Bahamas is similar to that of section 17 of The Constitution of Jamaica and it states:-

17(1) No person shall be subjected to torture or inhuman or degrading treatment or punishment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the Bahama Islands immediately before 10th July, 1973 – (10th July, 1973, being Bahamas Independence Day.)

Their Lordships are satisfied that the construction of Section 17(2) adopted by the minority is to be preferred. The purpose of Section 17(2) is to preserve all descriptions of punishment lawful immediately before Independence and to prevent them from being attacked under Section 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before Independence, the

death sentence for murder cannot be held to be an inhuman description for murder. (Pratt Vs. A.G. for Jamaica (1993) 3 WLR 995 at page 1010.)

Therefore the penalty of Capital Punishment as it is known is not unconstitutional in The Bahamas. The definition of capital murder in The Bahamas refers to specific intention to kill. (Section 11(3) of the Penal Code, Chapter 77).

The applicant here cannot be said, on the facts of this particular case, to have only had the intention to rob as averred in the Petition as 'an armed robbery gone tragically wrong.' The applicant went into the establishment in question armed with a firearm and almost immediately he commenced beating a customer about the head with a bag containing the said weapon. He fired the gun within a short distance of the deceased, and therefore appeared to have no other intention than to cause the kind of harm which in fact resulted.

58. The State argues the following with regarding the Petitioners' argument on the Advisory Committee on the Prerogative of Mercy:

The Advisory Committee on the Prerogative of Mercy is a Committee established by the Supreme Law of The Bahamas, the Constitution, Article 91, and it is the Privy Council, the final Court of Appeal that has held that applicants are not permitted to appear or make submissions before the Advisory Committee and this inability of the applicant so to appear before this Committee cannot therefore be called into question (GUERRA and BAPTISTE) 1996 1AC pg. 397.

Further, please be advised that the Constitution makes provision for all Sentences of Death to be considered by the Advisory Committee on the Prerogative of Mercy (Articles and S92) and all extenuating circumstances are therefore considered by this Committee which sometimes does not recommend that the sentence of the court be carried out.

Whilst the Government agrees that the Supreme Court of the United States ruled that the North Carolina statute imposing a mandatory death penalty was unconstitutional, however, the matters considered therein have no relevance having regard to the history and the law of The Bahamas. Further see the dissenting judgment by Mr. Justice White with whom the Chief Justice Mr. Justice Rheinquist agreed: they rejected the petitioners argument that the death penalty in any circumstances was a violation of the Eight Amendment. In the case of Lauriano (Wilfred) vs. Attorney General and Another (1995 47 WIR 74 at page 90) the views of Rheinquist, CJ were reiterated. Rheinquist, CJ held that he disagreed fundamentally with the view expressed by Stewart J. He held that "they were simply mistaken in their view that the history of mandatory death penalty statutes in the United States revealed that the practice of sentencing to death all persons convicted of a particular offence had been rejected as unduly harsh and unusually rigid."

59. In response to the Petitioners request for precautionary measures pursuant to Article 29 of the Commission's Regulations, the State indicates the following:

Be respectfully advised that the Government of The Bahamas gives the undertaking that it will accord to the IACHR "reasonable time," in accordance with the IACHR'S own Regulations, in

order to consider the Petition but maintains that it will not allow such reasonable time to extend to five (5) years from the date of conviction, thereby frustrating the domestic law as laid down by the Highest Court of the Land, the Judicial Committee of her Majesty's Privy Council. The Government regrets therefore, that unless the final recommendation of the IACHR be forwarded to reach the Government of The Bahamas in Nassau within eighteen (18) months of the 4th November, 1998 and in any event not later than the 4th May, 2000, the Government will be obliged to act in accordance with the laws of the land.

B. Omar Hall's Claims

1. Position of the Petitioners

60. The Petitioners state that Mr. Hall,[FN24] a national of The Bahamas, was charged with the murder of Dieseul Almanor ("the deceased") on June 17th, 1994, in New Providence, The Bahamas. The Petitioners report that according to the prosecution, Mr. Hall's motive for the murder was as part of a joint enterprise to rob the deceased which culminated in his death. The Petitioners maintain that Mr. Hall has alibi evidence, and that the only evidence against him was the confessions of his co-accused which the co-accused claimed had been given after they had been tortured by the police, and evidence of contradictory identification. The Petitioners also state that it is apparent from the co-accused's voluntary confessions that the main eyewitness was an accomplice and the Jury was not warned of the dangers of his evidence. In addition, the Petitioners claim that there was a lack of forensic evidence linking Mr. Hall to the scene of the crime, that Mr. Hall continues to deny his guilt in relation to the crime, and that Mr. Hall has no past criminal record.

[FN24] Co-defendant with Brian Schroeter and Jeronimo Bowleg at trial.

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61. The Petitioners indicate that Mr. Hall was convicted of the murder on September 2, 1996, and a mandatory death sentence was imposed on him. According to the Petitioners, Mr. Hall appealed to the Court of Appeal of The Bahamas against his conviction and sentence, and his appeal was dismissed by the Court on May 2, 1997, and the judgment was issued on July 23, 1997. Mr. Hall then petitioned the Judicial Committee of the Privy Council for Special Leave to Appeal his conviction and sentence, and the Privy Council dismissed his petition on June 3, 1998.

a. Articles I, II, XVIII, and XXVI, of the Declaration – The Mandatory Death Penalty and the Prerogative of Mercy

i. The Mandatory Death Penalty

62. The Petitioners allege that the State has violated Mr. Hall's rights under Articles I, II, XVII, XVIII, and XXVI of the Declaration in connection with the trial, conviction and sentencing of Mr. Hall for the crime of murder in The Bahamas. In addition, the Petitioners argue that the mandatory death sentence imposed by the State pursuant to its penal law on every

person convicted of murder, and the State's pardon and commutation procedure, violate Mr. Hall's rights under Articles I, II, XVII, and XVIII, of the Declaration, and his right to humane treatment under Article XXVI of the Declaration. More particularly, the Petitioners argue that the domestic law of The Bahamas does not provide the condemned men with the right to make representations to the Advisory Committee on the Prerogative of Mercy, the body in The Bahamas with authority to grant amnesties, pardons and commutations of sentences.

63. The Petitioners made arguments similar to those in Mr. Edwards' case concerning Mr. Hall's mandatory death sentence, based on the legislative history of the death penalty and the Prerogative of Mercy in The Bahamas, and domestic and international jurisprudence and practice in the imposition and application of the death penalty. For the sake of brevity those arguments are not referred to here, but have been considered by the Commission in the Analysis of the merits of this Report. The Petitioners also requested that the Commission consider the arguments made in the case of Rudolph Baptiste concerning the mandatory nature of the death penalty and the Prerogative of Mercy in support of Mr. Hall's case.

64. In addition, the Petitioners argue that the American Declaration is a developing instrument reflecting contemporary standards of moral justice and decency. The Petitioners claim that the Declaration shares this quality with other international instruments such as the International Covenant of Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR"), and that the American Declaration should evolve to reflect present day standards of humanity.

65. The Petitioners maintain that Article I of the Declaration does not, of itself, render the death penalty unlawful. The Petitioners claim that commentators have noted that the American Convention is more restrictive of the circumstances where the death penalty can be used than comparable provisions of the ICCPR and the ECHR. The Petitioners argue that there are two reasons why the imposition of the death penalty in Mr. Hall's case would amount to a violation of Article I. The Petitioners argue first, because the death penalty is not reserved for the most serious offences, and second, the death penalty fails to distinguish between different cases of murder or to ensure that like cases are treated alike and consequently it is arbitrary and can give rise to unjust discrimination.

66. The Petitioners argue that the drafters of the American Declaration, with the abolitionist tendencies of the Hispanic States and the restrictionist tendencies of the United States as a relevant regional background intended the right to life guaranteed by Article I to be subject to the exception of lawful sentences of death only in the most extreme circumstances, where evaluation of the circumstances of the crime and of the offender led to an objective sentencing rationale for the imposition of the ultimate penalty. The Petitioners contend that the subsequent elaboration of the American Convention on Human Rights which makes reference in Article 4 to "serious crimes" confirms this approach, and that seriousness goes beyond mere legal label and clearly requires some categorization or opportunity to make representations as to whether a particular offence of murder should be punished by death.

67. The Petitioners contend that the way in which the death penalty is administered makes deprivation of life arbitrary and contrary to Article I. The Petitioners argue that although Article

I contemplates that certain sentences of death are lawful, it does not mean that no sentence of death can be considered arbitrary under Article I or cruel, contrary to Article XXVI. The Petitioners maintain that in Mr. Hall's case considering the nature of the offense for which he was convicted does not amount to the most extreme form of murder. The Petitioners argue that the Bahamian domestic law is defective in providing no opportunity to restrict the infliction of the death penalty to the most heinous classes of murder and to mitigate in the light of personal circumstances.

68. In addition, the Petitioners argue, that in the absence of a fair procedure, due process is required to decide whether the imposition of a mandatory death sentence is appropriate in a particular case. Moreover, the Petitioners contend that because the system in place in The Bahamas does not allow for a review of the sentence imposed in cases of murder, and based on the majority of the United States Supreme Court in the case of Woodson v. North Carolina, that the imposition of the death sentence on Mr. Hall violates Articles XVII and XVIII of the Declaration.

b. Article XXVI - Right to Humane Treatment, Conditions of Detention

69. The Petitioners claim that since Mr. Hall's arrest in August of 1996, he has been subjected to inhuman and degrading treatment due to the appalling conditions in which he has been detained. The Petitioners report that Mr. Hall complains that he was sentenced to death and not sentenced to death aggravated by a lengthy period of inhuman and degrading treatment while awaiting execution. The Petitioners contend that this additional suffering inflicted upon Mr. Hall was not authorized by the original sentence, and that it amounts to cruel, infamous or unusual punishment in violation of Article XXVI of the American declaration. The Petitioners claim that the violation of Article XXVI of the Declaration began from the date of the incarceration on death row in August of 1996, and is still continuing.

70. The Petitioners allege that Mr. Hall has been detained in the maximum security unit for condemned men, together with prisoners under sentence of death awaiting execution, since August 1996, and has been incarcerated in such conditions which violate Article XXVI of the Declaration. The Petitioners maintain that during Mr. Hall's period of incarceration, he has been detained in a cell which has no windows and measures approximately 6ft by 6ft, with nothing more than a mattress and a bucket within the cell. The Petitioners contend that the cell is unbearably hot and airless and that the door to the cell has bars and that there are metal plates across them which prevent air circulating.

71. The Petitioners report that the amount of time that Mr. Hall spends exercising is substantially less than that required to be given under the Bahamian Prison Rules. The Petitioners contend that under Rule 216 of the Bahamian Prison Rules, prisoners should be allowed 1 hour of exercise each day, whereas Mr. Hall is permitted only 10 minutes of exercise four times a week. The Petitioners claim that the 10 minutes a day which Mr. Hall spends exercising is not only in violation of the Bahamian Prison Rules, but is also in breach of Rule 21(1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners which provide that "every prisoner who is not employed in outdoor work should have at least 1 hour of suitable exercise in the open air daily if whether permits."

72. The Petitioners indicate that a Report made by Her Majesty's Review Committee in September of 1991, concluded that the prison was an overcrowded, understaffed institution that performs two of its primary functions well: it incapacitates and it punishes. The Petitioners contend that the Committee's findings included the following: the inmates were confined to their cells for 23 hours a day due to the high number of inmates being supervised by only two prison officers, the lack of patient care was perfunctory at best and that prison officers for the most part lack sensitivity and compassion.

73. The Petitioners maintain that prison officers torment the condemned men with respect to their impending execution, particularly when a date has been set for an execution, and that when no date has been set, the officers make it clear that they are keen for the Government to carry out the sentence imposed on the condemned men to "get rid" of some of them. Finally, the Petitioners contend that Mr. Hall has endured this treatment since August of 1996, for over 2 years and 3 months. The Petitioners argue that these prison conditions have imposed severe stress on Mr. Hall since he has been incarcerated on death row, and that Mr. Hall's detention constitute cruel infamous or unusual punishment in violation of Article XXVI of the Declaration.

c. Article XXVI of the Declaration - Right to Humane Treatment and To a Fair Trial

74. The Petitioners argue that Mr. Hall has suffered cruel and inhuman treatment and punishment pursuant to Article XXVI of the Declaration, because he has been incarcerated for a total of over 3 years and 9 months. The Petitioners claim that Mr. Hall was incarcerated on remand from the time of his arrest in July 1994, until he was "bailed" in January of 1996. The Petitioners also claim that subsequent to Mr. Hall's trial in 1996, he has been incarcerated on death row up to the present time. In addition, the Petitioners argue that during the period of his detention and incarceration Mr. Hall has been detained in inhumane conditions of detention as referred to above.

75. The Petitioners contend that Mr. Hall did not receive a fair trial pursuant to Article XXVI of the Declaration, because of the imposition of his mandatory death sentence, and because Mr. Hall suffered prejudice due to biased reporting in the daily newspapers and television at the time of his trial. The Petitioners claim that such coverage meant that Mr. Hall was incapable of receiving a fair trial.

d. Articles XVIII and XXVI of the Declaration - Right to A Fair Trial and Legal Aid

76. The Petitioners argue that for all the reasons referred to hereinbefore, Mr. Hall did not receive a fair trial pursuant to Articles XVIII and XXVI, in relation to his mandatory death sentence. The Petitioners argue that in The Bahamas, there is no provision for pre-trial legal aid or the opportunity to commission expert reports before the trial. The Petitioners claim that many of those accused of murder are poor and cannot afford to pay for legal representation, and that State funded legal representation is available at the trial but the remuneration paid for such representation is small and does not include work done in advance to prepare a case for trial. The Petitioners also contend that the lawyers funded by the State are often inexperienced and

that preparation of an adequate defense is therefore not available to a substantial proportion of those accused of murder who, if convicted, face a mandatory death sentence. In addition, the Petitioners argue that the death penalty is imposed disproportionately on those of low socio-economic status who have been poorly represented on legal aid.

2. The Position of the State

77. The State has not provided the Commission with any observations regarding the admissibility or merits of Mr. Hall's petition, despite the Commission's communications to the State dated December 10, 1998, and October 19, 1999.

C. Schroeter and Bowleg's claims

1. Position of the Petitioners

78. The Petitioners state that Brian Schroeter and Jeronimo Bowleg,[FN25] nationals of The Bahamas, were charged with the murder of Dieseul Almanor ("the deceased") on June 17th, 1994, in New Providence, The Bahamas. The Petitioners report that according to the prosecution the condemned men's motive for the murder was as part of a joint enterprise to rob the deceased which culminated in his death. The Petitioners maintain that both Messrs. Schroeter and Bowleg made statements from the dock claiming that they had alibi evidence to show that they were not in the area at the time of the shooting. Mr. Schroeter stated that his alibi evidence was supported by the affidavit evidence of Teresa Ferguson, a friend of the family, and Clifford Schroeter, his father.

[FN25] Co-defendants with Omar Hall at trial.

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79. The Petitioners report that Messrs. Bowleg's and Schroeter's testimony was that they were tortured by the police, and due to the police violence exercised against them, they were forced to sign written statements. Both victims denied making oral statements to the police.

80. In Mr. Schroeter's case, the Petitioners allege that "the police slammed his head against a desk, punched him in the ear, grabbed him in his stomach and choked him." In Mr. Bowleg's case, the Petitioners allege that "a plastic bag was placed over his head, he was hit on his wrist with a bamboo stick and that the police used a vice-like object and pressed his testicles together." The Petitioners maintain that the condemned men challenged the admissibility of their written statements in court. The Petitioners claim that prior to their arrests, the condemned men were in good health with no injuries, and that subsequent to their arrests the condemned men complained that they had been beaten by CID officers and required hospital treatment. The Petitioners contend that the condemned men made further complaints of their inhumane treatment by police officers in the Magistrates Court on July 19, 1996, which resulted in the Magistrate, Cheryl Albury, directing that that they be taken to hospital. Moreover, the Petitioners claim that in Messrs. Schroeter's and Bowleg's case, the State did not hold any identification parades and that

the only identification of the condemned men was by means of "dock identification by an alleged accomplice Kenneth Andrews."

81. The Petitioners stated that the condemned men were convicted of murder on June 17, 1994, and a mandatory death sentence was imposed on them. The Petitioners maintain that on September 4, 1996, Messrs. Schroeter and Bowleg applied to the Court of Appeal of The Bahamas for leave to appeal their convictions and sentences. The Court of Appeal of The Bahamas dismissed their appeals on July 23, 1997, and their death sentences were affirmed. The Petitioners indicate that Messrs. Schroeter and Bowleg appealed their convictions and sentences to the Privy Council on June 3, 1998, which dismissed their appeals.

a. Articles I, II, XVIII, and XXVI, of the Declaration - The Mandatory Death Penalty and the Prerogative of Mercy

i. The Mandatory Death Penalty

82. The Petitioners allege violations of Articles I, II, XVII, XVIII, XI, XXV, and XXVI, of the American Declaration. The Petitioners argue that the mandatory death sentence imposed by the State pursuant to its penal law on every person convicted of murder, violates Messrs. Schroeter's and Bowleg's rights to life and to equal protection of the law pursuant to Articles I, and II, of the American Declaration. The Petitioners also argue that based on the facts of Messrs. Schroeter's and Bowleg's cases, the mandatory death sentences imposed on them violate their rights not to receive cruel, unusual, inhuman and degrading treatment and punishment pursuant to Article XXVI of the American Declaration, and that the mandatory death sentences imposed on them are disproportionate punishment which cannot be a justification for depriving them of their rights to life.

83. The Petitioners argue that Messrs. Schroeter's and Bowleg's due process rights as established by Articles II, XVIII, XXV, and XXVI of the Declaration, namely, the right to apply for amnesty and pardon, the right to liberty, to be promptly notified of the charge or charges and to be brought promptly before a judge or judicial officer, the right to a fair trial, and the right to equality before the law, have been violated by the State. The Petitioners also contend that the domestic law of The Bahamas does not provide Messrs. Schroeter and Bowleg with the right to make representations to the Advisory Committee on the Prerogative of Mercy before the Minister who determines whether the mandatory penalty imposed by law should take its course.

84. The Petitioners made arguments concerning the condemned men's mandatory death sentences similar to those made in Mr. Edwards' and Mr. Hall's cases on the legislative history of the death penalty and the Prerogative of Mercy in The Bahamas, and domestic and international jurisprudence and practice concerning the imposition and application of the death penalty. For the sake of brevity those arguments are not referred to here, but have been considered by the Commission in the analysis of the merits of the condemned men's claims in this Report.

b. Articles XXV and XXVI of the Declaration - Right of Protection from Arbitrary Arrest, Right to a Fair Trial and Due Process of Law, and Delay in trial

85. The Petitioners claim that the deceased was killed on June 17, 1994, and Messrs. Schroeter and Bowleg were arrested and committed to stand trial on the same date. The Petitioners maintain that the victims' trial commenced on August 12, 1996, approximately 26 months after they were arrested. The Petitioners claim that Messrs. Schroeter's and Bowleg's rights to protection from arbitrary arrest, fair trial and due process guarantees pursuant to Articles XXV and XXVI of the Declaration were violated, because they were not brought to trial promptly and within a reasonable time, nor did they have a fair trial.

86. The Petitioners argue that the delay in the condemned men's cases is comparable with the periods of delay in the cases of de Casariego v. Uruguay,[FN26] Sequeira v Uruguay [FN27] and Pinkney v Canada[FN28] which were decided by the United Nations Human Rights Committee ("UNHRC"). The Petitioners claim that in those cases the UNHRC held that the periods of delay violated the protections contained in the United Nations International Covenant on Civil and Political Rights. The Petitioners argue that in the case of Pratt and Morgan v Attorney General of Jamaica, the Privy Council held that "the State bears the responsibility of organizing its criminal justice system so that such periods of delay do not occur." The Petitioners contend that in the case of Andre Fillastre v Bolivia,[FN29] the UNHRC in deciding whether the trial in question was held within a reasonable time opined that:

[FN26] Doc. A/36/40 pg. 185.
[FN27] Doc. A/45/40 pg. 127.
[FN28] Doc. A/3/740 pg. 101.
[FN29] Communication Nº 336/1988.

It is a matter for assessment for each particular case. The lack of adequate budgetary appropriations for the administration of criminal justice does not justify unreasonable delays in the adjudication of criminal cases.

87. The Committee stated that in assessing whether the period of delay was reasonable, that it is relevant to consider the effect of the delay on the fairness of their trial. The Petitioners claim that in this case the evidence of identification was weak to begin with and the delay could only have served to increase the likelihood of error. The Petitioners contend the delay in bringing Messrs. Schroeter and Bowleg to trial was unreasonable in the circumstances and it is not compatible with Article XXVI of the Declaration. In addition, the Petitioners argue that Article XXV of the Declaration has been violated in respect of the condemned men because they were entitled to trial within a reasonable time and without undue delay. The Petitioners maintain that the conditions of confinement of the condemned men should be taken into account in assessing whether or not these Articles have been violated by the State Party.

c. Article XXVI of the Declaration - Right to a Fair trial, Right to Humane Treatment and Pre-Trial Detention

88. The Petitioners claim that the condemned men did not have a fair trial pursuant to Article XXVI of the Declaration. The Petitioners claim that in Messrs. Schroeter's and Bowleg's cases, the State did not hold any identification parades prior to trial and that the only identification of the condemned men were by means of "dock identification by a witness Kenneth Andrews during their trial." The Petitioners argue that the identification evidence was inconsistent, unsatisfactory and should not have been presented to the jury. The Petitioners allege that the condemned men's alleged confessions to the police implicated the witness, Kenneth Andrews who made the dock identification.

89. The Petitioners state that Messrs. Schroeter and Bowleg described the presence and role of Mr. Andrews in the commission of the crime, and the condemned men's claim that it was Mr. Andrews who supplied the shotgun, and entered the premises at the time of the shooting. The Petitioners contend that Mr. Andrews also stated that the four of them left the premises together after the shooting. The Petitioners argue that the trial judge failed to warn the jury of the dangers of relying upon the evidence of the witness if they concluded that he was an accomplice, and that the jury should consider Mr. Andrew's evidence with caution.

90. In addition, the Petitioners maintain that both Messrs. Schroeter and Bowleg made statements from the dock claiming that they had alibi evidence to show that they were not in the area at the time of the shooting. Mr. Schroeter stated that his alibi evidence was supported by the affidavit evidence of Teresa Ferguson, a friend of the family, and Clifford Schroeter, his father.

91. Moreover, the Petitioners claim that Messrs. Schroeter's and Bowleg's arrests and confessions were procured from them as a result of police violence and that they were both forced to sign confessions. In Mr. Schroeter's case the Petitioners argue that "the police slammed his head against a desk, punched him in the ear, grabbed him in his stomach and choked him." In Mr. Bowleg's case, the Petitioners contend that "a plastic bag was placed over his head, he was hit on his wrist with a bamboo stick and that the police used a vice-like object and pressed his testicles together."

92. The Petitioners contend that one of the grounds of Messrs. Schroeter's and Bowleg's appeal to the Court of Appeal of The Bahamas, challenged the admissibility of the condemned men's written statements on the basis that the condemned men were in pain when they made their statements to the police. According to the Petitioners, the trial judge held that although the condemned men were in some degree of pain when they made their statements to the police, however, he was satisfied beyond a doubt that such pain did not influence Messrs. Schroeter and Bowleg from making their statements voluntarily. The Petitioners indicate that they are not requesting that the Commission review the judge's final finding as to the admissibility of the written statement, but rather to determine whether the condemned men's rights were violated under the Declaration as a consequence of their treatment on arrest.

93. The Petitioners maintain that Messrs. Schoreter and Bowleg challenged the admissibility of their written statements. The Petitioners claim that prior to Messrs. Schroeter's and Bowleg's arrests both were in good health with no injuries, and that subsequent to their arrests the condemned men complained that they had been beaten by CID officers and required hospital treatment.

94. The Petitioners contend that the Messrs. Schroeter and Bowleg made further complaints of their inhumane treatment by police officers in the Magistrates Court on July 19, 1996, which resulted in the Magistrate, Cheryl Albury, directing that that they be taken to hospital. The Petitioners report that Messrs. Schroeter and Bowleg received treatment for injuries sustained whilst in police custody at the Accident and Emergency Department of the Princess Margaret Hospital. The Petitioners inform that the Casualty sheets containing the treating doctors notes in respect of the condemned men had been "inadvertently misplaced" and what remained were summarized notes in the Hospital's Accident and Emergency Ledger.

95. The Petitioners claim that at trial the medical evidence was not given by the treating doctor because he was "unavailable" but by a colleague based on a summarized note. The Petitioners indicate that the police witnesses at trial could not explain how the condemned men sustained their injuries, because they had not seen Messrs. Schroeter and Bowleg injure themselves or suffer any accident. The Petitioners argue that the nature of the medical evidence and the failure of the Crown to explain the injuries raised at least the possibility that the confessions were obtained by oppression. The Petitioners contend that in such circumstances the oral and written confessions attributed to Messrs. Schroeter and Bowleg should have been excluded from evidence.

96. The Petitioners also maintain that Messrs. Schroeter and Bowleg did not have a fair trial as provided by Article XXVI because of irregularities which occurred during the trial, which created a real risk of prejudice to the condemned men's cases. The Petitioners allege that during the trial judge's summing-up to the jury, the trial judge indicated that he disbelieved the condemned men's testimony as to what transpired while they were detained by police officers. The Petitioners argue the trial judge should not have informed the jury that he ruled on voir dire that the confessions obtained by the police during Messrs. Schroeter's and Bowleg's detention, were admissible. The Petitioners argue that the trial judge informed the jury of his ruling, and by doing so affected the credibility of the condemned men, because in effect, the judge implied that he believed the testimony of the two police officers that Messrs. Schroeter's and Bowleg's confessions were obtained voluntarily, and were not obtained through the use of violence by the police officers. In support of their argument the Petitioners cite the following statement from the judge's summing-up to the jury:

Just to give my ruling in the matter, and my decision has been arrived at after considering all the evidence adduced, the arguments raised, including the comments regarding alleged omissions and the detention forms and the absence of medical reports. And my conclusion is that I would allow the evidence to go forward.[FN30]

[FN30] Trial transcript p 872.

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97. The Petitioners argue that the judge's inescapable implications to the jury that he disbelieved Messrs. Schroeter and Bowleg deprived them of their right to a hearing by a competent, independent and impartial tribunal. The Petitioners contend that the functioning of

an institution is more significant than its title, and as the United Nations Human Rights Committee has stated "impartiality of the Court implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of the parties."[FN31] The Petitioners also argue that in a death penalty case, any breach of procedural safeguard in Article XXVI of the Declaration also violate the victims' right to life under Article I of the Declaration.

[FN31] Karttene v. Finland (387/1989) at para 7.2.)

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98. The Petitioners contend that the Untied Nations Human Rights Committee's jurisprudence regarding the death penalty is usually focused on the fairness of judicial proceedings from which a death sentence has resulted. The Petitioners maintain that in many Optional Protocol cases, the Committee has found a breach of Article 6(2) of the ICCPR where a death sentence has been imposed after a trial which did not satisfy the minimum guarantees for a fair trial found in Article 14 of the ICCPR. The Petitioners cited the cases of Pratt and Morgan v Jamaica,[FN32] and Reid and Jamaica.[FN33] The Petitioners maintain that in Pratt and Morgan v. Jamaica, when making reference to the provisions of Article 14 and Article 6 of the ICCPR the Committee stated that: "The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review by a higher tribunal."

[FN32] Nº210/1986.225/1987.
[FN33] Nº 240/1987.

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99. The Petitioners indicate that in Reid v. Jamaica the Human Rights Committee when referring to general comment 6(16) opined that:

The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of Article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision of a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review by a higher tribunal.

In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in Article 14, it must be concluded that the right protected by Article 6 of the Covenant has been violated.

100. Moreover, the Petitioners argue that the Prosecutor's case at trial was based on a false legal basis on which the prosecution had invited a conviction and the trial judge directed the jury,

and that there was an absence of any proper direction on the mental state necessary to convict a secondary party of murder. The Petitioners maintain that the prosecutor did not cross examine the witnesses on the issue of whether they knew that Mr. Hall's gun was loaded and whether they knew or foresaw that Mr. Hall might use the gun to kill or cause serious injury in furtherance of a joint enterprise to rob. The Petitioners argue that the jury had no evidence whatsoever which might have enabled them to resolve these issues one way or the other.

d. Articles II, XVII, and XXVI of the Declaration - Right to Fair Trial and Access to the Courts

101. The Petitioners contend that the State may claim that Messrs. Schroeter and Bowleg have a remedy under the Constitution of The Bahamas to pursue a Constitutional Motion, however, this remedy cannot be considered either available or effective. The Petitioners argue that the condemned men are unable to pursue a Constitutional Motion in The Bahamas to challenge their mandatory death sentences as being inhuman or degrading punishment or treatment because they are indigent, and the State's domestic law does not provide private funds nor legal aid to indigent persons to pursue such Motions. The Petitioners claim that their petitions to the Commission is being made on a pro bono basis, and that the State's practice is to refuse legal aid for Constitutional Motions. The Petitioners maintain that the legal complexity of a Constitutional Motion, combined with condemned men's relative lack of education, makes it unrealistic and unfair to expect them to present a Constitutional Motion without professional legal assistance. Finally, the Petitioners maintain that it is difficult for the condemned men to find a Bahamian lawyer who is willing to prepare and argue a Constitutional Motion pro bono.

102. In support of their position, the Petitioners rely upon jurisprudence of the United Nations Human Rights Committee (HRC), in particular its decision in the case of Champagnie, Palmer & Chisolm v. Jamaica,[FN34] in which the Committee stated as follows:

[FN34] U.N.H.R.C., Champagnie, Palmer & Chisolm v. Jamaica, Communication Nº 445/1991.

With respect to the authors' possibility of filing a Constitutional Motion, the Committee considers that, in the absence of Legal Aid, a Constitutional Motion does not constitute an available remedy in the case. In light of the above, the Committee finds that it is not precluded by Article 5(2)(b) of the Optional Protocol from considering the communication.[FN35]

[FN35] Article 5(2) of the United Nations Optional Protocol provides: "The Committee shall not consider any communication from an individual unless it has ascertained that: (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged."

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103. In addition, the Petitioners argue that the condemned men are being denied an effective remedy, the right to be treated equally before the law, and the right of access to the courts to seek

redress for the violation of their fundamental rights pursuant to Articles II, XVII, and XXVI of the Declaration. In support of their contention the Petitioners rely on the European Court of Human Rights cases of Golder v UK, Airey v. Ireland,[FN36] and the case of Currie v. Jamaica[FN37] decided by the United Nations Human Rights Committee.

[FN36] (1975) 1 EHRR 524.
[FN37] (1979) 2 EHRR 305.

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e. Articles XI, XXV, and XXVI of the Declaration - Right To The Preservation Of Health And To Well-Being, Right To Humane Treatment, and Conditions Of Detention

104. In addition, the Petitioners claim that Messrs. Schroeter's and Bowleg's rights to humane treatment pursuant to Article XXVI of the American Declaration have been violated by the State because of their treatment and the conditions under which they are being detained on death row in The Bahamas, which renders the implementation of their death sentences unlawful. The Petitioners contend that the condemned men are being confined in solitary confinement in prison under conditions which the UNHRC held were violative of Articles 7 and 10(1) of the ICCPR in the cases of Ambrosis v Uruguay,[FN38] Carballa v. Uruguay,[FN39] and Antonaccio v Uruguay.[FN40] The UNHRC found in these cases that detention in solitary confinement for three months and denial of medical treatment constituted a violation of the ICCPR.

[FN38] Doc. A/37/40.
[FN39] Doc. A/36/40.
[FN40] Doc. A/37/40.

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105. In the case of Pinto v Trinidad and Tobago[FN41] the UNHRC reaffirmed that the obligation under Article 10(1) of the ICCPR encompasses the provision of adequate medical care during detention. In Estrella v. Uruguay, the Committee found that the systematic way in which detainees had been treated constituted a practice of inhuman treatment. In the case of Clyde Neptune v Trinidad v Tobago, the UNHRC held that the sharing of a cell by the applicant with 6 to 9 other inmates with only three beds, and without adequate natural light, inedible food, and the applicant only permitted to exercise half an hour once every two to three weeks, violated the ICCPR.[FN42] In addition, the Petitioners contend that the State has violated Rules 8, 9(1), 10, 11, 12, 13, 14, 15, 16, 19, 20(1), 21(1), 22(1), 22(2), 22(3), 24, 25 (1), 25(2), 26(1), 26(2), 35(1), 36(1)(2)(3)(4),57, 71(2)(3) and 77 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, in respect of the condemned men.

[FN41] Doc. A/45/140
[FN42] Communication Nº 523/1992.

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2. Position of the State

106. The State has not provided observations regarding the issues of admissibility and merits of Messrs. Schroeter's and Bowleg's petitions, despite the Commission's communications to it dated January 19 and 25, 1999.

IV. ANALYSIS

A. Standard of review

107. The Commission will analyze the merits of Messrs. Edwards,' Hall's, Shroeter's and Bowleg's petitions pursuant to the provisions of the Articles of the American Declaration[FN43] because The Bahamas is not a party to the American Convention. In addressing the allegations raised by the Petitioners' representatives in these cases, including their claims that the condemned men's mandatory death sentences violate Article I of the American Declaration, the Commission first wishes to clarify that in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and Inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to Member States against which complaints of violations of the Declaration are properly lodged.[FN44] The Inter-American Court of Human Rights recently reiterated its endorsement of an evolutive interpretation of international human rights instruments, which takes into account developments in the corpus juris gentium of international human rights law over time and in present-day conditions.[FN45]

[FN43] In the Commission's 1999 Annual Report, pages 117, 184, and 190, the Commission declared that it was competent to examine the claims in the petitions relating to the alleged violations of the Declaration, because the Declaration became the source of legal norms for application by the Commission upon The Bahamas becoming a Member State of the Organization of American States in 1982. In addition, the Commission declared that it has authority under the Charter of the Organization of American States, Article 20 of the Commission's Statute, and the Commission's Regulations to entertain the alleged violations of the Declaration raised by the Petitioner against the State, which relate to acts or omissions that transpired after the State joined the Organization of American States. Consequently, the Commission declared that it has jurisdiction ratione temporis, ratione materiae, and ratione personae to consider the violations of the Declaration alleged and declared the petitions admissible pursuant to Articles 37 and 38 of its Regulations, at its 104th and 106th Regular Sessions respectively. See Messrs. Schroeter's and Bowleg's case, Nº 12.086, Report Nº 123/99, was declared admissible at the Commission's 104th Regular Sessions. Mr. Edwards' case Nº 12.067, Report Nº 24/00, and Mr. Hall's case Nº 12.068, Report Nº 25/00 were declared admissible at the Commission's 106th Regular Sessions.

[FN44] See I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Inter-Am.Ct.H.R. (Ser. A) No. 10 (1989), para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to

look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948). See also ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation ").
[FN45] Advisory Opinion OC-16/99, supra, para. 114, citing, inter alia, the decisions of the European Court of Human Rights in Tryer v. United Kingdom (1978), Marckx v. Belgium (1979), and Louizidou v. Turkey (1995).
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108. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments. This includes in particular the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.[FN46]

[FN46] See e.g. Canada Report, supra, para. 38 (confirming that while the Commission clearly does not apply the American Convention in relation to member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).
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109. Before addressing the merits of this case, the Commission deems it advisable to articulate its standard of review in capital punishment cases. In this regard, the Commission is of the view that it must apply a heightened level of scrutiny in such cases. The right to life is widely recognized as the supreme right of the human being, and the conditio sine qua non to the enjoyment of all other rights.[FN47] The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life perpetrated by a State Party through the death penalty complies strictly with the provisions of the Declaration, in particular the right to life provision of Article I, the guarantees of humane treatment under Articles XXV and XXVI, and the due process and judicial protections guaranteed by Articles XVIII, XXV, XXIV, and XXVI of the Declaration.

[FN47] See U.N.H.R.C., Baboheram-Adhin et al. v. Suriname, Communications Nos. 148-154/1983, Adopted 4 April 1985, para. 14.3 (observing that the right to life under Article 6(1) of the International Covenant on Civil and Political Rights is the “supreme right of the human being”).
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110. This “heightened scrutiny” test is consistent with the restrictive approach to the death penalty provisions of human rights treaties advocated by other international authorities.[FN48] In

particular, the Inter-American Court has concluded that the American Convention has adopted an approach in respect of the death penalty that is "incremental" in character, whereby, "without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance."[FN49]

[FN48] Id., para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 378 (commenting upon fair trial standards relating to capital punishment as follows:

While in many countries the law in force takes account of the standards of fair trials as contained in the pertinent international instruments, this alone does not exclude that a death sentence may constitute an extra-judicial, summary or arbitrary execution. It is the application of these standards to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.)

[FN49] I/A Court H.R., Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, (8 September 1983), Annual Report 1984, p. 31, para. 57.

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111. The Commission also notes that the heightened scrutiny test is not precluded by the fourth instance formula adopted by the Commission. Pursuant to the "fourth instance formula," the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees.[FN50] The fourth instance formula does not, however, preclude the Commission from considering a case where the petitioner's allegations entail a possible violation of any of the rights set forth in the American Convention and the American Declaration. In the case of Clifton Wright, for example, a Jamaican citizen who alleged that a judicial error resulted in a death sentence against him, the Commission concluded that the conviction and sentence were undermined by the record in the case, but that the appeals process in Jamaica did not permit for a correction of the situation. Consequently, the Commission found that Jamaica had violated the petitioner's right to judicial protection under Article 25 of the Convention, and recommended that the Government of Jamaica order an investigation of the matter and afford Mr. Wright a judicial remedy to have the inconsistency corrected. Because Mr. Wright had been denied effective domestic judicial protection, and was the victim of a discrete human rights violation under the American Convention, the fourth instance formula did not apply in his case.[FN51]

[FN50] I/A Comm. H.R., Santiago Marzioni, Report Nº 39/96, Case Nº 11.673 (Argentina), 15 October 1996, Annual Report 1996, p. 76.

[FN51] See also William Andrews, (United States),Case Nº 11.139, Report Nº 57/96, Annual Report of the Inter-American Commission 1997, p. 614, OEA/Ser.L/V/II.98, Doc. 7 rev., April 13, 1998; Rudolph Baptiste, (Grenada), Case Nº 11.743, Report Nº 38/00 Annual Report of the Inter-American Commission on Human Rights 1999, Volume I, OEA/Ser.L/V/II.106, Doc. 3 rev., April 13, 2000; and Desmond McKenzie, Case Nº 12.023, Andrew Downer and Alphonso Tracey, Case Nº 12.044, Carl Baker, 12.107, Dwight Fletcher, Case Nº 12.126, and Anthony Rose, Case Nº 12.146, Report Nº 41/00 (Jamaica), p. 918, Annual Report of the Inter-American Commission on Human Rights 1999, Volume II, OEA/Ser.L/V/II.106, Doc. 3 rev., April 13, 2000.

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112. Likewise, in the case of William Andrews, the Commission applied a heightened scrutiny test, and was not precluded from the fourth instance formula, in examining Mr. Andrews' case. Mr. Andrews was sentenced to death upon the conclusion of a trial in the State of Utah, United States of America. After examining the case, the Commission found that Mr. Andrews did not receive judicial protection from the United States of America from the racial discrimination to which he was subjected to during his trial for capital murder. The Commission found that Mr. Andrews' rights under the American Declaration had been violated, namely, his right to life (Article I), his right to an impartial hearing (Article XXVI), his right to equality before the law (Article II), and not to receive cruel, infamous or unusual punishment and treatment (Article XXVI) had been violated by the State. The Commission concluded as a result of the violations of Articles of the Declaration, that Mr. Andrews' execution constituted an arbitrary deprivation of his right to life pursuant to Article I of the American Declaration and recommended compensation to his next of kin.

113. The Commission will therefore review Messrs. Edwards,' Hall's, Shoreter's and Bowleg's allegations pertaining to the imposition of capital punishment with a heightened level of scrutiny, to ensure that the right to life as prescribed under the Declaration is properly respected. In addition, the fourth instance formula will not preclude the Commission from adjudicating their rights insofar as those claims disclose possible violations of the American Declaration.

B. Alleged Violations of the American Declaration

114. As detailed previously, the Petitioners allege: (i) violations of Articles I, II, XVII, XVIII, XI, XXV, and XXVI of the Declaration, relating to the mandatory nature of the death penalty and the process for granting amnesty, pardon or commutation of sentence in The Bahamas; (ii) violations of Articles XI, XXV, and XXVI of the Declaration pertaining to conditions of detention; and (iii) violations of Article XVIII, and XXVI of the Declaration, relating to the unavailability of legal aid for Constitutional Motions in The Bahamas, and the right to an impartial trial.

115. Also as noted previously, on December 11, 1998, the State only replied to the Commission's communications concerning Mr. Edwards. In Mr. Edwards' case the State argued that the Constitutionality of both the imposition of a mandatory death penalty upon a conviction for murder, and the procedure followed by the Advisory Committee on the Prerogative of Mercy,

have been upheld by the Privy Council, the highest Appellate Court in The Bahamas. The State has not replied to the Commission's communications to it dated December 10, 1998, and October 19, 1999, with regard to Mr. Hall's petition. Nor has the State responded to the Commission's communications to it dated, January 19, and January 25, 1999, with respect to Messrs. Schroeter's and Bowleg's petition to provide the Commission with information that the State deemed relevant pertaining to the exhaustion of domestic remedies and the claims raised in the petitions.

116. As a consequence, in determining the merits of the Petitioners' allegations in respect of Messrs. Hall, Schroeter and Bowleg, the Commission will presume the facts as reported in the petition to be true, provided that the evidence does not lead to a different conclusion, in accordance with Article 42 of the Commission's Regulations.

a. Articles I, II, XVIII, XXIV, XXVI - The Mandatory Death Penalty

i. Messrs. Edwards, Hall, Schroeter and Bowleg were sentenced to a Mandatory Death Penalty

117. Messrs. Edwards, Hall, Schroeter and Bowleg were convicted of murder under the Penal Code of The Bahamas. Section 311 of the Criminal Code of The Bahamas, provides that "whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse, as is in this Title hereafter mentioned."[FN52] Section 312 of the Criminal Code provides: "Whoever commits murder shall be liable to suffer death."[FN53] The crime of murder in The Bahamas can therefore be regarded as subject to a "mandatory death penalty," namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of murder, the death penalty must be imposed.

[FN52] Revised Edition 1987, Prepared under the authority of the Law Reform and Revision Act 1975, Chapter 77, Penal Code 77, Title XX, Homicide and Similar Crimes, page 1124. Title II of the General And Special Rules of Criminal Law of The Bahamas refers to what constitutes "intent" to commit a crime, and provides:

11. (1) If a person does an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event, within the meaning of this Code, although either in fact or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event.

(2) If a person does an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event, within the meaning of this Code, although he does not do the act for the purpose of causing or of contributing to cause the event.

(3) If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event.

[FN53] Id. Section 312 of The Statute of Law of The Bahamas Criminal Code at page 1124, contains a proviso to the death penalty for a crime of murder. The proviso states:
Provided that the sentence of death shall not be pronounced on or recorded against a person who, in the opinion of the Court, was at the time when the murder was committed under eighteen years of age; but, in lieu of such punishment, the Court shall sentence such person to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Code or the provisions of any other Act, be liable to be detained in such place and under such conditions as the Governor-General may direct, and whilst so detained shall be deemed to be in legal custody.
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118. With regard to Mr. Edwards' case, the Petitioners claim that there were mitigating circumstances which could not be presented to the trial judge upon Mr. Edwards' conviction for murder but prior to his sentencing. The Petitioners maintain that Mr. Edwards committed a robbery which resulted in death and that because of Section 11(3) of the penal code of the Bahamas which defines what constitutes "intent" to commit murder under Section 312 of the Penal Code, Mr. Edwards was sentenced to death. Section 11(3) states that: "If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event."

119. In addition, the Petitioners report that the deceased was shot with a single bullet, and was robbed of $800 in cash. The Petitioners maintain that three store employees, ages 14, 16, and 21, prosecution witnesses, testified that a robbery occurred in the store, during which one or two shots were fired causing the deceased's death, but no one saw the actual gun being fired. The Petitioners claim that a fourth prosecution witness testified that a robbery had occurred, and stated that during the course of the robbery he was asked to fill a bag with money from the "shop's till," but failed to identify the robber at the identification parade. The Petitioners contend that there had been collusion between the witnesses at the identification parade and that there were procedural irregularities in the conduct of his identification. The Petitioners argue that Mr. Edwards gave sworn testimony and his defense was that of misidentification, that he relied on an alibi witness, and that his alibi evidence was supported by five other witnesses. The Petitioners claim that one of Mr. Edwards' five witnesses testified that she was in the store when the robbery occurred and that the gunman did not have the appearance of Mr. Edwards. However, Mr. Edwards was sentenced to death based soley on the category of the crime for which he was convicted.

120. In Messrs. Hall's, Schroter's and Bowleg's cases, the Petitioners claim that Messrs, Hall, Schroeter and Bowleg were tried together as co-defendants for the crime of murder. In Mr. Hall's case, the Petitioners contend that Mr. Hall's defense was that of misidentification, and that Mr. Hall has an alibi witness. The Petitioners argue that there was a lack of forensic evidence of Mr. Hall's complicity in the murder, and that he was convicted upon the involuntary confessions of Messrs. Schroeter and Bowleg, who were tortured by the police prior to making those involuntary confessions, and who implicated him in the murder. In addition, the Petitioners

contend that Mr. Hall continues to deny his guilt in relation to the crime, and that Mr. Hall has no past criminal record. According to the Petitioners, the prosecution's case was that Messrs. Schroter and Bowleg were engaged in a joint enterprise to rob the deceased which culminated in his death. Both Messrs. Schroeter and Bowleg claimed to have had alibi evidence to show that they were not in the area at the time of the shooting, and that two alibi witnesses supported their defense by Affidavit.

121. In addition, Messrs. Schroeter and Bowleg claim that they were convicted on their involuntary statements which were made to police officers subsequent to their having been physically abused and tortured by the police. Accordingly, a court in imposing the death sentences on the condemned men in The Bahamas could not take these mitigating circumstances into account because pursuant to Sections 312 and 11(3) of the Penal Code of The Bahamas, death is the prescribed sentence for the crime of murder.

122. As indicated above, Messrs. Edwards, Hall, Schroeter and Bowleg have alleged that because they were sentenced to a mandatory death penalty for the crime of murder, the State violated their rights guaranteed under Articles I, II, XVIII, XXIV, and XXV, XXVI, of the American Declaration. Messrs. Edwards, Hall, Schroeter and Bowleg have also argued that the process for granting amnesty, pardon or commutation of sentence in The Bahamas does not provide an adequate opportunity for considering individual and mitigating circumstances, which is in violation of their right to petition pursuant to Article XXIV of the Declaration.

123. The Commission will first analyze the compatibility of the mandatory death sentence for the crime of murder with Articles I, II, XVIII, XXIV, XXV, XXVI, in light of the terms of those provisions, their underlying principles, and relevant international and domestic precedents. The Commission will then determine whether the State has violated the rights of Messrs. Edwards, Hall, Schroeter Bowleg under the Declaration, because of the manner in which they were sentenced to death.

ii. Articles I, XVIII, XXIV, XXV, XXVI of the Declaration and the Mandatory Death Penalty

124. In light of the allegations raised by the condemned men, the Commission must first ascertain whether the practice of imposing the death penalty for the crime of murder through mandatory sentencing is compatible with Article I (right to life), Articles XVIII, XXV, XXVI, XXIV (right to judicial protection, right to an impartial hearing, right to due process of law and to humane treatment, right to petition,) of the American Declaration and the principles underlying those provisions.

125. Article I of the American Declaration provides:

Every human being has the right to life, liberty and the security of his person.[FN54]

[FN54] Article 4 of the American Convention provides as follows:
Article 4. Right to Life

(1) Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
(2) In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
(3) The death penalty shall not be reestablished in states that have abolished it.
(4) In no case shall capital punishment be inflicted for political offenses or related common crimes. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
(5) Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.
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126. Article I of the Declaration places an emphasis on the "right to life," and not the arbitrary deprivation of life, and does not specifically refer to "capital punishment" in the manner that Article 4 of the American Convention does. However, the Commission refers to the travaux preparatoires on the American Declaration entitled, "Project of Declaration of the International Rights and Duties of Man," which was formulated by the Inter-American Juridical Committee ("the Judicial Committee") for consideration by the Ninth International Conference of American States, Pan American Union, Washington, 1948.[FN55] The Commission notes that the former Article I of the American Declaration as found in the travaux prepartoires specifically addressed the issue of capital punishment and restrictions on its application, and provides:

[FN55] Rio de Janeiro, December 8, 1947, (s) Francisco Campos, Jose Joaquin Caicedo Castilla, E. Arroyo Lameda, Charles G. Fenwick.

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.[FN56]

[FN56] Id. Travaux Prepartoire, at 2.
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127. However, the second paragraph of the draft Article I was deleted in the final draft of the Declaration, and the reason given for this deletion by the Juridical Committee in paragraph 10 of the travaux prepartoires was the following:

The last part of this article is also changed in order to emphasize that 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.

128. It is clearly evident from the travaux prepartoires of the American Declaration that the Juridical Committee considered "the right to life" to be the fundamental of all human rights which should be extended "from the moment of conception to all persons including incurables, imbeciles and the insane." However, the original paragraph 2 of the travaux prepartoires expressly restricted the imposition and application of capital punishment, and provided that it "only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity." Furthermore, despite the omission of the original paragraph 2 in the final draft of the Declaration, the Commission is of the opinion that the founding fathers of the Declaration intended that the states in issuing legislation in respect of capital punishment uphold the sanctity of life as being sacrosanct with all the due process judicial guarantees found in other Articles of the Declaration before the imposition and implementation of capital punishment. These due process rights and judicial guarantees provided for in the Declaration in addition to Article I, include the following Articles and their provisions:

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.

Article XVIII states:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXIV provides:

Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

Article XXV states:

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article XXVI provides:

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.

129. In comparison to the Declaration, Article 4 of the American Convention expressly provides limitations and restrictions on the imposition and application of capital punishment.[FN57] Article 4 of the Convention permits States Parties that have not abolished the death penalty to continue to impose it. At the same time, the Convention strictly regulates the manner in which States Parties may impose the death penalty in their respective States. This restrictive approach under the Convention to the perpetuation of the death penalty mirrors the treatment of the death penalty generally under contemporary international and, as Part IV of this Report will indicate, domestic practice.

[FN57] Article 4 of the American Convention provides as follows:
Article 4. Right to Life
(1) Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
(2) In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
(3) The death penalty shall not be reestablished in states that have abolished it.
(4) In no case shall capital punishment be inflicted for political offenses or related common crimes.
(5) Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
(6) Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.
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130. More particularly, drawing in part upon the past experience of international human rights bodies, several general principles of interpretation can be identified in respect of the death penalty provisions of international human rights instruments in general, and both Article 4 of the Convention and Article I of the Declaration in particular. First, the supervisory bodies of international human rights instruments have subjected the death penalty provisions of their governing instruments to a rule of restrictive interpretation. In its Advisory Opinion on Restrictions to the Death Penalty under Articles 4(1) and 4(4) of the Convention, for example, the Inter-American Court of Human Rights adopted a restrictive approach to Article 4 of the

Convention, finding that "the text of the article 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".[FN58]

[FN58] Advisory Opinion OC-3/83, supra, at 31, para. 52.

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131. Other international human rights supervisory bodies have similarly afforded a strict interpretation of the death penalty provisions in human rights treaties. The U.N. Human Rights Committee has held in the context of Article 6 of the ICCPR, which parallels Article 4 of the Convention in certain respects,[FN59] that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.[FN60] The Committee has accordingly determined that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of Article 6 of the Covenant. Its recommended remedies in such cases have included release,[FN61] and commutation of the death sentence.[FN62] The U.N. Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions has likewise emphasized that proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries and other strict requirements of due process.[FN63] This Commission has similarly closely scrutinized the circumstances of death penalty cases to ensure strict compliance with the requirements of due process and judicial protection.[FN64]

[FN59] Article 6 of the ICCPR provides as follows:

(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

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

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

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

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

[FN60] See e.g. Baboheram-Adhin et al. v. Suriname, supra, para. 14.3.

[FN61] See e.g. U.N.H.R.C., Anthony McLeod v. Jamaica, Communication Nº 734/1997, U.N. Doc. Nº CCPR/C/62/734/1997.

[FN62] See e.g. U.N.H.R.C., Patrick Taylor v. Jamaica, Communication Nº 707/1996, U.N. Doc. Nº CCPR/C/60/D/707/1996.
[FN63] Ndiaye Report, supra, para. 377. With respect to international sentencing standards more generally, the International Criminal Tribunal for the Former Yugoslavia provides one of the few modern examples of an international tribunal adjudicating serious violations of international humanitarian law, including genocide. While the penalty imposed by the Tribunal is limited to imprisonment, the Tribunal's governing statute specifically provides that that' "[i]n imposing the sentences, the Trial Chambers should take into account such matters as the gravity of the offence and the individual circumstances of the convicted person." Statute for the International Criminal Tribunal for the former Yugoslavia, Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N., Doc. S/25704/Add.1/Corr.1 (1993), Art. 24. See similarly Statute for the International Criminal Tribunal for Rwanda, Annex to Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994), Art. 23.
[FN64] See e.g. Clifton Wright, and William Andrews supra.
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132. It is also generally recognized that the death penalty is a form of punishment that differs in substance as well as in degree in comparison to other forms of punishment. It is the absolute form of punishment that results in the forfeiture of the most valuable of rights, the right to life, and once implemented, is irrevocable and irreparable. As the United States Supreme Court has observed, "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[FN65] In the Commission's view, the fact that the death penalty is an exceptional form of punishment must also be considered in interpreting Article 4 of the Convention and Article I of the Declaration.

[FN65] Woodson v. North Carolina 49 L Ed 2d 944 (U.S.S.C.).
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133. Finally, with respect to the restrictions prescribed in Article 4 of the American Convention in particular, the Inter-American Court has identified three principal limitations explicitly prescribed in Article 4 on the ability of States Parties to the Convention to impose the death penalty:

Thus, three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.[FN66] [emphasis added]

[FN66] Id. at 31, para. 55.

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134. The Court's observations therefore accentuate the significance of strict adherence to and review of due process guarantees in implementing the death penalty in accordance with Article 4 of the Convention. Moreover, as part of that process, the Court suggests that certain circumstances of individual offenses and individual defendants may bar the imposition or application of the death penalty altogether, and therefore must be taken into account in sentencing an individual to death. In this regard, in past cases the Commission has similarly declined to interpret Article I of the Declaration as either prohibiting use of the death penalty per se, or conversely as exempting capital punishment from the Declaration's standards and protections altogether. Rather, in part by reference to Article 4 of the American Convention on Human Rights, the Commission has found that Article I of the Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life.[FN67]

[FN67] See e.g. Roach and Pinkerton v. US, supra; William Andrews v. USA, supra.

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135. Further, the Commission has identified several deficiencies that may render an execution arbitrary contrary to Article I of the Declaration. These include a failure on the part of a state to limit the death penalty to crimes of exceptional gravity prescribed by pre-existing law,[FN68] denying an accused strict and rigorous judicial guarantees of a fair trial,[FN69] and notorious and demonstrable diversity of practice within a Member State that results in inconsistent application of the death penalty for the same crimes.[FN70] It is in light of the foregoing interpretive rules and principles that the Commission must determine whether the practice of imposing the death penalty through mandatory sentencing is compatible with the terms of Articles I, XVIII, XXIV, XXV, XXVI, of the Declaration and the principles underlying those provisions.

[FN68] See William Andrews v. USA, supra, para. 177.
[FN69] See Andrews v. USA, supra, para. 172 (finding that in capital punishment cases, states have an "obligation to observe rigorously all the guarantees for an impartial trial.")
[FN70] See e.g. Roach and Pinkerton v. US, supra, para. 61.

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136. In the Commission's view, several aspects of imposing mandatory death penalties for the crime of murder are problematic in the context of a proper interpretation and application of the Declaration. First, it is well-recognized that the crime of murder can be perpetrated in the context of a wide variety of mitigating and aggravating circumstances, with varying degrees of gravity and culpability.[FN71] This conclusion is illustrated by the broad definition of murder under law of The Bahamas, as the unlawful killing of another person with the intent to kill or to cause unlawful harm or injury.[FN72] It is also illustrated by the circumstances of the

condemned men's cases. Notwithstanding the existence of such disparities, however, the mandatory death penalty, seeks to impose capital punishment in all cases of murder, without distinction. It subjects an individual who, for example, commits a murder in a spontaneous act of passion or anger, to the equivalent and exceptional punishment as an individual who executes a murder after carefully planning and premeditation.

[FN71] In 1953, the British Commission on Capital Punishment noted that "there is perhaps no single class of offenses that varies so widely both in character and culpability as the class comprising those which may fall within the comprehensive common law definition of murder no one would now dispute that for many of these crimes it would be monstrous to inflict the death penalty. The view is widely accepted that this penalty should be reserved for the more heinous offenses of murder." Royal Commission on Capital Punishment, September 1953 Cmnd 8932, Exh. 20. Even in those jurisdictions in which a distinction has been drawn between capital and non-capital murder, experience indicates that varying degrees of culpability exist within categories of capital murder which may warrant discriminate application of the death penalty. See e.g. Woodson v. North Carolina, 49 L ED 2d 944, 956, n. 31 (indicating that data compiled on discretionary jury sentencing of persons convicted of capital murder in the United States reveal that the penalty of death is generally imposed in less than 20% of the cases.)
[FN72] See e.g. R. v. Cunningham [1982] A.C. 566 (P.C.).

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

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

139. Accepted principles of treaty interpretation suggest that sentencing individuals to the death penalty through mandatory sentencing and absent consideration of the individual circumstances of each offender and offense leads to the arbitrary deprivation of life within the meaning of Article I of the Declaration. Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The ordinary meaning of the term "arbitrary" connotes an action or decision that is based on random or convenient selection or choice rather than on reason or nature.[FN73] The U.N. Human Rights Committee suggested a similar meaning for the term arbitrary in the context of Article 6(1) of the ICCPR, in the case of Kindler v. Canada.[FN74]

[FN73] Webster's Third International Dictionary.
[FN74] U.N.H.R.C., Kindler v. Canada, Communication Nº 470/1991, U.N. Doc. CPR/C/48/D/470/1991 (1993).

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140. In that case, the complainant, a citizen of the United States, was ordered extradited from Canada to face a possible death sentence in the State of Pennsylvania for a conviction of murder. The Committee found that Canada did not violate the complainant's right under Article 6(1) of the ICCPR not to be arbitrarily deprived of his life, by extraditing him to the United States without seeking assurances from the United States' Government that the death penalty would not be imposed. At the same time, the Committee suggested that the decision not to refuse extradition or to seek assurances must be shown to have been based upon a reasoned consideration of the circumstances of Mr. Kindler's case:

While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances had been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.[FN75]

[FN75] Id., para. 14.6.

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141. The Committee has therefore suggested that an arbitrary decision includes one that is taken in the absence of a reasoned consideration of the circumstances of the case in respect of which the decision is made. In this respect, the mandatory death penalty can be regarded as arbitrary within the ordinary meaning of that term. The decision to sentence a person to death is

not based upon a reasoned consideration of a particular defendant's case, or upon objective standards that guide courts in identifying circumstances in which the death penalty may or may not be an appropriate punishment. Rather, the penalty flows automatically once the elements of the offense of murder have been established, regardless of the relative degree of gravity of the offense or culpability of the offender.

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

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

144. The Inter-American Court has recognized, that Articles 4,5, and 8, of the Convention, include strict observance and review of the procedural requirements governing the imposition or application of the death penalty. In this connection, the Commission reiterates the fundamental significance of ensuring full and strict compliance with due process protections in trying individuals for capital crimes, from which there can be no derogation under the Convention or the Declaration. Further, the Inter-American Court of Human Rights recently noted the existence of an "internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases," such that "[i]f the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects what is at stake: human life."[FN76] The Commission found in the cases of Rudolph Baptiste (Grenada),[FN77] Desmond Mckenzie, Andrew Downer and Alphonso Tracey, Carl Baker, Dwight Fletcher, and Anthony Rose, (Jamaica) that imposing a mandatory death penalty in all cases of murder is not consistent with the terms of Articles 4, 5, and 8 of the American Convention, particularly, where the due process rights of the condemned men were not strictly observed.[FN78]

[FN76] Advisory Opinion OC-16/99, supra, para. 135. See similarly UNHRC, Champagnie, Palmer and Chisholm v. Jamaica, Communication No. 445/991, U.N. Doc. CCPR/C/51/D/445/1991 (1994), para. 9 (finding that in capital punishment cases, "the obligations of states parties to observe vigorously all the guarantees of a fair trial set out in Article 14 of the Covenant [on Civil and Political Rights] admits of no exception.").

[FN77] Case Nº 11.743, Report Nº 38/00, at 721 (Grenada), Annual Report of the Inter-American Commission on Human Rights 1999, Volume I, OEA/Ser.L/V/II.106, Doc. 3 rev., April 13, 2000.

[FN78] Report Nº 41/00, Case Nos. 12.023, 12.044, 12.107, 12.146, Annual Report of the Inter-American Commission on Human Rights 1999, Volume II, OEA/Ser.L/V/II.106, Doc. 3 rev., April13, 2000.

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

Article XXVI provides:

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.

Article XXV states:

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

146. Among the fundamental principles upon which the American Declaration and the American Convention are grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of their human personality.[FN79] From this principle

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

[FN79] The Preamble to the Declaration and Convention recognizes that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon the attributes of the human personality."

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

148. Finally, the Commission considers that the imposition of mandatory death sentences cannot be reconciled with an offender's right to due process, as contemplated in and as provided for in Articles XVIII, XXV, and XXVI of the Declaration. It is well established that proceedings leading to the imposition of capital punishment must conform to the highest standards of due process. The due process standards governing accusations of a criminal nature against an individual prescribed in Articles XVIII, XXV, and XXVI, of the Declaration, include namely, the right to judicial protection which is the right to resort to the courts to ensure respect for his legal rights, and for violation of any fundamental constitutional rights (Article XVIII); the right not to be deprived of his liberty and to be tried without undue delay or to be released, and the right to humane treatment during the time he is in custody (Article XXV); the right to be presumed innocent until proven guilty and to be given an impartial and public hearing, with all due process guarantees; (Article XXVI); and the right to petition to any competent authority and to obtain a prompt decision thereon (Article XXIV).

149. In the Commission's view, therefore, the due process guarantees under Articles XVIII, XXIV, XXV, and XXVI, of the Declaration, when read in conjunction with the requirements of Article I of the Declaration, presuppose as part of an individual's defense to a capital charge an opportunity to make submissions and present evidence as to whether a death sentence may not be

a permissible or appropriate punishment in the circumstances of his or her case. The due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case.

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

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

152. In this regard, as the following discussion of international and domestic jurisdictions will indicate, a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through "individualized" sentencing. Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to himself and his or her offense, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment.[FN80]

[FN80] The Commission refers in this regard to the interpretative approach advocated by the European Court of Human Rights, that its governing Convention is "a living instrument which must be interpreted in light of present-day conditions." See Eur. Court H.R., Tyrer v. United Kingdom (1978) 3 E.H.R.R. 1 at para. 31.

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153. Mitigating factors may relate to the gravity of the particular offense or the degree of culpability of the particular offender, and may include such factors as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender. Consistent with the foregoing discussion, the Commission considers that the high standards of due process and humane treatment under Articles XVIII, XXIV, XXV, and XXVI of the Declaration should be interpreted to require individualized sentencing in death penalty cases.

154. In light of the foregoing analysis, the Commission considers that the imposition of a mandatory death sentence by the State for the crime of murder, is not consistent with the terms of Articles I, XXIV, XXV, and XXVI of the Declaration, and the principles underlying those Articles.

iii. Individualized Sentencing in Other International and Domestic Jurisdictions

155. The experience of other international human rights authorities, as well as the high courts of various common law jurisdictions that have, at least until recently, retained the death penalty, substantiates and reinforces an interpretation of Articles I, XVIII, XXIV, XXV, and XXVI, of the Declaration that prohibits the mandatory imposition of the death sentence. In this connection, it is the Commission's view, based upon a study of these various international and domestic jurisdictions, that a common precept has developed whereby the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offenses is considered to be a condition sine qua non to the rational, humane and fair imposition of capital punishment. Mitigating circumstances requiring consideration have been determined to include, inter alia, the character and record of the offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.

156. In the case of Lubuto v. Zambia,[FN81] for example, the complainant had received a mandatory death sentence for armed robbery. The United Nations Human Rights Committee did not address the question of whether mandatory death penalties per se contravened the International Covenant on Civil and Political Rights ("ICCPR"). The Committee found, however, that the absence of discretion on the part of a sentencing authority to consider the particular circumstances of an offense in determining whether the death penalty is an appropriate punishment may, in certain circumstances, contravene internationally prescribed conditions for implementing capital punishment. In this case, the Committee found that the absence of discretion contravened the requirement under Article 6(2) of the ICCPR[FN82] that the death penalty be imposed "only for the most serious crimes". The Committee concluded:

[FN81] U.N.H.R.C., Lubuto v. Zambia, Communication Nº 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev. 1, para. 7.2.
[FN82] ICCPR, Article 6, supra.

Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2 of the Covenant.

157. The United Nations Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions has suggested more generally that the due process standards applicable in death

penalty proceedings require, inter alia, that all mitigating factors be taken into account in imposing sentence:

Proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries. All defendants in capital cases must benefit from the full guarantees for an adequate defense at all stages of the proceedings, including adequate provision for State-funded legal aid by competent defense lawyers. Defendants must be presumed innocent until their guilt has been proven without leaving any room for reasonable doubt, in application of the highest standards for the gathering and assessment of evidence. All mitigating factors must be taken into account. A procedure must be guaranteed in which both factual and legal aspects of the case may be reviewed by a higher tribunal composed of judges other than those who dealt with the case at the first instance. In addition, the defendant's right to seek pardon, commutation of sentence or clemency must be guaranteed.[FN83] [emphasis added]

[FN83] Ndiaye Report, supra, para. 377. With respect to international sentencing standards more generally, the International Criminal Tribunal for the Former Yugoslavia provides one of the few modern examples of an international tribunal adjudicating serious violations of international humanitarian law. While the penalty imposed by the Tribunal is limited to imprisonment, the Tribunal's governing statute specifically provides that' "[i]n imposing the sentences, the Trial Chambers should take into account such matters as the gravity of the offence and the individual circumstances of the convicted person." Statute for the International Criminal Tribunal for the former Yugoslavia, Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N., Doc. S/25704/Add.1/Corr.1 (1993), Art. 24. See similarly Statute for the International Criminal Tribunal for Rwanda, Annex to Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994), Art. 23.

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158. The highest courts of various common law jurisdictions in which the death penalty has, at least until recently, been retained have similarly considered the rational, humane and fair imposition of the death penalty to require guided discretion on the part of the sentencing authority to consider mitigating circumstances of individual offenders and offenses. The United States Supreme Court in the case of Woodson v. State of North Carolina[FN84] found that a mandatory death sentence for first degree murder under the law of North Carolina violated the Eighth[FN85] and Fourteenth[FN86] Amendments to the U.S. Constitution. Among the grounds for the Court's decision was a finding that the mandatory death penalty did not satisfy a basic constitutional requirement, and that the process for imposing a death sentence should not be arbitrary, but rather incorporate "objective standards" that guide and regularize the process and make it amenable to judicial review.[FN87] The Court also found that the mandatory death penalty failed to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before imposing a death sentence upon him, and was therefore inconsistent with the fundamental respect for humanity underlying the prohibition of cruel and unusual punishment under the Eighth Amendment. In respect of the latter ground, the Court made the following compelling observations:

[FN84] Woodson v. North Carolina 49 L Ed 2d. 944.

[FN85] The Constitution of the United States, Amendment VIII (1791) (providing "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[FN86] Id. Amendment XIV, Section I (providing "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[FN87] Id. at 960. In its decision in the case Furman v. Georgia, 408 U.S. 238, the Supreme Court declared the vesting of standardless sentencing discretion in the jury in imposing capital sentences as contrary to the Eighth and Fourteenth Amendments. In rejecting North Carolina's contention in Woodson that the inadequacies identified in Furman were remedied by withdrawing all sentencing discretion from juries in capital cases, the Court suggested that the mandatory sentencing scheme was no more rational, as the statute provided "no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die," and provided no way for the judiciary to "check arbitrary and capricious exercise of that power through a review of death sentences."

In Furman, members of the Court acknowledged what cannot be fairly denied – that death is a punishment different from all other sanctions in kind rather than degree.[FN88] A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

[FN88] See 408 US, at 286-291, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan J. concurring); id., at 306, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring).

This Court has previously recognized that "[f] or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.[FN89] Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development.[FN90] While the prevailing practice of individualizing sentencing determinations generally reflects simply an enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment,[FN91] requires consideration of the character and record of the individual

offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

[FN89] Pennsylvania ex rel. Sullivan v. Ashe, 302 US 51, 55, 82 L Ed43, 58 S Ct 59 (1937).
[FN90] See Williams v. New York, 337 US, at 247-249, 93 L Ed 1337, 69 S Ct 1079; Furman v. Georgia, 408 US, at 402-3, 33 L Ed 2d 346, 92 S Ct 2726 (Burger C.J., dissenting).
[FN91] See Trop v. Dulles, 356 US, at 100, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion).

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[FN92]

[FN92] Id. at 961. See also Roberts (Stanislaus) v. Louisiana, 428 U.S., 325, 333, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

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159. In the case of The State v. Makwanyane and McHunu,[FN93] the Constitutional Court of South Africa struck down the death penalty provision of the Criminal Procedure Act Nº 51[FN94] as inconsistent with South Africa's 1993 Constitution. As part of its analysis, that Court also suggested that the guided discretion provided to South African judges to consider the personal circumstances and subjective factors of a defendant in applying the death penalty satisfied in part the requirement that the death penalty not be imposed arbitrarily or capriciously, the Court reasoned as follows [footnotes included]:

[FN93] The State v. Makwanyane and McHunu, Judgment, Case Nº CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa).
[FN94] Section 277 of the Criminal Procedure Act Nº 51 provided:
Sentence of Death
(1) The sentence of death may be passed by a superior court only and only in the case of a conviction for:
(a) murder;
(b) treason committed when the Republic is in a state of war;
(c) robbery or attempted robbery, if the court finds aggravating circumstances to have been present;
(d) kidnapping;
(e) child-stealing;
(f) rape.
(2) The sentence of death shall be imposed
(a) after the presiding judge conjointly with the assessors (if any), subject to the provisions of s. 145(4)(a), or, in the case of a trial by a special superior court, that court, with due regard to

any evidence and argument on sentence in terms of section 274, has made a finding on the presence or absence of any mitigating or aggravating factors; and
(b) if the presiding judge or court, as the case may be, with due regard to that finding, is satisfied that the sentence of death is the proper sentence.

Basing his argument on the reasons which found favor with the majority of the United States Supreme Court in Furman v. Georgia, Mr. Trengove contended on behalf of the accused that the imprecise language of section 277, and the unbounded discretion vested by it in the Courts, make its provisions unconstitutional.[FN95]

[FN95] Id. pp. 32-36. The Court went on to conclude that additional factors such as discrimination and the "imperfection" inherent in criminal trials may also lead to arbitrary results in the imposition of the death penalty, and determined further that such arbitrary results could not be appropriately remedied through strict due process, as had been endeavored in the United States. Id. at 36-43.

[…]

Under our court system questions of guilt and innocence, and the proper sentence to be imposed on those found guilty of crimes, are not decided by juries. In capital cases, where it is likely that the death sentence may be imposed, judges sit with two assessors who have an equal vote with the judge on the issue of guilt and on any mitigating or aggravating factors relevant to sentence; but sentencing is the prerogative of the judge alone. The Criminal Procedure Act allows a full right of appeal of persons sentenced to death, including a right to dispute the sentence without having to establish an irregularity or misdirection on the part of the trial judge. The Appellate Division is empowered to set the sentence aside if it would not have imposed such a sentence itself, and it has laid down criteria for the exercise of this power by itself and other courts.[FN96] If the person sentenced to death does not appeal, the Appellate Division is nevertheless required to review the case and to set aside the death sentence if it is of the opinion that it is not a proper sentence.[FN97]

[FN96] Criminal Procedure Act Nº 51 of 1977, section 322(2A) (as amended by section 13 of Act Nº 107 of 1990).
[FN97] Id. section 316A(4)(a).

Mitigating and aggravating factors must be identified by the Court, bearing in mind that the onus is on the State to prove beyond a reasonable doubt the existence of aggravating factors, and to negate beyond a reasonable doubt the presence of any mitigating factors relied upon by the accused.[FN98] Due regard must be paid to personal circumstances and subjective factors which might have influenced the accused person's conduct,[FN99] and these factors must then be weighed with the main objects of punishment, which have been held to be: deterrence,

prevention, reformation, and retribution.[FN100] In this process "[e]very relevant consideration should receive the most scrupulous care and attention,"[FN101] and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.[FN102]

[FN98] S. v Nkwanyana and Others 1990 (4) SA 735 (A) at 743E-745A.
[FN99] S v. Masina and Others 1990 (4) SA 709 (A) at 718G-H.
[FN100] S v. J 1989 (1) SA 669 (A) at 682G. "Generally speaking, however, retribution has tended to yield ground to the aspects of correction and prevention, and it is deterrence (including prevention) which has been described as the 'essential', 'all important', 'paramount', and 'universally admitted' object of punishment." Id. at 682I-J (cited with approval in S v P 1991 (1) SA 517 (A) at 523G-H. CF. R. v Swanepoel 1945 AD 444 at 453-455.
[FN101] Per Holmes JA in S v Letsolo 1970 (3) SA 476 (A) at 477B (cited with approval by Nicholas AJA in S v Dlamini 1992 (1) SA 18 (A) at 31I-32A in the context of the approach to sentencing under section 322(2A)(b) of the Criminal Procedure Act Nº 51 of 1977).
[FN102] S v Senonohi 1990 (4) SA 727 (A) at 734F-G; S v Nkwanyana, supra at 749A-D.

There seems to me to be little difference between the guided discretion required for the death sentence in the United States, and the criteria laid down by the Appellate Division for the imposition of the death sentence. The fact that the Appellate Division, a court of experienced judges, takes the final decision in all cases is, in my view, more likely to result in consistency of sentencing, than will be the case where sentencing is in the hands of jurors who are offered statutory guidance as to how that discretion should be exercised.[FN103]

[FN103] Id. at 35-36.

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160. Similarly, in the case of Bachan Singh v. State of Punjab,[FN104] the appellant argued before the Supreme Court of India that section 354(3) of the Indian Criminal Procedure Code, 1973 contravened the requirement under Article 21 of the Indian Constitution that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law," because the provision provided judges with too much discretion in determining whether offenders should be sentenced to death.[FN105] The Indian Supreme Court rejected the appellant's contention, because in the Court's view, it was consistent with the requirements of Article 21 for the legislation to leave the imposition of the death penalty to "the judicial discretion of the Courts which are manned by persons of reason, experience and standing in the profession" who exercise their sentencing discretion "judicially in accordance with well-recognized principles crystallized by judicial decisions directed along the broad contours of legislative policy towards the signposts enacted in section 354(3)."[FN106] In reaching this conclusion, the Court articulated the following propositions intended to guide Indian judges in exercising their sentencing discretion relating to the death penalty:

[FN104] Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 475.
[FN105] Id. at 509-510.
[FN106] Id. at 516.

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the normal rule is that the offense of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

While considering the question of sentence to be imposed for the offense of murder under section 302 of the Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offense is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence.[FN107]

[FN107] Id. at 515.

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161. The Court also emphasized the crucial role that mitigating factors play in the humane imposition of capital punishment. The Court stated that the "scope and concept of mitigating factors in the area of the death penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy written in section 354(3)," and opined that:

[a] real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That should not be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.[FN108]

[FN108] Id. at 534.

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162. The experience in other international and domestic jurisdictions therefore suggests that a Court must have the discretion to take into account the individual circumstances of an individual offender and offense in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process. The individual circumstances to be considered have been determined to include the character and record of the offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.

163.Authorities in these jurisdictions have also suggested that, in order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or

judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. The Commission considers that these principles should also be considered in interpreting and applying Articles I, XVIII, XXIV, XXV, and XXVI of the Declaration, so as to require individualized sentencing in implementing the death penalty. To accept any lesser standard would, in the Commission's view, fail to afford sufficient protection to the most fundamental of rights under the American Declaration.

iv. The Cases before the Commission

a. Mandatory Death Penalty

164. As previously discussed, the Commission concludes that once the condemned men in these cases were found guilty of the crime of murder, the law in The Bahamas did not permit a hearing by the courts as to whether the death penalty was a permissible or appropriate penalty for the condemned men. There was no opportunity for the trial judge or the jury to consider such factors as the condemned men's characters or records, the nature or gravity of the offenses, or any other relevant factors. The condemned men were likewise precluded from making representations on these matters. The condemned men were sentenced to mandatory death penalties by the Courts, based solely upon the category of crime for which they were convicted.

165. As noted above, the law in The Bahamas does not permit mitigating circumstances to be considered by a court in sentencing an individual to death. The Commission recognizes that, had the courts in these cases been provided with the discretion under law to consider factors of this nature in determining an appropriate sentence, it may well have still imposed the death penalty. The Commission cannot, and indeed should not, speculate as to what the outcome may have been. This determination properly falls to the domestic courts. What is crucial to the Commission's determination that the condemned men's death sentences contravene the Declaration, however, is the fact that the condemned men were not provided with an opportunity to present mitigating factors in the context of sentencing, nor was the Court permitted to consider evidence of this nature in determining whether the death penalty was an appropriate punishment in the circumstances of the condemned men's cases.

b. Advisory Committee on the Prerogative of Mercy

166. The Commission does not consider that the State's Advisory Committee on the Prerogative of Mercy ("the Advisory Committee"), which was established pursuant to Articles 91 and 92 of The Constitution of The Bahamas can provide an adequate opportunity consistent with the requirements of the Articles I, XVIII, XXIV, XXV, and XXVI of the American Declaration for the proper implementation of the death penalty through individualized sentencing. The authority of the Executive in The Bahamas to exercise the Prerogative of Mercy is prescribed in Sections 90, 91, and 92 of the Constitution of The Bahamas[FN109] which provide as follows:

[FN109] Statutory Instruments, 1973 Nº 1080, Caribbean and North Atlantic Territories, The Bahamas Independence Order 1973, at 58.

90.(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf.-

(a) grant to any person convicted of any offense against the law of The Bahamas a pardon, either free or subject to lawful conditions;
(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
(c) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or
(d) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to Her Majesty on account of such an offence."

(2) The powers of the Governor-General under paragraph (1) of this Article shall be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister.

91.There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of –

(a) the Minister referred to in paragraph (2) of Article 90 of this Constitution who shall be the Chairman;
(b) the Attorney General; and
(c) not less than three or more than five other members appointed by the Governor-General.

92. (1) Where an offender has been sentenced to death by any court for an offence, against the law of The Bahamas, the Minister shall cause a written report of the case from the trial Justice of the Supreme Court, together with such other information derived from the record of the case or elsewhere as the Minister may require, to be taken into consideration at a meeting of the Advisory Committee.
(2) The Minister may consult with the Advisory Committee on the Prerogative of Mercy before tendering any advice to the Governor-General under paragraph (2) of Article 90 of this Constitution in any case not falling within paragraph (1) of this Article.
(3) The Minister shall not be obliged in any case to act in accordance with the advice of the Advisory Committee.
(4) The Advisory Committee may regulate its own procedure.

167. The law in The Bahamas therefore provides for a process by which the Executive may exercise the authority to grant amnesties, pardons, or commutations of sentences. The Commission is not, however, aware of any prescribed criteria that are applied in the exercise of the functions or discretion of the Advisory Committee, save for the requirement in death penalty cases that the Minister cause a written report of the case from the trial judge, and possibly other information in the Minister's discretion, to be taken into consideration at the meeting of the Advisory Committee. Nor is the Commission aware of any right on the part of an offender to apply to the Advisory Committee, to be informed of the time when the Committee will meet to

discuss the offender's case, to make oral or written submissions to the Advisory Committee or to present, receive or challenge evidence considered by the Advisory Committee. The submissions of the Petitioners confirm that the exercise of the power of pardon in The Bahamas involves an act of mercy that is not the subject of legal rights and therefore is not subject to judicial review.[FN110]

[FN110] See Reckley v. Minister of Public Safety (Nº 2) [1996] 2 W.L.R. 281 at 289-291 (finding that the exercise of the Prerogative of Mercy by the Minister of Public Safety in The Bahamas involved an act of mercy that was not the subject of legal rights and was therefore not judicable.); de Freitas v. Benny [1976] 2 A.C. 239.

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168. This process is not consistent with the standards prescribed under Articles I, XVIII, XXIV, XXV, and XXVI of the Declaration, that are applicable to the imposition of mandatory death sentences. As outlined previously, these standards include legislative or judicially prescribed principles and standards to guide courts in determining the propriety of death penalties in individual cases, and an effective right of appeal or judicial review in respect of the sentence imposed. The Prerogative of Mercy process in The Bahamas clearly does not satisfy these standards, and therefore cannot serve as a substitute for individualized sentencing in death penalty prosecutions.

169. Moreover, based upon the information before it, the Commission finds that the procedure for granting mercy in The Bahamas does not guarantee condemned prisoners with an effective or adequate opportunity to participate in the mercy process, and therefore does not properly ensure the condemned men’s rights under Article XXIV of the Declaration to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

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

171. In this respect, the right to petition under Article XXIV of the Declaration may be regarded as similar to the right under Article XXVII of the American Declaration of every person "to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements," and the corresponding Article 22(7) of the Convention, which provides for the right to "seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes."[FN111] The Commission has interpreted the former provision, in conjunction with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, as giving rise to a right under international law of a person seeking refuge to a hearing in order to determine whether that person qualifies for refugee status.[FN112] Other internationally articulated requirements governing the right to seek asylum reflect similar minimum standards, namely, the right of an individual to apply to appropriate authorities for asylum, to make representations in support of their application, and to receive a decision.[FN113]

[FN111] See similarly Universal Declaration on Human Rights, Article 14 (providing for the right of every individual to "seek and to enjoy in other countries asylum from persecution.").
[FN112] I/A. Comm. H.R., Haitian Interdiction Case (United States), Case Nº 10.675 (March 13 1997), Annual Report 1996, para. 155.
[FN113] See e.g. Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 189-219 (prescribing basic requirements for the procedures for determining refugee status, including the right of an applicant to be given the necessary facilities for submitting his case to the authorities concerned, and that the applicant be permitted to remain in the country pending a decision on his initial request for refugee status); Council of Europe, Resolution on minimum guarantees for asylum procedures, Brussels, 21 June 1995, Articles 10, 12, 14, 15, 23 (prescribing common procedural guarantees to be provided by Member States of the European Union in processing asylum application, including the right of an asylum-seeker, at the border or otherwise, to have an opportunity to lodge his asylum application as early as possible, to remain in the territory of the state in which his application has been lodged or is being examined as long as the application has not been decided upon, to be given the opportunity of a personal interview with an official qualified under national law before a final decision is taken on the asylum application, and to have the decision on the asylum application communicated to the asylum-seeker in writing.).

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172. Consistent with the interpretation of the right to seek asylum by the Commission and other international authorities, the Commission finds that Article XXIV of the Declaration must be interpreted to encompass certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. The Commission notes in this regard that some common law jurisdictions retaining the death penalty have prescribed procedures through which condemned prisoners can engage and participate in the amnesty, pardon or commutation process.[FN114]

[FN114] In the State of Ohio, for example, clemency review has been delegated in large part to the Ohio Adult Parole Authority (OAPA). In the case of an inmate under sentence of death, the OAPA must conduct a clemency hearing within 45 days of the scheduled date of execution. Prior to the hearing, the inmate may request an interview with one or more parole board members. The OAPA holds a hearing, completes its clemency review, and makes a recommendation to the Governor. If additional information later becomes available, the OAPA may in its discretion hold another hearing or alter its recommendation. See Ohio Constitution, Art. III, s. 2, Ohio Revised Code Ann., s. 2967.07 (1993). See also Ohio Adult Parole Authority v. Woodward, Court File Nº 96-1769 (25 March 1998)(U.S.S.C.) (finding that Ohio's clemency procedures do not violate the U.S. Constitution's Due Process Clause).

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

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

v. Conclusion

175. Based upon the foregoing facts and the interpretive principles outlined above, the Commission finds that by imposing mandatory death sentences on Messrs. Edwards, Hall, Schroeter and Bowleg, the State violated their rights pursuant to Articles I, XVIII, XXIV, XXV, and XXVI, of the Declaration.

176. More particularly, the Commission concludes that the trial judge imposed the mandatory death penalty on the condemned men, in the absence of any guided discretion to consider their personal characteristics and the particular circumstances of their offenses to determine whether death was an appropriate punishment which violated their rights as established by Articles I, XVIII, XXIV, XXV, and XXVI, of the American Declaration. The condemned men were also not provided with an opportunity to present representations and evidence as to whether the death penalty was an appropriate punishment in the circumstances of their cases.

177. Rather, the death penalty was imposed upon them based upon the category of crime for which they were convicted and without any principled distinction or rationalization based upon the particular circumstances of their personality or the crime. Moreover, the propriety of the sentences imposed was not susceptible to any effective form of judicial review, and their

executions are now imminent, their convictions for murder having been upheld on appeal by the Appellate Court in The Bahamas. The Commission therefore concludes that the State has violated the rights of the condemned men under Article I of the Declaration not to be arbitrarily deprived of their lives, and therefore, that the mandatory death sentences of Messrs. Edwards, Hall, Schroeter and Bowleg are unlawful.

178. The Commission further concludes that the State, by sentencing the condemned men to mandatory death penalties absent consideration of their individual circumstances, has failed to respect their rights to humane treatment pursuant to Article XXV and XXVI of the Declaration, and has subjected them to cruel, inhuman, or degrading punishment or treatment in violation of those Articles. The State sentenced the condemned men to death solely because they were convicted of a predetermined category of crime. Accordingly, the process to which they have been subjected, would deprive them of their most fundamental rights, their rights to life, without consideration of their personal circumstances and their offenses. Treating Messrs. Edwards, Hall, Schroeter and Bowleg in this manner abrogates the fundamental respect for humanity that underlies the rights protected under the Declaration, and Articles XXV and XXVI in particular.

179. The Commission also concludes that the State has violated the condemned men's rights pursuant to Article XXIV of the American Convention by failing to guarantee them an effective right to petition and to apply for amnesty, pardon or commutation of sentence, to make representations, in person or by counsel, to the Advisory Committee on the Prerogative of Mercy, and to receive a prompt decision from the Advisory Committee within a reasonable time prior to their executions.

180. Finally, the Commission concludes that the State has violated the condemned men's rights to a hearing with due guarantees by a competent, independent and impartial tribunal as established under Articles XVIII, XXV, and XXVI, of the American Declaration. The condemned men were not provided with an opportunity to make representations and present evidence to the trial judge as to whether their crimes warranted the ultimate penalty of death, and was therefore denied the right to fully answer and defend the criminal accusations against them.

181. It follows from the Commission's findings that, should the State execute the condemned men pursuant to their mandatory death sentences, this would constitute further egregious and irreparable violations of Articles I, XVIII, XXV, XXVI and of the Declaration.

182. Given its foregoing conclusions as to the legality of the condemned men's death sentences under Articles I, XVIII, XXIV, XXV and XXVI the Declaration, the Commission does not consider it necessary to determine whether sentencing Messrs. Edwards, Hall, Schroeter and Bowleg, to mandatory death penalties violated their rights to equal protection of the law contrary to Article II, of the Declaration.

c. Articles XI, XXV, and XXVI of the Declaration, Conditions of Detention

183. The Petitioners allege that the State has violated the condemned men's rights to the preservation of health and to well-being, and not to be subjected to cruel, unusual or degrading punishment or treatment pursuant to Articles XI, XXV and XXVI of the American Declaration,

because of the conditions of detention to which they have been subjected. They argue fursther that these conditions render their executions unlawful under Article I of the Declaration.

i. Mr. Edwards' Conditions of Detention

184. The Petitioners have made general allegations concerning Mr. Edwards' conditions of detention and claim that his conditions violate the right to humane treatment guaranteed by Articles XI and XXVI of the American Declaration. In their original petition dated November 5, 1998, the Petitioners stated that "this ground will either be amplified or withdrawn in due course." Subsequently, by letter dated February 5, 1999, the Petitioners informed the Commission that they were having difficulties in obtaining information regarding Mr. Edwards' conditions of detention, and that they reserved the right to develop this ground of the petition once relevant information was received. As stated above, the State responded to the allegations in the petition concerning the mandatory nature of the death penalty and the Advisory Committee on the Prerogative of Mercy but did not comment on the Petitioners general claims of inhumane conditions of detention.

185. To date the Commission has not received the forthcoming information from the Petitioners to make a determination on Mr. Edwards' conditions of detention. Therefore, the Commission dismisses Mr. Edwards' claim relating to his conditions of detention.

ii. Mr. Hall's Conditions of Detention

186. The Petitioners claim that Mr. Hall's conditions of Detention violate his right to humane treatment pursuant to Article XXVI of the Declaration. In this regard, the Petitioners allege that upon Mr. Hall's arrest in August of 1996, he was placed in the maximum security unit of the prison where condemned men are detained prior to their execution, and that such detention has continued. The Petitioners maintain that during Mr. Hall's period of incarceration, he has been detained in a cell which has no windows and measures approximately 6ft by 6ft, with nothing more than a mattress and a bucket within the cell; the cell is unbearable hot and airless and that the door to the cell has bars and that there are metal plates across them which prevent air circulating; and that the time which he spends for exercising is substantially less than that required to be given under the Bahamian Prison Rules.

187. Mr. Hall claims that under Rule 216 of the Bahamian Prison Rules, prisoners should be allowed 1 hour of exercise each day, whereas he is permitted only 10 minutes of exercise four times a week; and that the 10 minutes a day which he spends exercising is not only in violation of the Bahamian Prison Rules, but is also in breach of Rule 21(1) of the United Nations Minimum Standards which provides that "every prisoner who is not employed in outdoor work should have at least 1 hour of suitable exercise in the open air daily if whether permits."

188. The Petitioners indicate that a Report made by Her Majesty's Review Committee in September of 1991, concluded that the prison was an overcrowded, understaffed institution that performs two of its primary functions well: it incapacitates and it punishes. The Petitioners contend that the Committee's findings included the following: the inmates were confined to their cells for 23 hours a day due to the high number of inmates under the supervision of only 2 prison

officers, the lack of patient care was perfunctory at best and that prison officers for the most part lack sensitivity and compassion.

189. The Petitioners maintain that prison officers torment the condemned men with their impending execution, particularly when a date has been set for an execution, and that when no date has been set, the officers make it clear that they are keen for the Government to carry out the sentence imposed on the condemned men to "get rid" of some of them. Finally, the Petitioners contend that Mr. Hall has endured this treatment since August of 1996, for over 2 years and 3 months. The Petitioners argue that these prison conditions have imposed severe stress on Mr. Hall since he has been incarcerated on death row, and that Mr. Hall's detention constitutes cruel infamous or unusual punishment in violation of Article XXVI of the Declaration. As indicated above, the State has not responded to the merits of Mr. Hall's petition, including the claims relating to his inhumane conditions of detention.

iii. Messrs. Schroter and Bowleg's Conditions of Detention

i. Pre-trial Conditions of Detention

190. The Petitioners claim that Messrs. Schroeter's and Bowleg's rights to humane treatment pursuant to Articles XI, XXV, and XXVI of the Declaration were violated by the State, because of the conditions under which they were detained both prior to, and subsequent to their trial. With regard to their pre-trial conditions of detention, Messrs. Schroeter and Bowleg claim that upon their arrests, they were subjected to inhumane treatment, namely, violence by the police, who forced them to sign confessions on their complicity in the crime of murder. The Petitioners maintain that in Mr. Schroeter's case, "the police slammed his head against a desk, punched him the ear, grabbed him in his stomach and choked him." The Petitioners allege that with regard to Mr. Bowleg, the police placed "a plastic bag over his head, he was hit on his wrist with a bamboo stick and that the police used a vice-like object and pressed his testicles together."

191. The Petitioners argue that prior to the condemned men's arrests both men were in good health with no injuries, and that subsequent to their arrests the condemned men complained that they had been beaten by police officers and required hospital treatment. The Petitioners contend that the condemned men made further complaints of their inhumane treatment by police officers in the Magistrates Court on July 19, 1996, which resulted in the Magistrate, Cheryl Albury, directing that that they be taken to hospital. The Petitioner reports that at the Accident and Emergency Department of the Princess Margaret Hospital both men received treatment for injuries sustained whilst in police custody. The Petitioners inform that the Casualty sheets containing the treating doctors notes in respect of the victims had been "inadvertently misplaced" and what remained were summarized notes in the Hospital's Accident and Emergency Ledger.

ii. Post Trial Conditions of Detention

192. The record before the Commission reflects that the Petitioners have made general allegations that Messrs. Schroeter and Bowleg were subjected to inhumane conditions of detention subsequent to their trials, and have cited numerous international jurisprudence in support of their claims. However, in reviewing the record before the Commission, the

Petitioners maintain that Messrs. Schroeter and Bowleg have been detained in solitary confinement, and stated that they would provide the Commission with more detailed information, such as the measurement of their cells, sanitation, ventilation, lighting, and affidavits. However, to date the Commission has not received the said information, and accordingly dismisses Messrs. Schroeter's and Bowleg's claims relating to their post convictions conditions of detention.

193. In considering Mr. Hall's claims relating to his general conditions of detention, Messrs. Schroeter's and Bowleg's claims regarding their pre-trial conditions of detention, that they were subjected to inhumane treatment and inhumane conditions of detention, the Commission is of the view that these conditions of detention, when considered in light of the periods of time for which the condemned men have been held in detention prior to trial and the final disposition of their appeals, fail to satisfy the standard of humane treatment prescribed under Articles XI, XXV, and XXVI of the Declaration. In this regard, the Inter-American Court considered similar conditions of detention in the Suarez-Rosero Case.[FN115] In that case, the victim alleged, inter alia, that he was held incommunicado for over one month in a damp and poorly ventilated cell measuring five meters by three, together with sixteen other persons. In finding that the victim had been subjected to cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention, the Court stated as follows:

[FN115] I/A Court H.R., Suarez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, at p. 283.

The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suarez-Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his incommunicado detention was arbitrary and carried out in violation of Ecuador's domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspapers; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suarez-Rosero was subjected may be described as cruel, inhuman and degrading.[FN116]

[FN116] Id., at pp. 302-3, para. 98.

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194. While the condemned men in the cases under consideration do not claim to have been held incommunicado, they are held in solitary confinement on death row, and the prison conditions under which they have been detained are strikingly similar to those to which the victim in the Suarez-Rosero case was subjected. Mr. Hall, has been held in confined conditions with inadequate hygiene, ventilation and natural light, and is only allowed out of his cell for 10

minutes for exercise four days per week. Messrs. Schroeter and Bowleg allege to have been abused by the police prior to their trials. These observations, together with the length of time over which the condemned men were held in these conditions, suggest that the treatment of the condemned men has failed to meet the minimum standards under Articles XI, XXV, and XXVI of the Declaration, which apply irrespective of the nature of the conduct for which the person in question has been imprisoned[FN117] and regardless of the level of development of a particular state.[FN118]

[FN117] See e.g. Eur. Court H.R., Ahmed v. Austria, Judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 220, para. 38.

[FN118] See similarly U.N.H.R.C., Mukong v. Cameroon, Communication Nº 458/1991, U.N. Doc. Nº CCPR/C/51/D/458/1991 (1994), para. 9.3 (observing that certain minimum standards governing conditions of detention for prisoners, as prescribed by the International Covenant on Civil and Political Rights and reflected in the U.N. Standard Minimum Rules for the Treatment of Prisoners, must be observed regardless of a state party's level of development).

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195. The Commission considers that Mr. Hall's claims in relation to his conditions of detention, and Messrs. Schroeter's and Bowleg's claims in respect of their pre-trial conditions of detention should be evaluated in light of minimum standards articulated by international authorities for the treatment of prisoners, including those prescribed by the United Nations. More particularly, Rules 10, 11, 12, 15, 21, and 31 of the United Nations Standard Minimum Rules for the Treatment of Prisoners[FN119] (UN Minimum Rules) provide for basic minimum standards for prisoners in respect of accommodation, hygiene, exercise, and their treatment and punishment during detention and incarceration and states as follows:

[FN119] United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (Nº 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (Nº 1) at 35, U.N. Doc E/5988 (1977).

10.All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

11. In all places where prisoners are required to live or work,

(a) the windows shall be large enough to enable prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

12.The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.

15.Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

21. (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.

31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

196. It is evident based upon the information provided by the Petitioners that the conditions of detention to which Mr. Hall has been subjected, fail to meet several of these minimum standards of treatment of prisoners, in such areas as accommodation, ventilation, hygiene, and exercise. Mr. Hall claims that his cell is 6ft by 6ft. is hot and airless with inadequate ventilation, and only has 10 minutes of exercise four days per week rather than the 1 hour prescribed under the UN Standard Minimum Rules. In addition, Mr. Hall claims that he is tormented by the prison guards who state that they would like to "get rid" of some of them. Likewise, Messrs. Schroeter's and Bowleg's pre-trial conditions of detention fail to meet several of the minimum standards of treatment of detainees, in particular, the violence which the condemned men encountered at the hands of the police officers prior to making statements implicating them in the murder. The physical abuse and violence is clearly in violation of Rule 31 of the UN Minimum Rules which prohibits corporal punishment and all cruel, inhuman or degrading forms of punishments.

197. The Petitioners also rely upon general sources of information regarding prison conditions in The Bahamas and other Caribbean countries. These include reports prepared in 1990 and 1991 by the non-governmental organization "Caribbean Rights." While somewhat outdated, the Reports tend to support Hall's allegations in respect of the conditions in which he has been incarcerated since his arrest.

198. The State has failed to provide any information in respect of conditions of detention in The Bahamas generally, or as they pertain to Messrs. Hall, Schroeter and Bowleg. Based upon the information on the record before the Commission, the Commission concludes that the State has violated Messrs. Hall's, Schroeter's and Bowleg's rights to the preservation of their health and well-being, their rights to humane treatment, and their rights not to receive cruel, infamous, or unusual punishment, pursuant to Articles XI, XXV, and XXVI of the Declaration, since their detention in 1996, and 1994, respectively.[FN1]

[FN1] See the Commission's decisions in the cases of Rudolph Baptiste (Grenada) and Desmond McKenize et. al (Jamaica) where the Commission found violations of the right to humane treatment pursuant to Article 5(1) and 5(2) of the American Convention.

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d. Articles XVII, XVIII, and XXVI of the Declaration, Unavailability of Legal Aid for Constitutional Motions

199. The Petitioners argue that legal aid is not effectively available for Constitutional Motions before the courts in The Bahamas, and that this constitutes a violation of the right to a fair trial under Articles XVIII and XXVI of the Declaration.

200. The Petitioners contend that the failure of the State to provide legal aid denies the condemned men access to the Courts in fact as well as in law. The Petitioners argue that to bring a Constitutional Motion before the domestic courts often involve sophisticated and complex questions of law that require the assistance of Counsel. In addition, the Petitioners claim that the condemned men are indigent, and that legal aid is effectively not available to them to pursue Constitutional Motions in the courts of The Bahamas. The Petitioners contend that there are a dearth of lawyers who are prepared to represent the condemned men pro bono.

201. Based upon the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by the condemned men in their petitions, such as the right to due process of law, the right to humane treatment, and the adequacy of their prison conditions, are procedurally and substantively complex and cannot be effectively raised or presented by a prisoner in the absence of legal representation. The Commission also finds that the State does not provide legal aid to individuals in The Bahamas to bring Constitutional Motions, and that the condemned men are indigent and are therefore not otherwise able to secure legal representation to bring Constitutional Motions.

202. As discussed above, the Commission considers that in light of the evolving nature of the American Declaration, that Articles XVIII, and XXVI of the Declaration must be interpreted in the circumstances of the condemned men's cases to require that the State has an obligation to provide legal assistance for Constitutional Motions in capital punishment cases. In particular, because of the complexity involved in initiating and pursuing a Constitutional Motion in the Supreme Court of The Bahamas for the determination of rights of the condemned men, the Commission believes that the provisions of Articles XVIII, and XXVI of the Declaration must be given effect by The Bahamas. In the circumstances of the condemned men's cases, the Supreme Court of The Bahamas would be called upon to determine whether the condemned men's convictions in a criminal trial violated their rights under Constitution of The Bahamas. In such cases, the application of a requirement of a fair hearing in the Supreme Court should be consistent with the principles in Articles XVIII, and XXVI of the Declaration.[FN2] Accordingly, when a convicted person seeking Constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State.

[FN2] See I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Annual Report 1991, para. 28 (interpreting Article 8 (1) of the Convention as follows:

For cases which concern the determination of a person's rights and obligations of a civil, labor, fiscal or any other nature, article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases.

See also I/A Comm. H.R., Loren Laroye Riebe Star and others v. Mexico, Report Nº 49/99 (13 April 1999), Annual Report 1998, para. 70 (interpreting Article 8(1) in the context of administrative proceedings leading to the expulsion of foreigners as requiring certain minimal procedural guarantees, including the opportunity to be assisted by counsel or other representative, sufficient time to consider and refute the charges against them and to seek and adduce corresponding evidence.).

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203. Due to the unavailability of legal aid, the condemned men have effectively been denied the opportunity to challenge the circumstances of their convictions under Constitution of The Bahamas, to an impartial hearing. This in turn constitutes a violation of their rights under Article XXVI of the American Declaration.[FN3]

[FN3] See similarly Currie v. Jamaica , Communication Nº 377/1989, U.N.Doc. Nº CCPR/C/50/D/377/1989 (1994), para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights require the State to provide legal assistance).

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204. Moreover, Article XVIII of the Declaration provides individuals with the right to resort to the courts to ensure respect for his legal rights, and the availability of a simple and brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights. In this regard the Commission has stated that the right to recourse under Article 25 of the American Convention when read together with the obligation in Article 1(1) and the provisions of Article 8(1), “must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the Constitution, or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.”[FN4]

[FN4] See Peru Case, supra, pp. 190-191.

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205. In addition, the Inter-American Court has held that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigence, then that person is exempted from the requirement under the Convention to exhaust domestic remedies.[FN5] While the Court rendered this finding in the context of the admissibility provisions of the Convention, the Commission considers that the Court's comments are also illuminating in the context of Article XVIII of the Declaration, in the circumstances of the present cases.

[FN5] I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies, supra, para. 30.

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206. By failing to make legal aid available to the condemned men to pursue Constitutional Motions in relation to their criminal proceedings, the State has effectively barred recourse for the condemned men to a simple and brief procedure whereby the courts in The Bahamas would protect them from acts of authority that, to their prejudice, violate their fundamental rights under the Constitution of The Bahamas and under the American Declaration. Moreover, in capital cases, where Constitutional Motions relate to the procedures and conditions through which the death penalty has been imposed and therefore relate directly to the right to life and to humane treatment of a defendant, it is the Commission's view that the effective protection of those rights cannot properly be left to the random prospect as to whether an attorney may be willing or available to represent the defendant without charge. The right to judicial protection of these most fundamental rights must be guaranteed through the effective provision of legal aid for Constitutional Motions.[FN6] The State cannot be said to have afforded such protection to the condemned men. As a consequence, the State has failed to fulfil its obligations under Article XVIII of the American Declaration in respect of the condemned men.

[FN6] See similarly U.N.H.R.C., William Collins v. Jamaica, Communication Nº 240/1987, U.N. Doc. Nº CCPR/C/43/D/240/1987 (1991), para. 7.6 (finding that in capital punishment cases, legal aid should not only be made available, it should enable counsel to prepare his client's defense in circumstances that can ensure justice.).

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207. Accordingly, the Commission concludes that the State has failed to respect the rights of Messrs. Edwards, Hall, Schroeter and Bowleg under Article XXVI of the Declaration by denying them an opportunity to challenge the circumstances of their convictions under the Constitution of The Bahamas in an impartial and public hearing. The Commission also concludes that the State has failed to provide Messrs. Edwards, Hall, Schroeter and Bowleg with a simple and brief procedure whereby the courts in The Bahamas would protect them from acts of authority that, to their prejudice, violate their fundamental constitutional rights under the Constitution of The Bahamas and under the American Declaration, and has therefore violated the rights of Messrs. Edwards, Hall, Schroeter and Bowleg to judicial protection under Articles XVIII, and XXVI of the Declaration.

e. Article XXVI - Right to an Impartial Trial

208. The Petitioners claim that Mr. Edwards did not have an impartial trial because he was denied the benefit of effective counsel at trial and that the State failed to disclose documents relating to the conduct of Mr. Edward's identification parade. In their Response to the State's Reply to Mr. Edwards' petition, the Petitioners stated that they were withdrawing the allegation of incompetence of counsel. In addition, the Petitioners stated that they were not in a position to develop Mr. Edwards' petition concerning the failure of the State to disclose documents pertaining to Mr. Edwards' identification parade.

209. In the State's Reply to the Petitioners allegations concerning ineffective assistance of counsel and the failure to disclose documents regarding Mr. Edwards' identification parade, the State denied that it violated the Declaration and refuted the Petitioners allegation concerning ineffective and incompetent counsel at trial. The State responded to the Petitioners allegations in the following manner:

It should be pointed out that the allegation that the applicant was 'denied effective and competent counsel' can in no way be supported either by reference to the record of the proceedings before the Learned Trial Judge of by Personal reference to the defense counsel in question. Mr. Malcolm Adderley, the attorney of record is a very senior lawyer who has served in the past as Justice of the Supreme Court of the Commonwealth of The Bahamas (in an acting capacity). He presently serves as judicial member of the Industrial Tribunal.

That there was no established procedure in place at the time of this investigation in the Royal Bahamas Police Force to fill out documents prior to holding an identification parade. That practice has now been in place for the past five years. Therefore at the time of trial there were no formal documents to disclose to counsel for the defense relative to the conduct of the identification Parade.

210. Because the Petitioners have withdrawn both of their allegations concerning Mr. Edwards' claims that he had ineffective and incompetent counsel at trial, and that the State failed to disclose documents relating to Mr. Edwards' identification parade, and bearing in mind the State's rebuttal of these allegations, the Commission finds no violation in this regard under Article XXVI of the Declaration.

211. In respect of Mr. Hall, the Petitioners claim that Mr. Hall did not receive a fair trial pursuant to Article XXVI of the Declaration because he suffered prejudice due to biased reporting in the daily newspapers and television at the time of his trial. The Petitioners contend that such coverage meant that Mr. Hall was incapable of receiving a fair trial. The State has not replied to Mr. Hall's allegations despite the Commission's communications to it dated December 10, 1998, and October 19, 1999, concerning the same. The Commission is of the opinion that the Petitioners have not presented the necessary evidence to support their claim concerning the alleged violation of Mr. Hall's right to an impartial trial pursuant to Article XXVI of the Declaration, therefore the Commission finds no violation of this Article.

212. With regard to Messrs. Schroeter's and Bowleg's claims, the Petitioners contend namely, that the condemned men did not have a fair trial because of the confessions obtained from them by the police were coerced and obtained through police violence and oppression; procedural irregularities occurred during the trial; the trial judge's summing-up to the jury was not impartial, and was prejudicial to the condemned men, because the trial judge indicated to the jury that he disbelieved the condemned men as to what transpired when they were detained by police officers; and that the trial judge should not have informed the jury that he ruled on voir dire that their confessions were obtained by the police during the condemned men's detention and were admissible, which affected their credibility.

213. In addition, the Petitioners contend that Messrs. Schroeter and Bowleg complained of their inhumane treatment by police officers in the Magistrates Court on July 19, 1996, which resulted in the Magistrate, Cheryl Albury, directing that that they be taken to hospital. The Petitioners maintain that at the Accident and Emergency Department of the Princess Margaret Hospital both victims received treatment for injuries sustained whilst in police custody. The Petitioners allege that at trial, the Casualty sheets containing the treating doctors notes in respect of the victims had been "inadvertently misplaced" and what remained were summarized notes in the Hospital's Accident and Emergency Ledger.

214. The Petitioners claim that at trial the medical evidence was not given by the treating doctor because he was "unavailable" but by a colleague based on a summarized note. The Petitioners indicate that the police witnesses at trial could not explain how the injuries were sustained, because they had not seen the condemned men injure themselves or suffer any accident. The Petitioners argue that the nature of the medical evidence and the failure of the Crown to explain the injuries raised at least the possibility that the confessions were obtained by oppression. The Petitioners contend that in such circumstances the oral and written confessions attributed to the condemned men should have been excluded from evidence. In support of their argument the Petitioners cite the following statement from the judge's summing-up to the jury:

Just to give my ruling in the matter, and my decision has been arrived at after considering all the evidence adduced, the arguments raised, including the comments regarding alleged omissions and the detention forms and the absence of medical reports. And my conclusion is that I would allow the evidence to go forward.[FN7]

[FN7] Trial transcript p 872.

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215. After carefully reviewing Messrs. Schroeter's and Bowleg's allegations and the information in the records before it, the Commission is of the view that the submissions in the above cases in respect of the manner in which the condemned men's trials were conducted are matters which are more appropriately left to the domestic courts of States Parties to the American Declaration. The Commission considers that it is generally for the courts of States Parties to the Declaration to review the factual evidence in a given case and give directions as to the applicable domestic law. Similarly, it is for the appellate courts of States Parties, and not the Commission, to review the manner in which a trial was conducted, unless it is clear that the

judge's conduct was arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality. In the present cases, the petitioners have failed to demonstrate that the manner in which their criminal proceedings were conducted warrants interference by this Commission.

f. Article XXV of the Declaration, Right To Be Tried Without Undue Delay

216. Messrs. Schroeter and Bowleg claim that their rights to be tried without undue delay and the length of time spent in detention, were violated by the State pursuant to Article XXV of the Declaration. The Petitioners claim that the deceased was killed on June 17, 1994, and Messrs. Schroeter and Bowleg were arrested and committed to stand trial on the same date. The Petitioners maintain that the victims' trial commenced on August 12, 1996, approximately 26 months after they were arrested. The Petitioners claim that Messrs. Schroeter and Bowleg rights to protection from arbitrary arrest, and due process guarantees pursuant to Article XXV of the Declaration were violated, because they were not brought to trial promptly and within a reasonable time.

217. The State has not responded to the merits of the condemned men's petition including, their claims relating to a violation of Article XXV of the Declaration.

218. In addressing the issue of a "reasonable time" under Articles 7(5) and 8(1) of the Convention, the Inter-American Court has confirmed that the purpose of the reasonable time requirement is to prevent accused persons from remaining in that situation for a protracted period and to ensure that a charge is promptly disposed of.[FN8] The Inter-American Court has also considered that the point from which a reasonable time is to be calculated is the first act of the criminal proceedings, such as the arrest of the defendant, and that the proceeding is at an end when a final and firm judgment is delivered and the jurisdiction thereby ceases. According to the Inter-American Court, the calculation of a reasonable time must, particularly in criminal matters, encompass the entire proceeding, including any appeals that may be filed.[FN9]

[FN8] I/A Court H.R., Suarez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, p. 283, para. 70.
[FN9] Id., para. 71.

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219. In determining the reasonableness of the time in which a proceeding must take place, the Inter-American Court has shared the view of the European Court of Human Rights that three points must be taken into account: (a) the complexity of the case; (b) the procedural activity of the Interested party; and (c) the conduct of the judicial authorities.[FN10] This Commission has likewise suggested that the reasonableness of a pre-trial delay should not be viewed exclusively from a theoretical point of view, but must be evaluated on a case by case basis.[FN11]

[FN10] Id., para. 72. See also I/A Court H.R., Genie Lacayo Case, Judgment of January 29, 1997, Annual Report 1997, para. 77. See also Report 2/97, Cases Nos. 11.205, 11.236, et al.

(Argentina) March 11, 1997, Annual Report 1997 at 241, 245-6. This reasoning was set forth in the leading European Court case on this issue, the Stogmuller v. Austria judgment of 10 November 1969, Series A Nº 9, p. 40.
[FN11] See Report 2/97, Cases Nos. 11.205, 11.236, et al. (Argentina), supra.
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220. In addition to its case by case analysis of the reasonableness of the pre-trial delay, the Inter-American Commission has established that the burden of proof is on the State to present evidence justifying any prolongation of a delay in trying a defendant. In assessing what is a reasonable time period, the Commission, in cases of prima facie unacceptable duration, has placed the burden of proof on the state to adduce specific reasons for the delay. In such cases, the Commission will subject these reasons to the Commission's "closest scrutiny."[FN12]

[FN12] Report Nº 12/96, Case Nº 11.245 (Argentina), March 1, 1996, Annual Report 1995, at 33, See similarly U.N.H.R.C., Desmond Williams v. Jamaica, Communication Nº 561/1993, U.N. Doc. CCPR/C/59/D/561/1993 (1997) (holding that by "rejecting the author's allegation in general terms, the State party has failed to discharge the burden of proof that the delays between arrest and trial in the instant case was compatible with article 14, paragraph 3(c); it would have been incumbent upon the State party to demonstrate that the particular circumstances of the case justified prolonged pre-trial detention.").
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221. In the condemned men's cases, they have been subjected to a pre-trial delay of more than 2 years. In light of the past jurisprudence of this Commission,[FN13] and other international authorities, the Commission is of the view that the delays in these cases are prima facie unreasonable and call for justification by the State.[FN14]

[FN13] Id. See Report No 41/00, Case Nº 12.023, Desmond McKenzie, Case Nº 12.044, Andrew Downer and Alphonso Tracey, Case Nº 12.027, Carl Baker, Case12.126, Dwight Fletcher. Inter-American Commission's Report at 918.
[FN14] See e.g. Suarez Romero Case, supra , p. 300, para. 73 (finding that a period of delay 4 years and 2 months between the victim's arrest and disposition of his final appeal to "far exceed" the reasonable time contemplated in the Convention and therefore to violate Articles 7(5) and 8(1) of the Convention.); I/A Comm. H.R., Report on Panama, Annual Report 1991, at p. 485 (finding an average pre-trial delay of 2 years and 4 months to be unreasonable contrary to Article 7(5) of the Convention); Desmond Williams v. Jamaica, supra, para. 9.4 (finding a delay of two years between arrest and trial to be prolonged and unreasonable); U.N.H.R.C., Patrick Taylor v. Jamaica, Communication Nº 707/1996, U.N. Doc. CCPR/C/60/D/707/1996 (1997) (finding a delay of 28 months between arrest and trial to be a violation of the petitioner's right to be tried without undue delay).
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222. In addition, the State has failed to respond to the issue of "delay" and has failed to provide any proper justification for the delay in bringing the condemned men to trial. There is also no indication that the case involved a complicated investigation or complex evidence.

223. After considering the information before the Commission in this case, in light of the factors laid out by the Inter-American Court in analyzing whether there has been a breach of the right to a trial within a reasonable time, the Commission concludes that the delay in trying Messrs. Schroeter and Bowleg was unreasonable contrary to Article XXV of the Declaration. According to the information before the Commission, the condemned men's prosecution does not appear to have been particularly complex, and there is also no indication that the prosecution's case consisted of complex evidence that might assist in explaining such a delay. The State has failed to provide the Commission with any information suggesting that the case was sufficiently complex. Similarly, there is no information before the Commission concerning the procedural activity relating to Mr. Bowleg or Mr. Schroeter or the conduct of the judicial authorities that explains or justifies a delay of 26 months between the condemned men's arrests and their trial.

224. Consequently, the Commission concludes that the State failed to try the condemned men without undue delay and within a reasonable time contrary to Article XXV of the American Declaration. Therefore, the Commission finds that the State has violated the rights of Messrs. Schroeter and Bowleg to be tried without undue delay and within a reasonable time pursuant to Article XXV of the Declaration.

225. Given its conclusions that the mandatory death sentences imposed upon the condemned men contravene Articles I, XVII, XXV, and XXVI of the Declaration and are therefore unlawful, the Commission does not consider it necessary to determine whether the length of the delays in trying the condemned men or their prolonged period of post-conviction detention, as outlined above, constitute cruel, unusual or degrading punishment or treatment contrary to Article XXVI of the Declaration and therefore may also render the condemned men's executions unlawful.

V. FINAL CONCLUSIONS

The Commission, on the basis of the information presented, and the due analysis under the American Declaration, reiterates its conclusions as follows:

226. The State is responsible for violating Articles I, XVIII, XXV, and XXVI of the American Declaration by sentencing Messrs. Edwards, Hall, Schroeter and Bowleg, to a mandatory death penalty.

227. The State is responsible for violating Messrs. Edwards', Hall's, Schroeter's and Bowleg's rights under Article XXIV of the American Declaration, by failing to provide the condemned men with an effective right to petition for amnesty, pardon or commutation of sentence.

228. The State is responsible for violating Messrs. Hall's, Schroeter's and Bowleg's rights under Articles XI, XXV, and XXVI of the American Declaration, because of the inhumane conditions of detention to which the condemned men were subjected.

229. The State is responsible for violating Messrs. Edwards', Hall's, Schroeter and Bowleg's rights under Articles XVIII, and XXVI of the American Declaration, by failing to make legal aid available to the condemned men to pursue Constitutional Motions.

230. The State is responsible for violating Messrs. Schroeter's and Bowleg's rights to be tried without undue delay under Article XXV of the Declaration.

231. The Commission finds no violation of Articles XXV and XXVI of the Declaration relating to Mr. Edwards' inhumane conditions of detention, incompetent and ineffective benefit of counsel, and the State's failure to disclose documents relating to Mr. Edwards' identification parade, and finds no violation of Articles XXV and XXVI of the Declaration.

232. The Commission does not find that the State is in violation of Mr. Hall's right to an impartial trial because of unfair media reporting and publicity.

233. With respect to Messrs. Schroeter's and Bowleg's claims that they did not have an impartial trial because of the conduct of their trial in particular the trial judge's summing-up to the jury concerning their involuntary confessions, the Commission finds no violation of Article XXVI of the Declaration.

VI. RECOMMENDATIONS

Based on the analysis and the conclusions in this Report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE COMMONWEALTH OF THE BAHAMAS:

234. Grant Messrs. Edwads, Hall, Schroeter and Bowleg, an effective remedy which includes commutation of sentence and compensation;

235. Adopt such legislative or other measures as may be necessary to ensure that the death penalty is imposed in compliance with the rights and freedoms guaranteed under the American Declaration, including and in particular Articles I, XXV, and XXVI, and to ensure that no person is sentenced to death pursuant to a mandatory sentencing law.

236. Adopt such legislative or other measures as may be necessary to ensure that the right under Article XXIV of the American Declaration to petition for amnesty, pardon or commutation of sentence is given effect in The Bahamas.

237. Adopt such legislative or other measures as may be necessary to ensure that the right to an impartial hearing under Article XXVI of the American Declaration and the right to judicial protection under Article XVIII of American Convention are given effect in The Bahamas in relation to recourse to Constitutional Motions.

238. Adopt such legislative or other measures as may be necessary to ensure that the right under Article XXV of the American Declaration to be tried without undue delay is given effect in The Bahamas.

239. Adopt such legislative or other measures as may be necessary to ensure that the rights under Articles XXV and XXVI of the American Declaration to humane treatment and the right not to receive cruel, infamous, or unusual punishment are given effect in The Bahamas.

VII. PUBLICATION

240. On January 4, 2001, in conformity with Article 53(1) and 53 (2) of the Commission's Regulations, the Commission sent Report No. 118/00 which was adopted in this case on December 8, 2000 to the State of The Bahamas, and granted the State a period of two months for it to adopt the necessary measures to comply with the foregoing recommendations and to resolve the situation under analysis.

241. On January 29, 2001, the State acknowledged receipt of the Commission's communication and Report No. 118/00, and stated that "the Report had been sent to the relevant authorities for the necessary action, and that a response would be forwarded as soon as the review is completed."

242. The period of two months has elapsed and the Commission has not received a response from the State of The Bahamas in respect of its Recommendations in this case.

243. For these reasons, the Commission decides that the State has not taken all of the appropriate measures to comply with the recommendations set forth in this report.

244. Based on the foregoing and pursuant to Articles 53(3) and 53 (4), and 48 of the Commission's Regulations, the Commission decides to reiterate the conclusions and recommendations contained in Report No. 118/00. The Commission further decides to make public this report and include it in the Commission's Annual Report to the General Assembly of the OAS. The Commission, pursuant to its mandate shall continue evaluating the measures taken by the State of The Bahamas with respect to the recommendations at issue, until they have been fully implemented.

Done and signed in Santiago, Chile, on the 4th day of the month of April, 2001 (Signed): Chairman, Claudio Grossman; Juan Mendez, First Vice-Chairman; Marta Altolaguirre, Second Vice-Chairman; Commissioners: Robert K. Goldman, Peter Laurie, Julio Prado Vallejo, Hélio Bicudo.

CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO

In the 108th period of sessions I expressed my opinion that the death penalty has been abolished in the Inter-American System of Human Rights. In Case 12.028 (Grenada), concerning the mandatory death sentence imposed on Mr. Donnason Knights, I presented my argument in favor of this understanding. In the present case, although I am in general agreement as to the findings,

reasoning and motives of the report, I would like to insist on my position that the death penalty has already been abolished by the evolution of the normative standards of the Inter-American system. For this reason I present the following separate opinion:

1. The American Declaration of the Rights and Duties of Man (hereinafter American Declaration), approved at the Ninth International American Conference, which took place in Santa Fe, Bogota in May and June of 1948, affirms that "Every human being has the right to life, liberty and the security of his person" (Article 1) and, moreover, that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor" (Article 2).

2. Article 4 of The American Convention on Human Rights (hereinafter American Convention), approved on November 22, 1969 in San Jose, Costa Rica, states that "Every person has the right to have his life respected. The right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

3. At the same time, the American Convention, by including the right to personal integrity in the civil and political rights framework, affirms that "No one shall be subjected to torture or to cruel, inhumane, or degrading punishment or treatment."

4. However, the death penalty is provided for in the American Convention in its original version. Article 4, Section 2 allows the death penalty to be applied by Member States only for the most serious crimes.

5. There is a contradiction among the aforementioned articles which repudiate torture, cruel, inhumane or degrading punishment or treatment.

6. The American Declaration considers life to be a fundamental right, and the American Convention condemns torture or the imposition of cruel, inhumane or degrading punishment or treatment. The elimination of a life could be deemed torture or cruel, inhumane or degrading punishment or treatment.

7. It seems that the tolerance expressed in Article 4, Section 2 of the American Convention reveals the sole adoption of a political position of conciliation between all Member-States in order to approve a more general article, the one about the right to life.

8. Before analyzing what it means for some States to retain the death penalty as a part of their legal systems, it is important to note that the Inter-American Convention to Prevent and Punish Torture, signed in Cartagena de Indias, Colombia, on December 9th, 1985, describes the meaning of torture as follows: "Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose" (Article 2).

9. Notice that this article addresses torture as a personal punishment or penalty in all circumstances.

10. The death penalty brings immeasurable suffering to the individual. Is it possible to imagine the anguish that the individual feels when he/she is informed of the verdict? Or the moments leading up to the actual execution? Would it be possible to evaluate the suffering of those who wait on death row for execution, in some cases for several years? In the United States, fifteen, sixteen or seventeen year-old minors, who committed homicide and subsequently received the death penalty, wait for fifteen years or longer for their execution. Is it possible to imagine a fate worse than remaining between hope and despair until the day of execution?

11. The OAS Member-States, by adopting the Convention on Forced Disappearance of Persons, reaffirms that "the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in the Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights."

12. It is important to mention that in 1998 and 1999, the United States was the only country in the world known for executing minors under 18 years of age. To that extent, it is important to note that the United States has accepted the International Covenant on Civil and Political Rights since September 1992 Article 6(5) of which establishes that the death penalty cannot be imposed on minors under 18 years old or on pregnant women. The U.S. Senate opted to express its reservation to this section at the moment of its ratification but currently, there is an international consensus opposed to that reservation based on Article 19 (c) of the Vienna Convention on the Law of Treaties. This Convention gives the State the possibility to formulate reservations, but these reservations cannot be incompatible with the object and purpose of the treaty.

13. In June 2000, Shaka Sankofa, formerly known as Gary Graham, was convicted in the State of Texas for a crime he committed when he was 17 years old. He was executed after waiting 19 years on death row, although the Inter-American Commission on Human Rights (hereinafter "IACHR" or "Commission") had formally presented requests to the American government to suspend the act until the case was decided by the Commission. There were serious doubts regarding whether Shaka Sankofa had really committed the crime. The U.S. Government did not respond to the Commission's recommendation but could not escape from the jurisdiction of the IACHR on the protection of human rights, according to the American Declaration. The Commission thus sent out a press release condemning the U.S. decision, since it was not in accordance with the Inter-American System for the Protection of Human Rights.[FN15]

[FN15] Press Release No. 9/00, Washington, D.C. June 28, 2000: "The Inter-American Commission on Human Rights deplores the execution of Shaka Sankofa, formerly known as Gary Graham, in the state of Texas on June 22, 2000. Mr. Sankofa was executed, despite formal requests by the Commission for the United States to ensure a suspension of Mr. Sankofa's execution pending the determination of a complaint lodged on his behalf before the Commission".
In 1993, the Commission received a complaint on behalf of Mr. Sankofa, alleging that the United States, as a Member State of the Organization of American States, had violated Mr. Sankofa's human rights under the American Declaration of the Rights and Duties of Man, including his

right to life under Article I of that instrument. In particular, it was contended that Mr. Sankofa was sentenced to death for a crime that he was alleged to have committed when he was 17 years of age, that he was innocent of that crime, and that he had been subjected to legal proceedings that did not comply with international due process standards.

On August 11, 1993, the Commission opened Case No. 11.193 in respect of Mr. Sankofa's complaint. Following a hearing on the matter on October 4, 1993, the Commission transmitted to the United States on October 27, 1993 a formal request for precautionary measures under Article 29(2) of the Commission's Regulations, asking that the United States ensure that Mr. Sankofa's death sentence was not carried out, in light of his pending case before the Commission. At that time, Mr. Sankofa's execution, which had previously been scheduled for August 17, 1993, was postponed pending the completion of domestic judicial procedures.

In February 2000, the Commission was informed that Mr. Sankofa's domestic proceedings were nearly completed, and that the issuance of a new warrant of execution was imminent. Accordingly, in a February 4, 2000 letter to the United States, the Commission reiterated its October 1993 request for precautionary measures. Subsequently, in May 2000, the Commission received information that Mr. Sankofa's petition before the U.S. Supreme Court had been dismissed and that his execution was scheduled for June 22, 2000. Accordingly, on June 15, 2000, during its 107th Period of Sessions, the Commission adopted Report No. 51/00, in which it found Mr. Sankofa's petition to be admissible and decided that it would proceed to examine the merits of his case. Also in this report, the Commission again reiterated its request that the United States suspend Mr. Sankofa's death sentence pending the Commission's final determination of his case.

By communication dated June 21, 2000, the United States acknowledged the receipt of the Commission's February 4, 2000 communication and indicated that it had forwarded the same to the Governor and Attorney General of Texas. On June 22, 2000, however, the Commission received information that the Texas Board of Pardons and Paroles declined to recommend that Mr. Sankofa be granted a reprieve, commutation or pardon, and that his execution was to proceed on the evening of June 22, 2000. Consequently, by communication of the same date, the Commission requested that the United States provide an urgent response to its previous request for precautionary measures. Regrettably, the United States did not respond to the Commission's June 22, 2000 request, and Mr. Sankofa's execution proceeded as scheduled.

The Commission is gravely concerned that, despite the fact that Mr. Sankofa's case had been admitted for consideration by a competent international human rights body, the United States failed to respect the Commission's requests to preserve Mr. Sankofa's life so that his case could be properly and effectively reviewed in the context of the United States' international human rights obligations. In light of the irreparable damage caused by such circumstances, the Commission calls upon the United States and other OAS Member States to comply with the Commission's requests for precautionary measures, particularly in those cases involving the most fundamental right to life."

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14. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Convention of Belém do Pará), approved in Belém do Pará, Brazil, on June 9, 1994, does not allow the imposition of the death penalty on women. Article 3 states " Every woman has the right to be free from violence in both the public and private spheres" and Article 4 states that "Every woman has the right to have her life respected".

Regarding the duties of States, the Convention of Belém do Pará establishes that States should "refrain from engaging in any act or practice of violence against women and ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation". Therefore, if every woman has the right to life, and the right to be free from violence, and the State is denied the practice of violence against women, it seems that the Convention of Belém do Pará prohibits the application of the death penalty to women. There is no discrimination against men or children. It cannot be argued that it is "positive discrimination" or "affirmative action", because it only serves to preserve the inherent rights of the individual. For instance, pregnant women or women with children are entitled to rights based solely on the fact of their exclusive female condition. Thus, the same rights cannot be extended to men. Positive discrimination is usually applied to bring about equality, through temporary and proportional measures, to groups of people that experience de facto inequality. There is no inequality between men and women with regard to the right to life. In any case, the imposition of the death penalty is not a proportional measure, as we will see later on. When it comes to common rights – such as the right to life - we cannot argue positive discrimination. All persons are equal before the law. The prohibition of the death penalty for women was based on both the female condition and the human condition.

15. Article 24 of the American Convention affirms that all persons are equal before the law, and consequently, they are entitled, without discrimination, to equal protection of the law. Although that Convention does not define discrimination, the IACHR understands that discrimination includes distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life (Manual on the Preparation of Reports on Human Rights, International Covenant on Civil and Political Rights, Article 26.)

16. It is also important to note that Article 37(a) of the Convention on the Rights of the Child prohibits the imposition of the death penalty on minors under 18 years of age.

17. The above-mentioned Convention is considered a universal legal instrument in the area of human rights. (Only the United States and Somalia have failed to ratify it.)

18. Article 37 of the Convention on the Rights of Child states: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

19. Although the U.S. has not ratified the Convention on the Rights of the Child, it became a signatory to the Convention in February 1995, and has thus accepted its legal obligations. Article 18 of the Vienna Convention on the Law of Treaties establishes that the States that have signed a treaty, but not ratified it, shall refrain from engaging in any act that is contrary to its purpose until it has decided to announce its intention of not becoming part of that treaty. Despite the fact that the U.S. has not ratified the Convention, the U.S. State Department has already recognized that the Vienna Convention on the Law of Treaties serves as a precedent for international treaty proceedings. The U.S. State Department considers the Convention a

declaration of customary law based on the Vienna Convention on the Law of Treaties, which establishes the importance of treaties as sources of international law as well as a method of peaceful development and cooperation between nations, no matter what their Constitutions and social systems entail.

20. As mentioned above, the imposition of the death penalty against women, is not a case in which positive discrimination could be applied because Article 37 (a) of the Convention on the Rights of the Child aims to preserve rights that are created not only for children but for all human beings.

21. If that is the case, then Article 4 of the American Convention has lost its previous meaning. Therefore States that have signed and ratified it as well as other international instruments cannot impose the death penalty upon any person, regardless of gender or any other personal condition.

22. The issue will be examined under legal hermeneutics of positive law. International law presupposes [normative] dispositions that are above [the] State [law]. As set forth by the illustrious Italian jurist, Norberto Bobbio, universalism – which international law attempts to embody – reappears today, specially after the end of WWII and the creation of the UN, no longer as a belief in an eternal natural law [order], but as the will to constitute, in the end, a single body of positive law of the social and historical development (as natural law and the state of nature). He also ponders that the idea of the single global State is the final limit of the idea of the contemporary juridical universalism, that is the establishment of a universal positive law (Cf. Teoria do Ordenamento Jurídico, Universidade de Brasília, 1991, p. 164).

23. In the present case, we cannot allow a previous law with the same content of a new law to supersede the new law. That would be considered as antinomy, and therefore it has to be solved. What are the rules that should prevail? There is no doubt that they are incompatible. But how could we solve the problem?

24. According to Mr. Bobbio, the criteria to solve an antinomy are the following: a) chronological criteria, b) hierarchical criteria, c) specialty criteria.[FN16]

[FN16] Op.cit 2, p.92

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25. According to the chronological criteria the new law prevails over the previous law – lex posteriori derogat priori. According to the hierarchy criteria, international law prevails over national law. Lastly, the specialty criteria could also apply in this case, since it is a specific law with a specific purpose.

26. It is impossible to argue that death penalty as described in the Section 2 of Article 4 of the American Convention is a specific law as opposed to general law of the right to life. It is also not possible to accept the idea that death penalty is considered a particular penalty that does not entail a violation of right to life or torture or any other cruel or inhumane treatment.

27. The Inter-American Court of Human Rights affirms that the imposition of restrictions on the death penalty should be effected by setting up a limit through an irreversible and gradual process, which would be applied both in countries that have not abolished the death penalty and in those that have done so. (Advisory Opinion – OC-3/83)

28. The Court also understands that the American Convention is progressive to the extent that, without deciding to abolish the death penalty, it adopts certain measures to limit it and diminish its application until it is no longer applicable.

29. It is worth reviewing the preparatory work of the American Convention that illustrates the interpretation of Article 4. The proposal to outlaw the death penalty made by several delegations did not receive any opposing vote, despite the fact that the majority of votes had not been reached. The development of negotiations in the Conference can be reviewed in the following declaration presented before the Plenary Session of Completion and signed by 14 of 19 participants (Argentina, Costa Rica, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela):

"The delegations that sign below, participants of the Specialized Inter-American Conference on Human Rights, taking into consideration the highly prevailing feeling, expressed in the course of the debates on the abolishment of the death penalty, in accordance with the purest humanistic traditions of our peoples, solemnly declare our firm aspiration of seeing the application of the death penalty in the American context eradicated as of now, and our indeclinable purpose of effecting all possible efforts so that, in the short term, an additional protocol to the American Convention on Human Rights "Pact of San Jose, Costa Rica" might be adopted, consecrating the definitive abolition of the death penalty, and putting America once more in the forefront of the protection of fundamental human rights." (author's translation from the original in spanish, Acts and documents, OAS-serv. K-XVI-I2, Washington – DC, 1973, hereafter Acts and Documents, repr. 1978, spanish version, p. 161, 195, 296 and 449/441).

30. In agreement with these assertions, the Commission's Rapporteur made clear, in this article, his firm tendency towards the abolition of this penalty. (Acts and documents, supra, n.296)

31. Moreover, the rule of law (Estado de derecho) implies, when punishment is imposed, the knowledge of what the penalty actually means. When the purpose of the punishment applied is not only retribution, but the recuperation or rehabilitation of the convict, he or she knows what will happen in his or her future. If the punishment is purely retributive, as in a sentence imposing imprisonment for life, the convict still envisages his future. But if the convict is sentenced to death, the State does not point to what the elimination of his being will bring him. Science, with all its developments, has not managed, up to now, to unveil the after-death: future life, with prize or punishment? Pure and simple elimination?

32. In this sense, the rule of law forbids the imposition of a penalty whose consequences cannot be unveiled.

33. In truth, all punishment enacted by the legislator constitutes species of sanctions, distributed according to a rational scale that attempts to take into consideration a series of factors specific to each hypothesis of unlawfulness.

34. The right and obligation to punish which belongs to the State expresses itself in a variety of figures and measures, according to gradual solutions, measurable in money or in amounts of time. This gradual order is essential to criminal justice, for it would not be realized without a superior criterion of equality and proportionality in the distribution of punishment, for transgressors would then receive more than their just deserts.

35. With the imposition of the death penalty, however, the aforementioned serial harmony is abruptly and violently shattered; one jumps from the temporal sphere into the non-time of death.

36. With what objective criterion or with what rational measure (for ratio means reason and measure) does one shift from a penalty of 30 years imprisonment or a life sentence to a death penalty? Where and how is proportion maintained? What is the scale that ensures proportionality?

37. It could be argued that there is also a qualitative difference between a fine and detention, but the calculus of the former can be reduced to chronological criteria, being determined, for instance, in terms of work days lost, so that it has a meaning of punishment and suffering to the perpetrator, linked to his patrimonial situation. In any circumstance, these are rational criteria of convenience, susceptible to contrast with experience, that govern the passage from one type of punishment to the other, whereas the notion of “proportion” is submerged in face of death.

38. Summing up, the option for the death penalty is of such order that, as Simmel affirmed, it emphasizes all contents of the human life, and it could be said that it is inseparable from a halo of enigma and mystery, of shadows that cannot be dissipated by the light of reason: to attempt to fit it into the scheme of penal solutions is equal to depriving it from its essential meaning to reduce it to the violent physical degradation of a body (quoted by Miguel Reale, in O Direito como experiencia).

39.Hence, the conclusion of the eminent philosopher and jurist Miguel Reale: Analyzed according to its semantic values, the concept of punishment and the concept of death are logically and ontologically impossible to reconcile and that, therefore the “death penalty” is a “contradictio in terminis” (cf. O Direito como Experiencia, 2nd edition, Saraiva, Sao Paulo, Brasil)

40. The jurist Hector Faundez Ledesma writes on this topic: “ as the rights consecrated in the Convention are minimum rights, it cannot restrict their exercise in a larger measure than the one permitted by other international instruments. Therefore, any other international obligation assumed by the State in other international instruments on human rights is of utmost importance, and its coexistence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual.”

41. “The same understanding”, continues the jurist, “is extensive to any other conventional provision that protects the individual in a more favorable way, be it contained in a bilateral or multilateral treaty, and independently of its main purpose” (El Sistema Interamericano de Proetccion de los Derechos Humanos, 1996, pp. 92-93).

42. Moreover, Article 29(b) of the American Convention establishes, in the same line of thought, that no disposition of the Convention may be interpreted in the sense of “restricting the enjoyment or exercise of any right or freedom recognized by the virtue of the laws of any State Party”. In this sense, it is opportune to refer to the IACHR report on Suriname, and the Advisory Opinions 8 and 9 (of the Inter-American Court on Human Rights, 1987)

43. On this opportunity, the IACHR affirmed that the prohibition of imposing the death penalty in cases where the offender was a minor at the time of the crime was an emerging principle of international law. Twelve years later there is no doubt that this principle is totally consolidated. The ratification of the Convention on the Rights of the child by 192 States, where the death penalty of minor offenders is prohibited, is a irrefutable proof of the consolidation of the principle (Cf. Report presented by Amnesty international to the IACHR, in Washington, on March 5th, 1999).

44. It is true that the Universal Declaration on Human Rights does not refer specifically to the prohibition of the death penalty, but consecrates in its Article 3 the right of every person to his life, liberty and security (the same provision can be found on Article I of the American Declaration of the Rights and Duties of Man). Adopted by the General Assembly of the United Nations in 1948, under the guise of a recommendatory resolution, the Universal Declaration is held – by many important scholars – to be a part of the body of international customary law and a binding norm (jus cogens) – as defined in Article 53 of the Vienna Convention on the Law of Treaties. Mutatis Mutandi, it would be lawful to affirm that the Convention on the Rights of the Child, by reason of its breadth and binding character, must also be observed by the only two States that have not ratified it, as has already been said, and has been recognized by the Department of State of the United States of America.

45. It is convenient to observe, furthermore, that the European Court of Human Rights, in its decision in the Soering Case – Jens Soering, born in Germany, in detention in England and submitted to an extradition procedure on behalf of the government of the United States pending charges of murder committed in Virginia, a State that punishes this crime with the death penalty – made opportune comments regarding Article 3 of the European Convention, which establishes the interdiction of torture, inhuman cruel or degrading treatment or punishment. The Court considered that the request could not be granted unless the person subject to extradition would be guaranteed his or her rights under Article 3 of the Convention (cf. Jurisprudence de la Cour europeenne des droits de l’homme, 6th ed. 1998, Sirey, Paris, pp. 18 and ff.).

46. The Court concluded that the extradition to a country that applied the death penalty did not constitute a breach of the right to life or to the right to personal integrity since the death penalty is not, in itself, explicitly prohibited by the European Convention. Nonetheless, the possibility that the condemned could spend years waiting for the moment – totally unpredictable, by the way – of the execution of the punishment, the so called “death row syndrome”, was

considered by the Court as constituting a cruel treatment and, therefore, a breach of the right to personal integrity.

47. It is, doubtlessly, an ambiguity: if there is a delay in imposing the penalty, there is violation of the right; if the sentence is carried out immediately, the State's action will not be considered a breach of the fundamental right to life.

48. This decision gives rise to the conclusion that little by little, the traditional vision, the positivistic application of the law, is being abandoned. Instead of a literal interpretation of the texts in discussion, a teleological hermeneutics is searched, in this case, of the European Convention, to achieve the major conclusion that the death penalty should not be permitted in any hypothesis.

49. Therefore, the absolute prohibition, in the European Convention, of the practice of torture or of inhuman or degrading treatment or punishment shows that article 3, referred to above, proclaims one of the fundamental values of democratic societies. The judgment underlines that provisions in the same sense can be found in the International Covenant on Civil and Political Rights of 1966, and in the American Convention on Human Rights of 1969, protecting, in all its extension and depth, the right of the human person. The Court concludes that it is an internationally approved norm.

50. It is true that the concept of inhuman or degrading treatment or punishment depends upon a whole set of circumstances. It is not for any other reason that one should have utmost care to ensure the fair balance between the requirements of the communities' general interest and the higher imperatives of the protection of the fundamental rights of the individual, that take form in the principles inherent to the European Convention taken as a whole.

51. Amnesty International has affirmed that the evolution of the norms in Western Europe concerning the death penalty leads to the conclusion that it is an inhuman punishment, within the meaning of Article 3 of the European Convention. It is in this sense that the judgment of the court in the Soering case should be understood.

52. For its part, the Inter-American Court on Human rights has already affirmed that "The right to life and the guarantee and respect thereof by States cannot be conceived in a restrictive manner. That right does not merely imply that no person may be arbitrarily deprived of his or her life (negative obligation). It also demands of the States that they take all appropriate measures to protect and preserve it (positive obligation)." (Cf. Repertorio de Jurisprudencia del Sistema Interamericano de Derechos humanos, 1998, Washington College of Law, American University, 1/102)

53. It was for the same reason that the European Court, in the aforementioned Soering decision, considered that "Certainly, 'the Convention is a living instrument which ... must be interpreted in the light of present-day conditions'; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field" (par. 102).

54. In fact, to determine whether the death penalty, because of current modifications of both domestic and international law, constitutes a treatment prohibited by Article 3, it is necessary to take into consideration the principles that govern the interpretation of that Convention. In this case, both in the European Convention and in the American Convention, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” (Article 3 of the European Convention); “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” (Article 5(2) of the American Convention on Human Rights).

55. In the same line of thought, in the case between Ireland and the United Kingdom, the European Court had already decided that “The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (…) Article 3 (art. 3) makes no provision for exceptions (…)the only relevant concepts are "torture" and "inhuman or degrading treatment", to the exclusion of "inhuman or degrading punishment".(par. 163-164)

56. More recently, in its Advisory Opinion OC-16, of October 1st, 1999, requested by Mexico, the Inter-American Court on Human Rights considered it opportune to state that, as regards the right to information about consular assistance, as part of the due process guarantees, that “in a previous examination of Article 4 of the American Convention, the Court observed that the application and imposition of capital punishment are governed by the principle that " no one shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it.” (par. 134)

57. It is reasonable to ask what is still lacking for the universal elimination of the death penalty? Simply the total recognition of the rights emanated from the treaties.

58. In support of this idea, we find the concurring vote, in the above-mentioned Advisory Opinion requested by Mexico, of Judge Cancado Trindade, wherein relevant assertions are made concerning the hermeneutics of law in face of the new protection demands.

59. In his concurring vote, the illustrious international legal scholar and current President of the Court (1999/2001) underlines that “The very emergence and consolidation of the corpus juris of the International Law of Human Rights are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (el Derecho) came to the encounter of the human being, the ultimate addressee of its norms of protection.” (Concurring vote, par.4)

60. The author of the concurring vote also warns that “In the same sense the case-law of the two international tribunals of human rights in operation to date has oriented itself, as it could not have been otherwise, since human rights treaties are, in fact, living instruments, which accompany the evolution of times and of the social milieu in which the protected rights are exercised” (ibid, par. 10)

61.In this sense the European Court on Human Rights, in its Tyrer vs. United Kingdom Case (1978), when determining the unlawfulness of physical punishment applied to teenagers in the Isle of Man, affirmed that the European Convention on Human Rights is “a living instrument which ... must be interpreted in the light of present-day conditions”.

62. Finally, with the demystification of the postulates of the voluntarist legal positivism, it has become clear that the answer to the problem of the basis and the validity of general international law can only be found in the universal legal consciousness, from the affirmation of an idea of objective justice.

63. Furthermore, in a meeting of representatives of the human rights treaty bodies, it was emphasized that conventional procedures are part of a broad international system of human rights protection, which has – as a basic postulate – the indivisibility of human rights (civil, political, economic, social and cultural). To ensure in practice the universalization of human rights, the meeting recommended the universal ratification, up to the year 2000, of the six core human rights treaties of the United Nations (the two International Covenants of 1966; the conventions on the elimination of racial discrimination and discrimination against women; the UN Convention against Torture; and the Convention on the Rights of the Child), of the three regional conventions on human rights (European, American and African), and the ILO Conventions that concern basic human rights. The representatives at the meeting warned that the non-compliance by the states in respect of their obligation to ratify constituted a breach of conventional international obligations and that the invocation of state immunity, in this context, would result in a “double standard” that would punish the States that duly complied with their obligations. (Cancado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol 1, Fabris Ed. 1997, pp. 199-200)

64. Article 27 of the Vienna Convention on the Law of Treaties of 1969 forbids the invocation of domestic law to justify the non-compliance of an international obligation. Moreover, according to Article 31 of the Vienna Convention: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their contest and in light of its object and purpose”. It follows also that, according to the doctrine of “effet utile”, the interpreter must not deny any term of a normative provision its value in the text: no provision can be interpreted as not having been written.

65. In effect, the Inter-American Court, in its Advisory opinion OC-14/94, has held that: “Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions [Greco-Bulgarian “Communities”, Advisory Opinion, 1930, P.C.I.J., Series B, No. 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 167; and, I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) 12, at 31-2, para. 47].” (par.35)

66. In view of the considerations presented here, it can be said that the norm of article 4, section 2 of the Inter-American Convention, has been superseded by the aforementioned conventional provisions, following the best hermeneutic of the International Law of Human Rights, with the result that it is prohibitive, for domestic law – even if older than the American Convention – to apply cruel punishment, such as the death penalty.

67. This result also follows from the principle of the International Law of Human Rights that all action must have as its basic goal the protection of victims.

68. In light of these considerations, provisions such as Article 4(2) of the American Convention on Human Rights should be disregarded, in favor of legal instruments that better protect the interests of the victims of violations of human rights.

Done and signed in Santiago, Chile, on the 4th day of the month of April, 2001 (signed): Commissioner: Hélio Bicudo.