Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 52/01; Case 12.243
Session:	Hundred and Eleventh Special Session (3 – 6 April 2001)
Title/Style of Cause:	Juan Raul Garza v. United States
Doc. Type:	Report
Decided by:	Chairman: Claudio Grossman; First Vice-Chairman: Juan Méndez; Second Vice-Chair: Marta Altolaguirre; Commissioners: Peter Laurie and Julio Prado Vallejo. The concurring opinion of Hélio Bicudo is included immediately following this report. Commission Member Professor Robert Goldman did not take part in the discussion and voting on this case, pursuant to Article 19(2) of the Commission's Regulations.
Dated:	4 April 2001
Citation:	Raul Garza v. United States, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20, rev. (2000)
Represented by:	APPLICANTS: Hugh Southey (a Barrister with Tooks Chambers in London); Michael Mansfield, QC (the Human Rights Committee of the Bar of England and Wales); John Quigley (Professor of International Law at Ohio State University); William Shabas (then Professor of International Human Rights Law at the University of Quebec at Montreal); Gregory Weirciock (an attorney in Houston) and Mark Norman (Solicitor of the Supreme Court of England and Wales)
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I. SUMMARY

1. The petition in the present case was lodged with the Inter-American Commission on Human Rights (the "Commission") against the United States of America (the "State," the "United States," or the "U.S.") on December 20, 1999 by six individuals: Hugh Southey, a Barrister with Tooks Chambers in London, United Kingdom; Michael Mansfield, QC, representing the Human Rights Committee of the Bar of England and Wales; John Quigley, Professor of International Law at Ohio State University; William Shabas, then Professor of International Human Rights Law at the University of Quebec at Montreal; Gregory Weirciock, an attorney in Houston, Texas; and Mark Norman, Solicitor of the Supreme Court of England and Wales (hereinafter the "Petitioner's representatives").

2. The petition was filed on behalf of Juan Raul Garza (the “Petitioner”), an inmate on Federal death row in the United States. In their petition and subsequent observations, the Petitioner’s representatives have alleged that Mr. Garza’s death sentence violates his right to life under Article I of the American Declaration of the Rights and Duties of Man (the "American Declaration" or the "Declaration"), and that the procedures employed by the State in sentencing Mr. Garza to death violate his right to equal protection of the law under Article II of the Declaration, his right to a fair trial under Article XVIII of the Declaration and his right to due process under Article XXVI of the Declaration. In particular, the petition contests the introduction during the sentencing phase of the Petitioner’s criminal proceeding of evidence of four unadjudicated murders that Mr. Garza was alleged to have perpetrated in Mexico, which evidence was considered by the jury in determining whether Mr. Garza should be sentenced to death. The petition also indicated that, according to information provided by the United States at that time, Mr. Garza’s execution date might be set for February 2000. Mr. Garza's execution was subsequently scheduled to take place on August 5, 2000, following which then-U.S. President William J. Clinton granted Mr. Garza two temporary reprieves, one on August 2, 2000, and the second on December 7, 2000. The Petitioner's representatives have claimed that, should Mr. Garza be executed, it will constitute the first execution under U.S. federal law in excess of 35 years.

3. In the present Report, having examined the information and arguments provided by the parties, the Commission decided to admit the case in relation to Articles I, XVIII, and XXVI of the Declaration, with the exception of further claims under Articles I and II of the Declaration raised by the Petitioner in observations dated September 22, 2000, which the Commission declared to be inadmissible. In addition, after considering the merits of the case, the Commission found the State responsible for violations of Articles I, XVIII and XXVI of the American Declaration, in connection with the procedure followed by the State in sentencing the Petitioner to death. Accordingly, the Commission recommended that the State provide Mr. Garza with an effective remedy, which includes commutation of his death sentence. The Commission also decided to recommend that the State review its laws, procedures and practices to ensure that persons who are accused of capital crimes are tried and sentenced in accordance with the rights under the American Declaration, including in particular prohibiting the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On January 27, 2000, the Commission decided to open Case Nº 12.243 in relation to Mr. Garza’s complaint, and by note of the same date transmitted the pertinent parts of the Petitioner’s petition to the State, with a request that the State deliver information that it considered pertinent to the complaint within 90 days as prescribed by the Commission’s Regulations. In addition, in light of the information in the petition indicating that Mr. Garza’s execution may be scheduled for February 2000, the Commission decided to adopt precautionary measures pursuant to Article 29(2) of its Regulations and requested in its January 27, 2000 communication to the State that the United States take all necessary measures to preserve Mr. Garza’s life and physical integrity so as not to hinder the processing of his case before the inter-American system. The Commission based its request on the fact that, if the State were to execute Mr. Garza before the Commission had an opportunity to examine his case, any eventual decision would be rendered moot in respect

of the efficacy of potential remedies, and irreparable harm would be caused to Mr. Garza. Also by note dated January 27, 2000, the Commission informed the Petitioner's representatives that Mr. Garza's petition had been transmitted to the State and that the Commission had adopted precautionary measures in relation to Mr. Garza.

5. In a communication dated February 7, 2000, the Petitioner's representatives provided the Commission with additional information relevant to their complaint, including a copy of the transcript from Mr. Garza's sentencing hearing, and copies of the decisions of the domestic courts that had considered Mr. Garza's appeals from his conviction and sentence. In their communication, the Petitioner's representatives did not indicate that a date for Mr. Garza's execution had yet been scheduled.

6. By note dated May 8, 2000, the Commission reiterated its request for the State to provide information relating to Mr. Garza's petition, which the Commission asked the State to provide within 30 days.

7. In a note dated May 11, 2000, the State requested that the Commission grant it an extension of time of 45 days within which to file a response to the Petitioner's petition. By communication dated May 18, 2000, the Commission granted the State's request for an extension of time, on the understanding that the State would take all necessary measures to preserve Mr. Garza's life and physical integrity in accordance with the Commission's previous request for precautionary measures.

8. In a letter dated May 29, 2000, the Petitioner's representatives provided the Commission with a copy of a decision issued by the United States District Court, Southern District of Texas, on May 26, 2000, ordering that Mr. Garza be executed on August 5, 2000 at 6:00 a.m.

9. By note dated May 31, 2000, the Commission transmitted the pertinent parts of the Petitioner's May 29, 2000 communication to the State, with a response requested within 30 days. The Commission also reiterated its previous call for an urgent response to its January 27, 2000 request for precautionary measures, in light of the scheduling of Mr. Garza's execution date. By communication of the same date, the Commission informed the Petitioner's representatives that these steps had been taken.

10. On or about July 14, 2000, the Commission received information that then-U.S. President William J. Clinton would postpone Mr. Garza's scheduled August 5, 2000 execution date until the U.S. Department of Justice had completed drafting guidelines for seeking presidential clemency in such cases. Accordingly, by communication dated July 17, 2000, the Commission requested that the State provide the Commission on an urgent basis with information respecting the current status of Mr. Garza's death sentence. By note of the same date, the Commission likewise requested that the Petitioner's representatives provide the Commission with an urgent communication informing the Commission of the current status of Mr. Garza's death sentence.

11. By note dated July 20, 2000, the State transmitted to the Commission its observations on the Petitioner's petition. In its observations, the State expressed the view that the Commission's request for precautionary measures in Mr. Garza's case was not binding but rather only

constituted a non-binding "recommendation," of which the State had taken note. The Commission subsequently transmitted the pertinent parts of the State's observations to the Petitioner's representatives, with a response requested within 30 days.

12. In a letter dated August 7, 2000, the Petitioner's representatives provided the Commission with a copy of an "Executive Grant of Clemency" dated August 2, 2000 and signed by U.S. President Clinton, which granted a reprieve of Mr. Garza's execution date from August 5, 2000 to December 12, 2000 and established December 12, 2000 as the new date for Mr. Garza's execution.

13. By communication dated August 19, 2000, the Petitioner's representatives delivered to the Commission a response to the State's observations of July 20, 2000, and requested a hearing in the Petitioner's case during the Commission's next period of sessions. The Commission subsequently transmitted the pertinent parts of the Petitioner's observations to the State in a note dated August 23, 2000, with a response requested within 30 days.

14. In notes dated September 12, 2000, the Commission informed the Petitioner's representatives and the State that a hearing in the Petitioner's case had been scheduled for October 12, 2000 during the Commission's 108th period of sessions at its headquarters in Washington, D.C., for the purpose of receiving the parties' representations on the admissibility and merits of the case.

15. By communication dated September 22, 2000, the Petitioner's representatives delivered to the Commission a document entitled "Request to Raise Additional Matters," and by note of the same date the Commission transmitted a copy of the document to the State, with a request for observations within 30 days.

16. In a note dated September 25, 2000, the State provided the Commission with a "Second Reply" to the Petitioner's petition. By communication dated September 26, 2000, the Commission transmitted the pertinent parts of the State's second reply to the Petitioner's representatives, with a response requested within 30 days.

17. On October 12, 2000, the Commission convened a hearing in the Petitioner's case during its 108th period of sessions in Washington D.C. Representatives of both the Petitioner and the State attended the hearing, presented oral representations to the Commission respecting the admissibility and merits of the Petitioner's case, and delivered written summaries of their oral submissions.

18. Subsequently, by communication dated November 16, 2000, the State delivered to the Commission a document entitled "Response of the Government of the United States to October 12, 2000 Submission by Petitioner." The Commission transmitted the pertinent parts of the State's response to the Petitioner's representatives in a note dated November 17, 2000.

19. By communication dated November 21, 2000, the Petitioner's representatives indicated that in light of Mr. Garza's scheduled execution on December 12, 2000, they did not intend to comment on the State's additional observations, but rather requested that the Commission

consider the merits of the petition so that a report with recommendations could be issued before December 12, 2000.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

1. Admissibility

20. In their initial petition and subsequent observations, the Petitioner's representatives have contended that Mr. Garza's petition is admissible in accordance with the requirements of the Commission's Regulations. They first argue that Mr. Garza has exhausted domestic remedies in accordance with Article 37 of the Commission's Regulations, as he pursued appeals and constitutional remedies in both the U.S. District Court and the U.S. Court of Appeals for the Fifth Circuit, with the U.S. Supreme Court dismissing his final petition for a Writ of Certiorari on November 15, 1999.

21. In addition, the Petitioner's representatives argue that Mr. Garza has complied with Article 38 of the Commission's Regulations, as his petition was lodged with the Commission on December 20, 1999 and therefore within 6 months of the date of the final domestic judgment in his case.

22. Moreover, the Petitioner's observations indicate that no proceedings are pending or have been decided by the Commission or any other international organization raising the subject matter of Mr. Garza's petition, in compliance with Article 39 of the Commission's Regulations.

23. With respect to the claims raised in their September 22, 2000 "Request to Raise Additional Matters", which, as discussed below, allege violations of Mr. Garza's rights under Articles I and II of the Declaration based upon a document issued by the U.S. Department of Justice on September 12, 2000 and entitled "Report on the Federal Death Penalty System: A Statistical Survey (1988-2000)," the Petitioner's representatives argue that, as Mr. Garza's execution is scheduled for December 12, 2000, any attempts to raise the issues contained in the September 22, 2000 request in a domestic forum is unlikely to produce results until shortly before that scheduled execution date. Consequently, the Petitioners argue that there would be no opportunity to make the allegations of human rights abuses contained in the request in sufficient time to enable the Commission to consider them before execution, and therefore that it is appropriate for the Commission to consider the matters raised in their September 22, 2000 request.

2. Merits

24. With respect to the merits of the case, the Petitioner's representatives indicate that Mr. Garza is a U.S. national who was tried and convicted by a jury in the United States District Court, Southern District of Texas, under U.S. Federal law on three counts of killing in the furtherance of a continuing criminal enterprise, among other offenses, and sentenced by the same jury to death. They also confirm that in his proceedings before the Commission, Mr. Garza does

not challenge these convictions, but rather takes issue with the punishment that he has received for these crimes. In particular, the Petitioner's representatives argue that the State is responsible for violations of Mr. Garza's rights under Articles I, XVIII and XXVI of the American Declaration, as a consequence of the fact that the death penalty has been imposed upon Mr. Garza, as well as certain aspects of the process through which Mr. Garza was afforded this punishment.

25. With respect to Article I of the Declaration, the Petitioner's representatives have raised four principal arguments. First, they contend that international law has developed such that capital punishment per se violates the right to life and therefore that Mr. Garza's death sentence in and of itself contravenes Article I of the Declaration. In this connection, the Petitioner's representatives argue that the Declaration should be regarded as a living instrument that reflects the standards of democratic and just societies as they develop.[FN1] While the Petitioner's representatives recognize that the Commission has held in past reports that the death penalty is not per se contrary to the right to life, they urge that the standards inherent in the Declaration have now developed to the extent that capital punishment should be regarded as contrary to Article I of the Declaration, and that the intentions of the original drafters of the Declaration cannot be determinative in this respect.

[FN1] Petitioner's Summary of Issues to be Presented, dated October 5, 2000, para. 5.1, citing IACHR, Report on the Human Rights of Asylum Seekers in the Canadian Refugee Determination System, OEA/Ser.L/V/II.106; Resolution Nº 3/87, Roach and Pinkerton v. U.S., Annual Report of the IACHR 1987-88; Eur. Court H.R., Tyrer v. U.K (1978) 2 E.H.R.R. 1 at para. 31.

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26. In support of this contention, the Petitioner's representatives present several arguments. They first claim that there is a clear worldwide trend that individual nation states are abolishing the death penalty,[FN2] and, consistent with this trend, that the United Nations human rights system supports the abolition of the death penalty and has encouraged states to reduce their use of the death penalty.[FN3] They also note the fact that the Statute of the International Criminal Court and the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda do not include capital punishment among the penalties that may be imposed by those tribunals. In relation to the Americas in particular, the Petitioner's representatives refer to the Protocol to the American Convention on Human Rights to Abolish the Death Penalty as evidence of a "commitment" by the Organization of American States to the abolition of the death penalty.

[FN2] Id., para. 6.1, citing Report of the Secretary General to the Commission on Human Rights, U.N. Doc. E/CN.4/1999/52; Facts and Figures on the Death Penalty, ACT 50/006/2000).

[FN3] Id., para. 6.2, citing G.A. Res. 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1997; U.N. Commission on Human Rights, Resolution Nº 2000/65; International Covenant on Civil and Political Rights, Art. 6(2); Errol Johnson v. Jamaica, Communication Nº 588/1994, U.N. Doc. CCPR/C/56/D/588/1994.

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27. Alternatively, the Petitioner's representatives argue that Mr. Garza's death sentence contravenes Article I of the American Declaration because international law requires states to progressively restrict the application of the death penalty. Contrary to this trend, however, the United States has effectively re-introduced the death penalty after a 35-year absence of Federal executions between 1972 and 1988 and, on two occasions since November 18, 1988, has expanded it to apply to new offenses.[FN4] In addition to the arguments cited above respecting the unlawfulness of the death penalty per se, the Petitioner's representatives contend that by protecting the right to life, the American Declaration implicitly suggests that the abolition of the death penalty is desirable and that one of the objects and purposes of the Declaration is the restriction of the use of the death penalty.[FN5] They also argue that the worldwide trend toward a reduction in the use of the death penalty suggests that there is no sufficient justification for an increase in the use of the death penalty and therefore that any such increase instituted by a state is arbitrary. According to the Petitioner's representatives, it is difficult to see what justification there can be for re-introducing the death penalty when so many states have found that they are able to abolish it.

[FN4] Id., para. 8, citing Survey of the Federal Death Penalty (1988-2000), U.S. Department of Justice, September 12, 2000, Introduction.
[FN5] Id., para. 7.2, citing Errol Johnson v. Jamaica, supra.

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28. In the further alternative, the Petitioner's representatives contend that the decision by the State to seek the death penalty in the circumstances of Mr. Garza's case was arbitrary contrary to Article I of the American Declaration, for two reasons: it was based upon political concerns and therefore lacked sufficient and proper justification; and, as argued in the Petitioner's September 22, 2000 "Request to Raise Additional Matters," the State's own statistics indicate that decisions by U.S. attorneys since 1988 as to whether to seek the federal death penalty appear to have been influenced by racial and geographic disparities. In this respect, the Petitioner's representatives suggest that the Petitioner need only establish a prima facie case that the application of capital punishment in his case is arbitrary, upon which it is for the State to show that there is no violation of Article I of the Declaration.[FN6]

[FN6] Id., citing Report Nº 57/96, Andrews v. United States, Annual Report of the IACHR 1998, at para. 146.

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29. With regard to the first point, the Petitioner's representatives submit that the State can show no rational reason for seeking and imposing the death penalty in Mr. Garza's case such as deterrence,[FN7] but rather that any proposed reasons are political in nature and therefore cannot be regarded as legitimate justifications for the use of capital punishment.[FN8] In the view of the Petitioner's representatives, to the extent that it is not per se contrary to the Declaration, the death penalty's use must be limited to circumstances in which it is intended to protect the rights of others under the Declaration. They refer in this respect to previous determinations by the

Commission that the death penalty can only be imposed for crimes of "exceptional gravity."[FN9]

[FN7] Id., paras. 9.1, 9.2, citing, inter alia, Capital Punishment and Deterrence: Examining the Effect of Executions in Texas, Crime and Delinquency, Vol. 45, Nº 4, p. 481 (suggesting that capital punishment does not act as a deterrent to crime).
[FN8] Id., para. 9.3, citing, inter alia, The Death Penalty: Casualties and Costs of the War on Crime, a lecture by Stephen Bright; USA: Death Penalty Developments in 1996, Amnesty International.
[FN9] Id., citing Andrews v. United States, supra, para. 177.

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30. With regard to the second point noted above, the Petitioner's representatives rely upon a statistical study released by the U.S. Department of Justice on September 12, 2000 entitled "The Federal Death Penalty System: A Statistical Survey (1988-2000)" which, according to the Petitioner's representatives, reveals discrepancies in the application of the federal death penalty throughout the United States that may be considered to render Mr. Garza's execution prima facie arbitrary. In this respect, the Petitioner's representatives explain that at the time when federal prosecutors sought the death penalty in Mr. Garza's case, U.S. attorneys were only required to submit to the U.S. Attorney General for approval cases in which they wished to seek the death penalty. They were not required to submit cases in which the death penalty was not being sought, cases in which a plea was accepted in return for a sentence other than death, cases where a decision was taken that a case would not be prosecuted at the federal level, or cases in which the matter was charged in such a way that it did not attract the death penalty. As a consequence, the Petitioner's representatives claim that there was no procedure for ensuring that the approach of local US attorneys to the selection of cases for submission to the Attorney General was consistent. They further claim that a Protocol introduced by the Justice Department in January 1995 eliminated one element of discretion, by requiring U.S. attorneys to submit to the Attorney General for review all cases in which a defendant is charged with a capital-eligible offense, regardless of whether the U.S. attorney actually desires to seek the death penalty in that case.

31. In this context, the Petitioner's representatives claim that the State's survey reveals evidence of two types of discrepancies in the application of the U.S. federal death penalty. First, they claim that the survey reveals geographic disparities across the United States in decisions by U.S. prosecutors to seek the death penalty.[FN10] In addition, they claim that, according to the statistics, the federal death penalty has been sought on a disproportionately more frequent basis for non-white offenders than for white offenders.[FN11] The Petitioner's representatives therefore argue that this statistical information constitutes prima facie evidence that local U.S. attorneys were not taking the decision to seek the death penalty in a consistent manner at the time when the decision to seek the penalty was made in Mr. Garza's case. The Petitioner's representatives emphasize in this regard that it is crucial that prosecutorial discretion to seek the death penalty is taken in a consistent manner to ensure that it is not applied arbitrarily.[FN12]

[FN10] Id., paras. 11-12, citing U.S. Department of Justice, Report on the Federal Death Penalty (12 September 2000), pp. T18-T22. The Petitioner's representatives note in particular that according to the Report, two states, Virginia and Texas, produced 25% of the cases in which local prosecutors sought the federal death penalty during the period when the decision was made to seek the penalty in Mr. Garza's case.
[FN11] Id., paras. 11, 12, footnote 10 (indicating that the number of non-white defendants in cases in which the death penalty was sought decreased following the introduction of the Justice Department's January 1995 Protocol).
[FN12] Id., para. 12, citing Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August - 7 September, 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

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32. The Petitioner's representatives state further that the arbitrary nature of the decision to seek the death penalty in Mr. Garza's case is reinforced by material obtained by Mr. Garza's attorneys, which, according to their observations, indicates that in many cases of multiple homicides arising out of drug-related or other criminal enterprises, federal authorities have not sought the death penalty.[FN13] While recognizing that it is "obviously difficult" for Mr. Garza's attorneys to produce any form of comprehensive statistics showing a lack of consistency in the decision to seek the death penalty, the Petitioner's representatives claim that the material that they have provided is sufficient to make a prima facie case that the decision to seek the death penalty in Mr. Garza's case was arbitrary.

[FN13] Id., para. 14, citing Clemency petition filed on behalf of Juan Raul Garza.

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33. As their second principal argument, the Petitioner's representatives contend that the process employed by the State in sentencing Mr. Garza to death violated his rights to a fair trial and to due process under Articles XVIII and XXVI of the American Declaration. In particular, the petition alleges that during the sentencing phase of Mr. Garza's criminal proceeding, the prosecution introduced as aggravating factors evidence of five unadjudicated murders that Mr. Garza was alleged to have committed, four of which were alleged to have occurred in Mexico. According to the Petitioner's representatives, Mexican authorities were unable to solve any of these four homicides, and Mr. Garza had never been charged or convicted of any of these murders. However, the U.S. Government sent Customs agents to Mexico to investigate these closed cases, and then introduced resulting evidence during Mr. Garza's sentencing hearing.

34. Mr. Garza contends that this practice violated the due process and fair trial protections under the American Declaration, because the jury, having convicted Mr. Garza of capital murder, could not be regarded as an impartial tribunal in assessing evidence of further murders for the purposes of sentencing. Alternatively, Mr. Garza argues that if evidence of this nature was not by its nature inadmissible, his right to equality of arms was violated because he was unable to conduct his own meaningful investigation of unadjudicated murders in Mexico, and therefore could not obtain favorable documentary evidence and the attendance and examination of witnesses on his behalf.

35. The first argument proffered by the Petitioner's representatives contends that Mr. Garza was, in effect, convicted and sentenced to death for eight murders, only three of which were proved through a proper criminal trial, and five of which were adjudicated during a sentencing hearing where the rules of procedure did not offer the guarantees of impartiality and sound evidence necessary in trying and convicting individuals for capital crimes. In support of their argument, the Petitioner's representatives observe that at the time of filing their petition, eight states in the United States imposed a complete ban on the presentation of evidence of unadjudicated offenses during the sentencing phase of capital trials, and have therefore recognized the unfairness of having to answer criminal allegations in front of a jury that has already found a person guilty of serous misconduct.[FN14]

[FN14] See e.g. Petition dated December 20, 1999, Appendix, U.S. v. Garza, Petition for a Writ of Certiorari before the U.S. Supreme Court, October Term 1998, pp. 11-12 (indicating that eight states in the United States impose a strict prohibition on the use of unadjudicated offenses at capital sentencing (Alabama, Florida, Indiana, Maryland, Ohio, Pennsylvania, Tennessee and Washington), and ten other states allow the introduction of such evidence but require strict procedural protections such as a heightened standard of reliability (Arkansas, California, Delaware, Georgia, Illinois, Louisiana, Nebraska, Nevada, South Carolina and Utah).

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36. The Petitioner's representatives emphasize that a person facing the death penalty is entitled to all possible safeguards to ensure a fair trial, and argue that in considering whether Mr. Garza had received a fair trial for the four unadjudicated murders alleged to have occurred, it must be determined whether there was a "reasonable appearance" of a lack of impartiality on the part of the jury or whether the impartiality of the jury "was capable of appearing to the [defendant] to be open to doubt."[FN15] Further, they contend that requiring a jury to determine whether a person is guilty of serious criminal conduct when that same jury has already determined that the person is guilty of other offenses gives rise to a particular risk of unfairness and thereby infringes that person's right to a fair trial. The Petitioner's observations refer in this regard to the dissenting decisions of several U.S. Supreme Court justices, who have expressed the view that the use of evidence of unadjudicated offenses in capital sentencing hearings is improper under the U.S. Constitution.[FN16]

[FN15] Petitioner's Summary of the Issues to be Presented, supra, para. 16.1, citing Andrews v. United States, supra, para. 177; Eur. Court H.R., De Cubber v. Belgium (1984) 7 E.H.R.R. 236.
[FN16] Id., para. 20, citing Justice Marshall, joined by Justice Brennan, dissenting in Williams v. Lynaugh, 484 U.S. 935 (1987) at 938.

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37. In the context of Mr. Garza's case, the Petitioner's representatives state that when evidence was presented during the sentencing phase of Mr. Garza's trial to prove his involvement in offenses for which he had never been previously tried, the jury was required to consider whether he was guilty of those additional offenses "beyond a reasonable doubt."

Accordingly, the Petitioner's representatives argue that these were offenses for which Mr. Garza would effectively receive punishment and therefore to which the presumption of innocence applied, and consequently that the existence of a reasonable appearance of a lack of impartiality on the part of the jury undermined the fairness of Mr. Garza's criminal proceedings. According to the Petitioner's representatives, this lack of impartiality was particularly acute as a result of the complexity of the task that the jury was asked to conduct during the sentencing stage, as reflected in the 36-question "Special Findings Form" that the jury was required to complete.

38. The Petitioner's representatives further submit that the risk of unfairness from introducing the evidence of unadjudicated offenses at Mr. Garza's sentencing hearing was amplified by the fact that the rules of evidence that would normally apply to the determination of a criminal charge were not applied when the jury was presented with the evidence of the unadjudicated murders. According to the Petitioner's representatives, these rules are normally an important protection for defendants in the guilt-innocence stage of a criminal proceeding where the defendant need not prove anything and the burden lies entirely upon the prosecution. As a consequence, they claim that the State denied Mr. Garza the highest standard of procedural fairness applicable in cases involving the death penalty.

39. In addition, the Petitioner's representatives claim that the practice of introducing evidence of unadjudicated foreign murders at Mr. Garza's sentencing proceeding violated the principle in Article XXVI of the Declaration that defendants be "tried…in accordance with pre-existing laws." In particular, they argue that the murders alleged to have committed in Mexico did not occur within the special maritime or territorial jurisdiction of the United States as required under 18 U.S.C., Section 1111(b), and therefore could not have been tried as Federal crimes under existing U.S. law at the time when they were alleged to have been perpetrated.

40. Alternatively, in the event that the introduction of evidence of unadjudicated offenses during sentencing proceedings for capital crimes is not considered per se contrary to the due process and fair trial protections under the American Declaration, the Petitioner's representatives argue that this practice nevertheless violated Mr. Garza's right to due process, and in particular his right to equality of arms. Specifically, it is argued on behalf of Mr. Garza that mechanisms were available to the State under the Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance (hereinafter the "US-Mexico MLAT"),[FN17] that permitted the State to investigate the Mexican murders, but that these mechanisms are not available to defendants such as Mr. Garza. Consequently, it is contended that Mr. Garza could not obtain exculpatory evidence under the same conditions that incriminating evidence against him was obtained by the prosecution, in violation of the right to equality of arms.

[FN17] Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, December 9, 1987, U.S.-Mex., 27 I.L.M. 447. According to the Petitioner's representatives, this treaty obliges the states parties to provide each other with assistance in criminal matters, including the taking of testimony or statements of persons, the provision of documents records and evidence, and the execution of legal requests for searches

and seizures. Moreover, the Petitioner's representatives note that Article 1(5) of the Treaty explicitly excludes the possibility that private defendants may invoke the provisions of the treaty.

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41. In this respect, the Petitioner's representatives observe that the relative ability of the prosecution and defense to gather evidence is relevant to the principle of equality of arms, and requires that steps be taken so that the advantages that the prosecution inevitably enjoys do not disadvantage the defense.[FN18] Further, the Petitioner's representatives argue that the principle of equality of arms is a part of the right to a fair trial contained in the American Declaration, and that the due process requirements of the Declaration apply to the sentencing phase of a criminal trial.[FN19] In the context of Mr. Garza's sentencing, it is claimed that the principle of equality of arms was not respected because, as a result of its greater resources and the US-Mexico MLAT, the prosecution was in a better position to obtain evidence from Mexico. In particular, the Petitioner's representatives state that Mr. Garza was subject to a clear inequality, because the U.S. prosecution authorities were entitled under the treaty to seek assistance from the Mexican authorities, whereas Mr. Garza was not entitled to any such assistance.

[FN18] Petitioner's Summary of Issues to be Presented, supra, para. 16.3, citing Eur. Comm. H.R., Jespers v. Belgium (1981) 27 D.R. 61, para. 58.

[FN19] Id., paras. 16.2, 16.4, 16.5, citing Canada Report, supra, para. 96; McKenzie et al., supra, para. 204.

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42. As an example of such inequality, the Petitioner's representatives refer to the fact that one of the ways in which the equality of arms is normally secured in domestic prosecutions is through the requirement that the U.S. authorities disclose all relevant material to the defense. In contrast, the Mexican authorities were under no such obligation to disclose relevant material to Mr. Garza. Further, according to his representatives, Mr. Garza, unlike the State, had no power to subpoena witnesses in Mexico.

43. The Petitioner's representatives also indicate in this connection that, to-date, there does not exist a letters rogatory process between the United States and Mexico on criminal matters, in that neither state has extended the provisions of the Inter-American Convention on Letters Rogatory to apply in criminal matters. Further, while the Petitioner's representatives have recognized the existence of letters rogatory processes between states as a matter of custom, they have asserted that the degree of cooperation between states with respect to litigation varies widely, which explains in part why states execute separate mutual legal assistance treaties such as the US-Mexico MLAT. Moreover, they point out that during his pre-trial hearing, Mr. Garza was denied a request to have the prosecution seek specific exculpatory evidence from the Mexican authorities on his behalf.

B. Position of the State

44. With respect to the admissibility of Mr. Garza's petition generally, the State contends that the petition should be considered inadmissible because it is manifestly ill-founded and fails to

state facts that constitute a violation of any of the rights under the American Declaration. In addition, specifically in respect of the claims raised in the Petitioner's September 22, 2000 "Request to Raise Additional Matters," the State argues that the Commission should reject and declare inadmissible these new claims, because the Petitioner failed to raise them before any U.S. courts.

45. In support of its position that the petition as a whole should be considered inadmissible under Article 41 of the Commission's Regulations, the State has provided observations respecting the merits of Mr. Garza's complaints, with a view to demonstrating their groundless nature.

46. More particularly, with respect to the background to the case, the State indicates that for over a decade, Mr. Garza controlled and operated a major drug trafficking enterprise, through which he sold thousands of pounds of marijuana in the United States smuggled from Mexico. As his criminal enterprise grew in scope, Mr. Garza decided to eliminate individuals from his organization who had earned his suspicion, and to this end either ordered or carried out the execution-style murders in the United States of three individuals.

47. After a trial in the U.S. District Court, Southern District of Texas, Mr. Garza was convicted of five violations of federal drug trafficking laws, operating a continuing criminal enterprise, money laundering, and three counts of killing in the furtherance of a continuing criminal enterprise. During the punishment phase of Mr. Garza's proceeding, the government introduced evidence showing that he had committed four additional murders in Mexico, three by gunshot and one by strangulation and suffocation. Following the punishment hearing, the jury recommended a sentence of death.

48. Mr. Garza's convictions and sentence were subsequently affirmed by the U.S. Court of Appeals for the Fifth Circuit, following which the Fifth Circuit denied a request for a re-hearing en banc, and the U.S. Supreme Court denied certiorari review. Further, in December 1997, Mr. Garza filed a motion to vacate his sentence under the U.S. federal habeas corpus statute, arguing that the government's introduction of evidence relating to the four murders in Mexico violated his rights under the Due Process Clause of the Fifth Amendment to the U.S. Constitution. This motion was denied in April 1998. Mr. Garza subsequently requested a certificate of appealability from the U.S. District Court, as required under 28 U.S.C., Section 2253(1), in order to appeal the District Court's denial of habeas corpus, and the request was denied. Mr. Garza appealed this determination to the Fifth Circuit Court of Appeals, and it also denied his request, for the reason that he had not made a substantial showing of the denial of a constitutional right. Finally, on November 15, 1999, the U.S. Supreme Court denied Mr. Garza certiorari review of this decision.

49. In support of its contention that Mr. Garza's rights under the American Declaration have not been violated, the State first argues that Article I of the Declaration did not at the time of its adoption nor does it presently prohibit the death penalty. The United States emphasizes in this regard that a state cannot be bound to legal obligations, either under treaties or under customary international law, that it has not explicitly accepted, and contends that the Petitioner's representatives cannot claim that general language in an instrument negotiated in 1948 has taken on a different meaning 50 years later so as to prohibit the United States from employing the

death penalty. Rather, the State argues that governments must consent to any such modifications through, for example, the adoption of additional protocols to treaties.

50. The State also argues that the Petitioner has failed to establish that international law precludes the use of the death penalty. Rather, the State contends that the death penalty is permitted under international law when applied to serious crimes and pursuant to proceedings that comply with due process. According to the State, the undisputed fact is that a majority of nations retain the option of imposing the death penalty for the most serious offenses, and in this respect Mr. Garza's case is no exception. The State notes further that the UN Secretary General reported to the UN Commission on Human Rights that as of March 10, 1999, 87 countries retained and used the death penalty for the most serious ordinary crimes and that another 26 countries retained the death penalty for ordinary crimes but had not executed any one in the previous 10 years. Moreover, the State indicates that only 65 countries have formally abolished the death penalty for all crimes. Based upon these statistics, the State contends that state practice is clear and consistent, and that there is no prohibition under international law on the use of the death penalty. In the context of the Petitioner's case, it is the State's position that Mr. Garza's crimes were sufficiently serious to merit a sentence of death.

51. With respect to the Petitioner's arguments regarding the U.S. Justice Department's September 12, 2000 report on the Federal death penalty, should the Commission decide to consider his claims in this regard, the State argues that mere statistical studies are insufficient to establish a claim that the death penalty is imposed in a racially discriminatory manner so as to violate the right to life.[FN20] In summary, the State submits that the Petitioner's representatives have failed to identify any evidence that race played a factor in Mr. Garza's case. To the contrary, the State notes that the Petitioner's representatives have admitted that "[c]learly, Mr. Garza had been found guilty of offenses that made him eligible for the death penalty under the federal statute."

[FN20] State's November 16, 2000 observations, citing Resolution 23/89 (Celestine v. US), Annual Report of the IACHR 1989-90.

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52. The State also argues that the Petitioner has not established a violation of either the right to a fair trial or the right to due process of law in relation to Mr. Garza's criminal proceeding. In particular, according to the State, the Petitioner's contention that introducing evidence of unadjudicated murders during Mr. Garza's sentencing hearing per se violated his right to due process and a fair trial by reason of the consequential lack of impartiality on the part of the jury lacks merit. Rather, the State argues that the jury is best positioned to understand the nature and severity of the crimes committed by the defendant, namely the three murders for which Mr. Garza was convicted, and that the previous trial for these crimes did not render the jury prejudicial, only better informed.

53. Similarly, with respect to the Petitioner's alternative argument that Mr. Garza was denied equality of arms due to the manner in which the evidence of unadjudicated murders was gathered and presented at the sentencing hearing, the State contends there was nothing about Mr. Garza's

trial, at the guilt/innocence or sentencing phase, that fell short of international standards for equality of arms and Mr. Garza's right to a fair trial. The State further argues in this respect that the principle of equality of arms protects procedural rather than substantive equality, and therefore that the fact that the State may have more resources than a defendant–which, the State notes, it almost invariably does–cannot found a claim that a particular proceeding was not fair.

54. Rather, in the circumstances of Mr. Garza's prosecution, the State alleges that neither the law nor the court imposed any condition that placed Mr. Garza at a substantial disadvantage vis a vis the prosecution, in that Mr. Garza was free to impeach the prosecution's evidence in any manner and to call witnesses in his defense. In this respect, the State argues that the procedural conditions at sentencing were the same for both parties, and the fact that certain evidence was accumulated in Mexico is of no legal import. According to the State, nothing prevented Mr. Garza from collecting mitigating evidence on his behalf, whether in Mexico or in the United States, and proffering that evidence at his sentencing hearing.

55. The State provides several arguments in support of its contention that mere access to greater resources by the State, in the present case through the MLAT between the United States and Mexico, cannot form the basis of a claim of inequality of arms. In particular, the State submits that this treaty merely enhances the State's ability to collect evidence against the accused and in no way restrains the defense from challenging that evidence or presenting his own evidence. The State also points in this respect to the fact that the U.S. Constitution requires the prosecution to turn over to the accused before trial all aggravating or mitigating evidence. Further, the State argues that neither the existence of the MLAT between the U.S. and Mexico nor the decision by the U.S. and Mexico not to apply the Inter-American Convention on Letters Rogatory to criminal matters affect the ability of a litigant, civil or criminal, from obtaining evidence through letters rogatory, as this process is rooted in custom between countries regardless of their treaty relations.

56. In support of its argument that equality of arms secures only procedural and not substantive equality, the State relies in particular upon the July 15, 1999 judgment of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY") in the case The Prosecutor v. Dusko Tadic.[FN21] In this case, the defense alleged that the lack of cooperation and the obstruction by certain external entities–the Government of the Republika Srpska and the civic authorities in Prijedor–prevented it from properly presenting its case at trial and accordingly that there was no "equality of arms" between the prosecution and defense at trial so as to frustrate the defendant's right to a fair trial. In responding to Tadic's argument, the Prosecution contended, inter alia, that the principle of equality of arms entitles both parties the same access to the powers of the court and the same right to present their cases, but does not call for equalizing the material and practical circumstances of the two parties. The ICTY Appeals Chamber ultimately rejected the defense position, on the basis that the defendant failed to show that the protection offered by the principles of equality of arms was not extended to him by the ICTY Trial Chamber. In reaching this conclusion, the Appeals Chamber held that "equality of arms obliges a judicial body to ensure that neither party is put at a disadvantage when presenting its case." The State regards Mr. Garza's claim as being markedly similar to that in the Tadic case, and contends that the Commission should similarly reject Mr. Garza's argument on this point.

[FN21] Case Nº IT-94-1-T, The Prosecutor v. Tadic, Judgment of July 15, 1999, International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber).

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57. Further, according to the State, the European Court of Human Rights and the United Nations Human Rights Committee have likewise interpreted equality of arms as protecting procedural rather than substantive equality, and cites in support cases including Dombo Beheer B.V. v. Netherlands[FN22] and B.d.B. et al. v. The Netherlands.[FN23] Applying these authorities in the context of the Petitioner's case, the State claims that neither the law nor the court imposed any conditions that placed Mr. Garza at a substantial disadvantage in relation to the prosecution, but rather that the procedural conditions at trial and at sentencing were the same for both parties.

[FN22] Eur. Court H.R., Dombo Beheer B.V. v. Netherlands (27 October 1993), A274.
[FN23] UNHRC, B.d.B. et al. v. The Netherlands, Comm. Nº 273/1989 (30 March 1989), U.N. Doc. Supp. Nº 46 (A/44/40) at 286 (1989).

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58. With respect to the rules of evidence applicable during Mr. Garza's sentencing hearing, the State agrees that the ordinary rules of evidence do not apply during a Federal capital sentencing proceeding in the United States, but argues that this works to the benefit and detriment of both parties and is therefore consistent with the nature of the equality of arms principle. Of particular significance in this regard, the State contends that the Petitioner's representatives misunderstand the purpose of a sentencing hearing which, according to the State, is not to prove guilt, but rather is meant to determine the appropriate punishment for the defendant's crimes, taking account of all relevant evidence.

59. Moreover, the State contends that the rules applicable to a sentencing hearing that permit liberal submission of evidence by both parties were developed principally to protect the defendant in capital cases, not the prosecution.[FN24] Accordingly, in the circumstances of the present case, the State is of the view that Mr. Garza was simply unable to marshal sufficient mitigating evidence to avoid the death sentence, and therefore that this case does not warrant a finding that federal law did not protect his rights to due process or a fair trial.

[FN24] State's Second Reply, dated September 25, 2000, citing the decision of the U.S. Supreme Court in the case Lockett v. Ohio 438 U.S. 586, 604 (1978) for the proposition that in all but the rarest kind of capital case the sentencing authority should be permitted to consider as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

IV. ANALYSIS

A. Commission's Competence

60. The Petitioner claims that the State has violated his rights under Articles I, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man. The State is a member of the Organization of American States that is not a party to the American Convention on Human Rights, as provided for in Article 20 of the Commission's Statute and Article 51 of the Commission's Regulations, and deposited its instrument of ratification of the OAS Charter on June 19, 1951.[FN25] The events raised in the Petitioner's claim occurred subsequent to the State's ratification of the OAS Charter. The Petitioner is a natural person, and the Petitioner's representatives are authorized under Article 26 of the Commission's Regulations to lodge the petition on his behalf. The Commission is therefore competent to examine this petition.

[FN25] The Inter-American Court of Human Rights and this Commission have previously determined that the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS member states that are not parties to the American Convention on Human Rights, as a consequence of Articles 3, 16, 51, 112, and 150 of the OAS Charter. See I/A Court H.R., Advisory Opinion OC-10/89 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, July 14, 1989, Ser. A Nº 10 (1989), paras. 35-45; I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49. See also Statute of the Inter-American Commission on Human Rights, Art. 20.

B. Admissibility

61. With respect to the admissibility of the Petitioner's petition, the information presented by the parties indicates that Mr. Garza unsuccessfully appealed his conviction and sentence to the U.S. Court of Appeals and the U.S. Supreme Court, the latter having dismissed his petition for a Writ of Certiorari and his petition for rehearing in 1996.[FN26] It also indicates that Mr. Garza pursued constitutional remedies before the U.S. District Court, the U.S. Court of Appeals and the U.S. Supreme Court, for alleged violations of his rights under the Due Process Clause of the U.S. Constitution, and was likewise unsuccessful, the U.S. Supreme Court having dismissed his final petition for a Writ of Certiorari on November 15, 1999. The State has not alleged or otherwise established that Mr. Garza has failed to exhaust the domestic remedies available to him in the United States. Accordingly, the Commission finds that the claims of violations of Articles I, XVIII and XXVI of the American Declaration contained in the Petitioner's petition of December 20, 1999 are not inadmissible for failure to exhaust domestic remedies in accordance with Article 37 of the Commission's Regulations.

[FN26] U.S. v. Garza, 519 U.S. 825 (1996); 519 U.S. 1022 (1996).

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62. In addition, the record in this case indicates that Mr. Garza's petition was lodged with the Commission on December 20, 1999, and therefore within 6 months of the dismissal by the U.S. Supreme Court of his final petition for a Writ of Certiorari on November 15, 1999. The State has not contested the timeliness of Mr. Garza's petition. The Commission therefore does not find the Petitioner's petition to be inadmissible for violation of the 6-month period under Article 38 of the Commission's Regulations.

63. Further, according to the Petitioner's representatives, the issue of Mr. Garza's execution has not been previously considered by the Commission, nor is it pending in another international proceeding for settlement. The State has not alleged that Mr. Garza's petition is duplicitous. Accordingly, the Commission finds that the Petitioner's petition is not inadmissible under Article 39 of the Commission's Regulations.

64. Finally, with respect to the requirements of Article 41 of the Commission's Regulations, the State has contended that Mr. Garza's petition should be considered inadmissible because it is manifestly ill-founded and fails to state facts that constitute a violation of any of the rights under the American Declaration. Having reviewed the Parties' observations and other material on the record in this matter, and in light of the heightened level of scrutiny that the Commission has traditionally applied in cases involving the implementation of capital punishment, the Commission considers that the Petitioner's petition is not manifestly groundless and contains facts that, if proven, may establish violations of Articles I, XVIII and XXVI of the American Declaration. Consequently, the Commission does not find Mr. Garza's petition to be inadmissible under Article 41 of the Commission's Regulations.

65. With regard to the Petitioner's September 22, 2000 "Request to Raise Additional Matters," in which the Petitioner's representatives allege violations of Mr. Garza's rights under Articles I and II of the Declaration in connection with the U.S. Justice Department's September 12, 2000 "Report on the Federal Death Penalty System: A Statistical Survey (1988-2000)," the State argues that these constitute new claims based upon new alleged facts and arguments that were not a part of the Petitioner's original petition, and which have not been raised before any U.S. court. The Petitioner's representatives have not alleged that Mr. Garza has exhausted domestic remedies in respect of these claims or that such remedies are not available or effective. Rather, they argue that any attempt to secure domestic relief would likely not produce results until shortly before Mr. Garza's scheduled execution date, and as a consequence would deprive the Commission of an opportunity to address the merits of these claims at that stage and prior to Mr. Garza's execution. Consequently, the Petitioner's representatives urge the Commission to consider these claims.

66. The Commission recognizes and is deeply concerned by the fact that its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned prisoners despite the fact that those prisoners have proceedings pending before the Commission. It is for this reason that the Commission requests precautionary measures pursuant to Article 29(2) of its Regulations, as it has in Mr. Garza's case, to require a state to stay a condemned prisoner's execution until the Commission has had an opportunity to investigate his or her claims. Anything less effectively deprives condemned prisoners of their right to petition in the inter-American human rights

system and causes them serious and irreparable harm. Accordingly, the Commission has on numerous occasions called upon the United States and other OAS member states to comply with the Commission's requests for precautionary measures in cases involving threats to the right to life and thereby properly and fully respect their international human rights obligations.[FN27]

[FN27] See e.g. IACHR, Press Communiqué 9/00, June 22, 2000, Regarding the Execution in the United States of Shaka Sankofa, formerly known as Gary Graham; IACHR, Press Communiqué 17/00, November 13, 2000, Regarding the Execution in the United States of Miguel Angel Flores.

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67. Notwithstanding these regrettable complications, however, the Commission is also obliged to apply the requirements prescribed by its Regulations and under general principles of international law governing the admissibility of claims presented to it, including the requirement that domestic remedies be invoked and exhausted. In the present case, the claims raised in the Petitioner's September 22, 2000 request constitute additional claims based upon new facts and evidence that, according to the information available, have not been raised before domestic courts in the United States. Moreover, the Petitioner has not alleged, and the Commission cannot conclude on the record before it, that domestic remedies are not available to address these claims, that the Petitioner has been prevented from exhausting them, or that such remedies would not be potentially effective.

68. Accordingly, based upon the information before it, the Commission concludes that the domestic remedies have not been invoked and exhausted in accordance with Article 37 of its Regulations, in connection with the claims raised in the Petitioner's Request to Raise Additional Matters dated September 22, 2000. Consequently, the Commission finds that the Petitioner's claims in this regard are inadmissible, without prejudice to the Petitioner's right to raise these claims before the Commission at such subsequent time that the requirements of the Commission's Regulations may be satisfied.

69. In accordance with the foregoing analysis of the requirements of the applicable provisions of the Commission’s Regulations, the Commission decides to declare as admissible the claims presented in the Petitioner's December 20, 1999 petition with respect to Articles I, XVIII, and XXVI of the American Declaration, and to proceed to examine the merits of these matters. The Commission also decides to declare as inadmissible the claims respecting Articles I and II of the Declaration raised by the Petitioner in his September 22, 2000 Request to Raise Additional Matters.

C. Merits

1. Standard of Review

70. Before addressing the merits of the present case, the Commission wishes to reaffirm and reiterate its well-established doctrine that it will apply a heightened level of scrutiny in deciding capital punishment cases. The right to life is widely-recognized as the supreme right of the human being, and the conditio sine qua non to the enjoyment of all other rights. The Commission

therefore considers that it has an enhanced obligation to ensure that any deprivation of life that an OAS member state proposes to perpetrate through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty,[FN28] and has been articulated and applied by the Commission in previous capital cases before it.[FN29]

[FN28] See e.g. I/A Court H.R., Advisory Opinion OC-16/99 (1 October 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 136 (finding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result"); Baboheram-Adhin et al. v. Suriname, Communication nos. 148-154/1983, adopted 4 April 1985, para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter “Ndiaye Report”), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trials to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.).
[FN29] See e.g. Report Nº 57/96 (Andrews v. United States), Annual Report of the IACHR 1997), paras. 170-171; Report Nº 38/00 (Baptiste v. Grenada), Annual Report of the IACHR 1999, paras. 64-66; Report Nº 41/00 (McKenzie et al. v. Jamaica), Annual Report of the IACHR 1999, paras. 169-171.
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71. The Commission also notes that this heightened scrutiny test applicable to death penalty cases is not precluded by the Commission's fourth instance formula, according to which the Commission in principle will not review the judgments issued by domestic courts acting within their competence and with due judicial guarantees.[FN30] In particular, where a possible violation of an individual's rights under applicable Inter-American human rights instruments is involved, the Commission has consistently held that the fourth instance formula has no application and the Commission may consider the matter.[FN31]

[FN30] See Report Nº 39/96 (Santiago Marzioni v. Argentina), Annual Report of the IACHR 1996, p. 76, paras. 48-52. See also Report Nº 29/88 (Clifton Wright v. Jamaica), Annual Report of the IACHR 1987-88, p. 154.
[FN31] See e.g. Marzioni v. Argentina, supra; Wright v. Jamaica, Case, supra; Baptiste v. Grenada, supra, para. 65; McKenzie et al. v. Jamaica, supra, para. 170.
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72. The Commission will therefore review the allegations of the Petitioner's representatives in the present case with a heightened level of scrutiny, to ensure in particular that the right to life, the right to due process, and the right to a fair trial as prescribed under the American Declaration have been properly respected by the State.

2. Pertinent Facts

73. In undertaking its analysis of the substance of the present case, the Commission will first set out its understanding, based upon the record before it, of the pertinent facts pertaining to Mr. Garza's trial and sentencing. These facts appear to be largely uncontested as between the parties, insofar as the parties have commented upon them.

74. Under U.S. constitutional law, both state governments and the Federal Congress have the authority to establish criminal penalties for matters falling within their respective jurisdictions.[FN32] In addition, the U.S. Supreme Court has confirmed that such penalties may as a matter of Federal constitutional law include capital punishment, as the Court has concluded that the death penalty does not per se constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment to the U.S. Constitution.[FN33] In 1972, however, the U.S. Supreme Court issued a ruling that had the effect of invalidating capital punishment throughout the United States, both in the Federal criminal justice system and in all of the states that provided for the death penalty, based upon the arbitrary manner in which judges and juries were applying the penalty in individual cases.[FN34] A number of states revised their death penalty legislation relatively expeditiously in order to comply with the standards prescribed by the Supreme Court. The federal government did not do so, however, until November 18, 1988, when President Ronald Reagan signed into law the Anti-Drug Abuse Act of 1988, rendering the death penalty available as a possible punishment for certain drug-related offenses. Subsequently, in September 1994, the Federal Death Penalty Act was enacted, which provided that over 40 offenses could be punished as capital crimes, and in 1996, the Antiterrorism and Effective Death Penalty Act came into effect that further extended the list of Federal capital crimes to include additional Federal offenses.[FN35]

[FN32] See e.g. Nowak et al., Constitutional Law 168-9 (2d ed. 1983) (indicating that Congress has the inherent power to establish criminal penalties for actions that interfere with any federal interest, as well as independent authority to do so under the federal "commerce" power).
[FN33] See e.g. Gregg v. Georgia, 428 U.S. 153 (1976).
[FN34] See Furman v. Georgia, 408 U.S. 238.
[FN35] U.S. Department of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000), September 12, 2000.

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75. In the circumstances of Mr. Garza's case, the record indicates that in 1993, Mr. Garza was tried and convicted in the United States District Court, Southern District of Texas, under U.S. Federal law on three counts of killing in the furtherance of a continuing criminal enterprise, in addition to seven other counts that included conspiring to import over 1,000 kilograms of

marijuana and possession with intent to distribute over 1,000 kilograms of marijuana. More particularly, Mr. Garza was prosecuted and sentenced under Title 21, Section 848 of the U.S. Code (21 U.S.C. Section 848) for the killings of Gilberto Matos, Erasmo De La Fuente and Thomas Rumbo.

76. 21 U.S.C. Section 848(e)(1)(A) establishes criminal responsibility and punishment, including the death penalty, for killing in the course of a continuing criminal enterprise, as follows:

any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; [emphasis added]

77. 21 U.S.C. Section 848 also prescribes certain preconditions and procedures that are necessary in order for the State to seek the death penalty, and for a jury or court to impose the death penalty, in a particular case. In particular, Section 848(h) requires that whenever the Government seeks the death penalty for an offense under Section 848 for which one of the sentences provided is death (including Section 848(e)) the attorney for the Government, at a reasonable time before trial or acceptance by the court of a plea of guilty, "shall sign and file with the court, and serve upon the defendant, a notice (a) that the Government in the event of conviction will seek the sentence of death; and (b) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as a basis for the death penalty."

78. In addition, under 21 U.S.C. Section 848(i), where the government has filed a notice required under Section 848(h) and the defendant is found guilty or pleads guilty to an offense under Article 848(e), a separate sentencing hearing must be conducted to determine the punishment to be imposed. In cases in which the defendant was tried and convicted before a court sitting with a jury, the sentencing hearing must be conducted before the jury that determined the defendant's guilt or, upon motion of the defendant and with the approval of the government, before the court alone.

79. Moreover, 21 U.S.C. Section 848 prescribes a specific and detailed regime for the proof and consideration of aggravating and mitigating factors during a sentencing hearing under Article 848(i), in determining whether a defendant should be sentenced to death. In particular, Article 848(j) dispenses with the rules governing the admission of evidence at criminal trials and mandates the liberal consideration of evidence of aggravating and mitigating factors as follows:

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no pre-sentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been

provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence. [emphasis added]

80. It is significant to note that Section 848(j) permits the introduction of evidence of aggravating or mitigating factors regardless of its admissibility under the rules governing the admission of evidence at criminal trials, and that the existence of any aggravating factors must be established by the Government "beyond a reasonable doubt".

81. 21 U.S.C. Sections 848(m) and (n) in turn prescribe, respectively, pertinent statutory aggravating and mitigating factors to be considered during a capital sentencing hearing as follows:

m) Mitigating factors

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:
(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
(3) The defendant is punishable as a principal (as defined in section 2 of title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.
(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.
(5) The defendant was youthful, although not under the age of 18.
(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.
(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.
(9) The victim consented to the criminal conduct that resulted in the victim's death.
(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

(n) Aggravating factors for homicide

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant –
(A) intentionally killed the victim;
(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;
(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim; (D) intentionally engaged in conduct which –

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.
(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.
(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.
(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.
(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.
(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
(8) The defendant committed the offense after substantial planning and premeditation.
(9) The victim was particularly vulnerable due to old age, youth, or infirmity.
(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this subchapter in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 859 of this title.
(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

82. Finally, 21 U.S.C. Section 848(k) prescribes the procedure to be followed by a jury or court in identifying and weighing aggravating and mitigating factors in determining whether the death penalty is to be imposed upon a defendant:

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

83. In summary, Section 848(k) requires the jury to reach a unanimous verdict on, at a minimum, the existence of one or more of the aggravating factors in each of Sections 848(n)(1) and 848(n)(2) to (12) before a death sentence may be imposed. In the event of such a verdict, Section 848(k) further mandates the jury to determine whether the aggravating factors "sufficiently outweigh" any mitigating factors or are otherwise sufficient to justify a death sentence.

84. In the circumstances of Mr. Garza's case, the process by which the jury determined Mr. Garza's punishment was described in the decision of the Firth Circuit Court of Appeals disposing of Mr. Garza's statutory appeal as follows:

The day after the jury's guilty verdict, the district court convened the penalty hearing. The jury made a binding recommendation of a death sentence for each of Garza's §848(e) convictions after taking steps required by the statute. First, as to each murder, the jury was asked to decide whether the government had established at least one of the four aggravating "intent" factors in §848(n)(1). §848(j). For the De La Fuente murder, the jury found that Garza had intentionally killed De La Fuente, (n)(1)(A), and that Garza had intentionally engaged in conduct intending that De La Fuente be killed and/or that lethal force be employed against him, (n)(1)(C). For the Rumbo murder, the jury again found both (n)(1)(A) and (n)(1)(C) and for the Matos murder, the jury found only (n)(1)(c), If the jury had not unanimously found one of these factors to exist for a murder, it could not have recommended a death sentence for that murder. §848(k).

Having found the requisite aggravating intent for all three killings, the jury then considered the second category of statutory aggravating factors derived from §848(n)(2)-(12). In this step, the jury found that Garza had committed all three murders after substantial planning and premeditation, (n)(8), and that Garza procured De La Fuente and Matos' killing by payment of something of pecuniary value, (n)(6). Again, if the jury had not unanimously found at least one of these enumerated factors for each of these killings, it could not have recommended death for that particular murder. §848(k).

Having found these second tier statutory aggravators to exist, the jury was directed to determine whether the government had proven any of its non-statutory aggravators. In response to this inquiry, the jury found that Garza was responsible for five additional killings, that he procured two of these killings by payment of something of a pecuniary value, that four of these killings were committed after substantial planning and premeditation, that two of these killings were committed in furtherance of the CCE, and that Garza represented a continuing danger to the lives of others based upon his pattern of violent and brutal acts.

The jury next considered whether Garza had proven any mitigating factors. Garza's jury found that Garza had established the statutory mitigators that he was under unusual and substantial duress, that he was youthful, that other defendants who were equally culpable would not be punished by death and that the victims consented to the criminal conduct that resulted in their deaths. Although it did not specify which one, the jury also found at least one mitigator from the list of non-statutory mitigators that Garza had introduced.

After making these findings, the jury was instructed to balance the aggravators against the mitigators. The jury could recommend death only if it unanimously found that the aggravators sufficiently outweighed the mitigators to justify a sentence of death. Even if it found the aggravators sufficiently weighty, the jury was never required to recommend death. After considering the questions required by the statute, Garza's jury recommended a death sentence. Pursuant to §848(o), the jurors certified that they arrived at this decision without considering the race, color, religion, national origin or sex of Garza or his victims. After the jury recommended death, the district court imposed a death sentence as the statute mandated.[FN36] [emphasis added]

[FN36] US v. Flores; US v. Garza, 63 F 3d 1342, 1366-1367 (1995) (footnotes omitted).

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85. As the foregoing description suggests, during Mr. Garza's sentencing hearing the prosecution introduced as aggravating factors evidence pertaining to five additional killings that Mr. Garza was alleged to have committed, four of which related to the deaths of Oscar Cantu, Antonio Nieto, Bernabe Sosa and Fernando Escobar-Garcia in Mexico.[FN37] The information on the record also indicates that the Mexican authorities had been unable to solve any of the four homicides, but that the U.S. government sent Customs agents to Mexico to re-investigate the cases. According to the Petitioners, the prosecution offered no physical evidence tying Mr. Garza to the crimes. The only evidence directly linking him to the murders was the testimony of three accomplices, Gregory Srader, Israel Flores and Jesus Flores, who received promises of substantially reduced sentences in exchange for their testimony. The evidence presented by the prosecution during the sentencing phase related almost entirely to the unadjudicated offenses, and consisted of the testimony of the accomplices, US customs agents and pathologists.[FN38]

[FN37] See US v. Garza, 165 F 3d 312 (1999).
[FN38] See Petitioner's Petition for a Writ of Certiorari to the U.S. Supreme Court, supra, p. 3.
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86. The foregoing description also confirms that during the sentencing hearing, the jury concluded beyond a reasonable doubt that Mr. Garza committed the four killings in Mexico, and considered his responsibility for these crimes in determining whether he should be sentenced to death.

3. The Right to Life under Article I of the American Declaration

87. Article I of the Declaration provides as follows:
Right to life, liberty and person security.
Article I. Every human being has the right to life, liberty and the security of his person.

88. In addressing the allegations raised by the Petitioner's representatives in this case, including their claim that Mr. Garza's death penalty violates 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.[FN39] 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.[FN40]

[FN39] 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").
[FN40] 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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89. 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.[FN41]

[FN41] 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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90. Against this backdrop of interpretative principles, the Commission observes in relation to the Petitioner's alleged violations of Article I of the Declaration that this provision is silent on the issue of capital punishment. In past decisions, however, the Commission has 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.[FN42]

[FN42] See e.g. Roach and Pinkerton v. US, supra; Andrews v. US, supra.
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91. 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,[FN43] denying an accused strict and rigorous judicial guarantees of a fair trial,[FN44] and notorious

and demonstrable diversity of practice within a member state that results in inconsistent application of the death penalty for the same crimes.[FN45]

[FN43] See Andrews v. US, supra, para. 177.
[FN44] See Andrews v. US, supra, para. 172 (finding that in capital punishment cases, states have an "obligation to observe rigorously all the guarantees for an impartial trial.")
[FN45] See e.g. Roach and Pinkerton v. US, supra, para. 61.

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92. Having carefully reviewed the information and evidence submitted by the parties in Mr. Garza's case, the Commission cannot conclude that pertinent international law has developed to the present time, so as to alter the Commission's standing interpretation of Article I of the Declaration. Rather, the Commission remains of the view that the American Declaration, while not proscribing capital punishment altogether, does prohibit its application in a manner that would render a deprivation of life arbitrary.

93. The Commission similarly recognizes and takes note of evidence, including that cited by the Petitioner's representatives, which suggests the existence of an international trend toward the restrictive application of the death penalty. Indeed, the Inter-American Court of Human Rights has interpreted Article 4 of the American Convention on Human Rights as adopting an approach that is "clearly incremental in character, that is, 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."[FN46]

[FN46] I/A Court H.R., Advisory Opinion OC-3/83 "Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the ACHR)," 8 September 1983, (Ser. A) Nº 3 (1993), para. 57.

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94. In this respect, the Commission is deeply troubled by the fact that the United States has not only chosen to re-introduce the death penalty at the Federal level after an interruption of over 35 years, but has also chosen to extend the penalty on at least two occasions to additional crimes. The Commission, like other international authorities,[FN47] considers that these courses of action are inconsistent with the spirit and purpose of numerous international human rights instruments to which the State is a signatory or a party,[FN48] and are at odds with a demonstrable international trend toward more restrictive application of the death penalty. Interpreted in the context of these contemporary developments, the Commission likewise considers that the State's actions are not consistent with the spirit and purposes underlying the American Declaration.

[FN47] See similarly U.N. Special Rapporteur on extra-judicial, summary or arbitrary executions, 1998 Report on the United States, U.N. Doc. Nº E/CN.4/1998/68/Add.3.

[FN48] In this connection, the Commission observes that the United States signed the American Convention on Human Rights on June 1, 1977. As a consequence, the State is obliged under general principles of treaty interpretation to refrain from acts which would defeat the object and purpose of the American Convention. See Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969), Article 18(a).

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95. The Commission is unable to conclude, however, based upon the information before it, that the international legal norms binding upon the State by way of Article I of the American Declaration precluded the United States from applying the death penalty in the circumstances of Mr. Garza's case. In particular, the Commission cannot find on the evidence in the record that the State abolished the death penalty under its law so as to preclude it from applying this penalty to Mr. Garza's crimes. Rather, the evidence indicates that the death penalty continued to be applied in the United States as early as 1976, albeit at the state level. Further, the Commission is not satisfied based upon the information available that the norms of international law under Article I of the Declaration, as informed by current developments in international human rights law, prevented the State from prescribing the penalty for the crimes for which Mr. Garza was tried and convicted. In particular, the Commission does not find before it sufficient evidence establishing the existence of an international legal norm binding upon the United States, under Article I of the Declaration or under customary international law, that prohibited the extension of the death penalty to Mr. Garza's crimes, provided that they are properly considered to be of a "most serious" nature.[FN49] The Commission notes further in this connection that Mr. Garza was convicted, among other offenses, of multiple homicides in the course of a continuing criminal enterprise, convictions with which he has not taken issue in these proceedings. The Commission cannot find that crimes of this nature do not constitute "most serious crimes" to which the death penalty may be imposed without rendering the execution arbitrary contrary to Article I of the Declaration.[FN50] For similar reasons, the Commission cannot conclude that the State's decision to seek the death penalty in the circumstances of Mr. Garza's crimes lacked sufficient justification so as to be rendered arbitrary under Article I of the Declaration.

[FN49] The Commission notes in this respect that neither Article 3 of the Universal Declaration of Human Rights nor Article 6 of the International Covenant on Civil and Political Rights explicitly prohibit the extension of capital punishment to new crimes. With respect to the practice of the United States in this regard, the Commission observes that when it ratified the International Covenant on Civil and Political Rights, that State reserved in respect of Article 6 of that instrument the right to impose capital punishment "under any existing or future laws." See U.N. Doc. ST/LEG/SER.E/13, p. 175. In addition, the Inter-American Court of Human Rights appears not to have foreclosed the possibility that a state party may, in appropriate circumstances, enter a reservation in respect of the penultimate sentence of Article 4(2) of the Convention, prohibiting the extension of the death penalty to crimes to which it does not presently apply. See Advisory Opinion OC-3/83, supra, paras. 59, 70.

[FN50] See e.g. American Convention on Human Rights, Article 4(2); International Covenant on Civil and Political Rights, Art. 2(6); U.N. Human Rights Committee, General Comment 6(16), para. 7 (stating that the expression "most serious crime" must be read "restrictively", because of the "exceptional" nature of the death penalty); Safeguards Guaranteeing Protection of Those

Facing the Death Penalty, ESC Res. 1984/50, endorsed by G.A. Res. 39/118 (declaring that the ambit of the term "most serious crimes" should not go "beyond international crimes, with lethal or other extremely grave consequences.")

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96. Based upon the foregoing analysis and the record in the present matter, therefore, the Commission does not find a violation of Mr. Garza's rights under Article I of the Declaration in relation to the application per se of the death penalty in the circumstances of his case.

4. The Rights to Due Process and a Fair Trial under Articles XVIII and XXVI of the American Declaration

97. Articles XVIII and XXVI of the Declaration provide as follows:

Right to a fair trial.

Article XVIII. 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 of his fundamental constitutional rights.

Right to due process of law.

Article XXVI. Every accused person is presumed to be innocent until proven 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.

98. As indicated previously, the Petitioner's representatives have challenged the procedure employed by the State in sentencing Mr. Garza to death under Articles XVIII and XXVI of the American Declaration in two respects, both of which relate to the introduction during Mr. Garza's sentencing hearing of evidence of unadjudicated murders alleged to have been committed by Mr. Garza in Mexico. The Commission wishes to point out in this regard that the Fifth Circuit U.S. Court of Appeals did not deal explicitly with these aspects of Mr. Garza's constitutional claims on either occasion when these issues were raised before that Court.[FN51] To this extent, therefore, the Commission appears to be the first tribunal to expressly analyze the compatibility of this process with Mr. Garza's fundamental human rights.

[FN51] See U.S. v. Garza, 165 F 3d 312, at 313 (stating that "[e]ven though this Court did not expressly discuss Garza's challenge to the aggravating factors evidence, the issue nevertheless received full consideration and a ruling").

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99. First, the Petitioner's representatives argue that evidence of the four unadjudicated murders in Mexico should not have been introduced at all for the purposes of sentencing,

essentially because consideration of evidence of this nature failed to satisfy the standard of due process applicable when trying individuals for capital crimes.

100. In this connection, the Commission reiterates the fundamental significance of ensuring full and strict compliance with due process protections in trying individuals for capital crimes, from which there can be no derogation. The Commission has recognized previously that, due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether death is the appropriate punishment in a given case.[FN52] Further, the Inter-American Court of Human Rights recently noted the existence of an "internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases," such that "[i]f the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life."[FN53] The U.S. Supreme Court has similarly emphasized in addressing allegations of due process violations in capital cases that it is of vital importance to a defendant and to the community more broadly that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion.[FN54]

[FN52] See e.g. McKenzie et al. v. US, supra, para. 188, referring in part to Woodson v. North Carolina, 449 L Ed 944, 961 (U.S.S.C.).
[FN53] 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.").
[FN54] See e.g. Gardner v. Florida, 430 U.S. 349, 357-358.

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101. Consistent with these fundamental principles, the Commission considers that Articles I, XVIII and XXVI of the Declaration must be interpreted and applied in the context of death penalty prosecutions so as to give stringent effect to the most fundamental substantive and procedural due process protections.[FN55] The essential requirements of substantive due process in turn include the right not to be convicted of any act or omission that did not constitute a criminal offense, under national or international law, at the time it was committed,[FN56] and the right not to be subjected to a heavier penalty than the one that was applicable at the time when the criminal offense was committed.[FN57] The requisite procedural due process protections include most fundamentally the right of a defendant to be presumed innocent until proven guilty according to law,[FN58] the right to prior notification in detail of the charges against him,[FN59] the right to adequate time and means for the preparation of his defense,[FN60] the right to be tried by a competent, independent and impartial tribunal, previously established by law,[FN61] the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing and to communicate freely and privately with

his counsel,[FN62] and the right not to be compelled to be a witness against himself or to plead guilty.[FN63]

[FN55] See similarly Advisory Opinion OC-16/99, supra, para. 136 (concluding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.").

[FN56] Universal Declaration of Human Rights, Proclaimed by General Assembly Resolution 217 (III) of December 10, 1948, U.N. GAOR, 3rd Sess., Res. (A/810), p. 71, Art. 11(1); American Declaration of the Rights and Duties of Man, Art. XXVI; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Art. 15(1); American Convention on Human Rights, Art. 9 ; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Art. 7.

[FN57] Universal Declaration of Human Rights, Art. 11(2); International Covenant on Civil and Political Rights, Art. 15(1); American Convention on Human Rights, Art. 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 7.

[FN58] Universal Declaration of Human Rights, Art. 11(1); American Declaration of the Rights and Duties of Man, Art. XXVI; International Covenant on Civil and Political Rights, Art. 14(2); American Convention on Human Rights, Art. 8(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(2).

[FN59] Universal Declaration of Human Rights, Art. 11(1); International Covenant on Civil and Political Rights, Art. 14(3)(a); American Convention on Human Rights, Art. 8(2)(b); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(3)(a).

[FN60] Universal Declaration of Human Rights, Art. 11(1); International Covenant on Civil and Political Rights, Art. 14(3)(b); American Convention on Human Rights, Art. 8(2)(c); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(3)(b).

[FN61] Universal Declaration of Human Rights, Art. 10; American Declaration of the Rights and Duties of Man, Arts. XVIII, XXVI; International Covenant on Civil and Political Rights, Art. 14(1); American Convention on Human Rights, Art. 8(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(1).

[FN62] Universal Declaration of Human Rights, Art. 11(1); International Covenant on Civil and Political Rights, Art. 14(3)(b), (d); American Convention on Human Rights, Art. 8(2)(d); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(3)(c).

[FN63] See International Covenant on Civil and Political Rights, Art. 14(3)(g); American Convention on Human Rights, Art. 8(2)(g). See also Advisory Opinion OC-16/99, supra, para. 117 (identifying the right not to incriminate oneself as one example of a new procedural right that has developed as part of the right to the due process of law under international human rights law).

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102. The Commission considers that these protections apply to all aspects of a defendant's criminal trial, regardless of the manner in which a state may choose to organize its criminal proceedings.[FN64] Consequently, where, as in the present case, the State has chosen to establish separate proceedings for the guilt/innocence and sentencing stages of a criminal

prosecution, the Commission considers that due process protections nevertheless apply throughout.

[FN64] The Commission has similarly found in the context of the American Convention on Human Rights that the due process guarantees under Article 8 of the Convention apply to the sentencing phase of the victim's capital prosecution so as to guarantee him an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of his or her case. See Baptiste, supra, paras. 91, 92; McKenzie et al., supra, at paras. 204, 205. See similarly Eur. Comm. H.R., Jespers v. Belgium, 27 D.R. 61 (1981) (applying the principle of equality of arms to sentencing proceedings).

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103. It is in light of the above principles that the Commission has analyzed the allegations of the Petitioner's representatives regarding the conduct of Mr. Garza's sentencing proceeding. In this respect, several facts, as described previously, are particularly relevant to determining this aspect of his claim. First, the parties agree that during Mr. Garza's sentencing hearing, the prosecution introduced evidence relating to four additional murders that Mr. Garza was alleged to have committed in Mexico. Mr. Garza was never previously charged or convicted of these crimes; indeed the Mexican authorities were not able to resolve or prosecute them, which resulted in their "unadjudicated" status. Moreover, the Petitioner's representatives have alleged, and the State has not disputed, that these murders could not have been prosecuted under U.S. Federal law at the time that they were committed, as they did not occur within the special maritime or territorial jurisdiction of the United States, a prerequisite for prosecuting the crime of murder under U.S. federal law.[FN65] The evidence presented by the prosecution consisted of the testimony of several alleged accomplices to these murders, who agreed to testify in exchange for substantial reductions in their sentences.

[FN65] See 18 U.S.C. Section 1111(b) (providing that "[w]ithin the special maritime and territorial jurisdiction
of the United States, Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment
for life; Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.").

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104. It also appears to be common ground, as supported by the record and judicial decisions in Mr. Garza's case, that the jury was required to conclude, and in fact did conclude "beyond a reasonable doubt" on the evidence presented that Mr. Garza committed each of these four murders. Finally, it is apparent from the record that the jury considered Mr. Garza's responsibility for these additional murders in determining whether he should be sentenced to the death penalty.

105. Based upon these facts, the Commission can only conclude that during his criminal proceeding, Mr. Garza was not only convicted and sentenced to death for the three murders for which he was charged and tried in the guilt/innocence phase of his proceeding; he was also convicted and sentenced to death for the four murders alleged to have been committed in Mexico, but without having been properly and fairly charged and tried for these additional crimes. Considered in this light, in the Commission's view, the introduction of evidence of this nature and in this manner during Mr. Garza's sentencing hearing was inconsistent with several fundamental principles underlying Articles XVIII and XXVI of the Declaration.

106. First, based upon the record in this case, the United States would have been prevented from prosecuting Mr. Garza for these additional crimes under the nullum crimen sine lege principle, as U.S. federal law did not render conduct of this nature perpetrated in Mexico as a crime under U.S. law at the time that Mr. Garza was alleged to have committed them. To this extent, then, the State appears to be seeking to do indirectly what it cannot do directly, namely secure responsibility and punishment on the part of Mr. Garza for four murders through a sentencing hearing, which are otherwise outside of U.S. federal jurisdiction to prosecute.

107. In addition, it cannot be said that Mr. Garza was tried for these four additional murders before an impartial tribunal. Rather, the Commission is of the view that the jury that sentenced Mr. Garza could not reasonably have been considered impartial in determining his criminal liability for the four unadjudicated murders in Mexico when the same jury had just convicted Mr. Garza of three murders. The Commission has previously articulated the international standard on the issue of “judge and juror impartiality” as employing an objective test based on “reasonableness and the appearance of impartiality”.[FN66] In the Commission’s view, it cannot reasonably be contended that the facts concerning these additional four murders were presented to an untainted, unbiased jury in a forum in which the full protections of the rights under the American Declaration were afforded to Mr. Garza. To the contrary, presentation of evidence of prior criminal conduct is generally considered to be irrelevant and highly prejudicial to the determination of guilt for a current criminal charge. This conclusion is corroborated by the State’s own Federal Rules of Evidence, which preclude the introduction of evidence of prior crimes during the guilt/innocence phase of a criminal trial, unless it is relevant to proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[FN67]

[FN66] Andrews v. US, supra, para. 159.

[FN67] See Federal Rules of Evidence, R. 404(b). See also Gregg v. Georgia, 428 U.S. 153, 190 (noting that much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question).

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108. Further, the prejudice resulting from the determination of Mr. Garza’s guilt for four additional murders during his sentencing hearing was compounded by the fact that lesser standards of evidence were applicable during the sentencing process. As the Petitioner’s representatives have pointed out, the application of strict rules of evidence during trials of criminal charges, where the onus is solely upon the prosecution, is generally intended to protect

the defendant from conviction based upon information that is prejudicial or unreliable.[FN68] Such protections were not, however, applicable when the jury found Mr. Garza responsible for the four murders in Mexico, as is clear from the terms of 21 U.S.C. Section 848(j). Consequently, Mr. Garza was not afforded the strictest and most rigorous standard of due process when his liability for the four foreign murders was determined.

[FN68] See e.g. id.

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109. The State appears to argue in this respect that the unadjudicated murders were simply another aggravating factor properly taken into account in determining the appropriate sentence for Mr. Garza. The Commission must emphasize, however, that a significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense, such as those enumerated in 21 U.S.C. 848(n), and an effort to attribute to an offender individual criminal responsibility for violations of additional serious offenses that have not, and indeed could not under the State's criminal law, be charged and tried pursuant to a fair trial offering the requisite due process guarantees. The State itself asserts that the purpose of a sentencing hearing is to determine the appropriate punishment for a defendant's crime, not to prove guilt. Yet proving Mr. Garza's guilt for the four unadjudicated murders so as to warrant imposition of the death penalty was, by the Government's own admission, precisely the intended and actual effect of its effort in introducing evidence in this regard during Mr. Garza's sentencing hearing.

110. Based upon the foregoing, the Commission considers that the State's conduct in introducing evidence of unadjudicated foreign crimes during Mr. Garza's capital sentencing hearing was antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes. Accordingly, the Commission finds that the State is responsible for imposing the death penalty upon Mr. Garza in a manner contrary to his right to a fair trial under Article XVIII of the American Declaration, as well as his right to due process of law under Article XXVI of the Declaration.

111. The Commission also concludes that, by sentencing Mr. Garza to death in this manner, and by scheduling his execution for December 12, 2000 and thereby exhibiting its clear intention to implement Mr. Garza's sentence, the State had placed Mr. Garza's life in jeopardy in an arbitrary and capricious manner, contrary to Article I of the Declaration. In addition, to execute Mr. Garza pursuant to this sentence would constitute a further deliberate and egregious violation of Article I of the American Declaration.

112. In light of the Commission's conclusion that evidence pertaining to the four unadjudicated murders should not have been introduced during Mr. Garza's sentencing hearing, the Commission does not consider it necessary to determine whether, in the alternative, introduction of this evidence violated Mr. Garza's right to equality of arms and was for this reason contrary to the Declaration.

V. PROCESSING OF REPORT Nº 109/00 PREPARED PURSUANT TO ARTICLE 53 OF THE REGULATIONS OF THE COMMISSION

113. On December 4, 2000, the Commission adopted Report 109/00 pursuant to Article 53 of its Regulations, setting forth its analysis of the record, findings and recommendations.

114. Report 109/00 was transmitted to the State on December 5, 2000. In light of Mr. Garza's then-pending execution on December 12, 2000 and the State's failure to clearly and adequately respond to and comply with the Commission's request for precautionary measures in the matter, the Commission also decided to transmit Report 109/00 to the Petitioner's representatives, and to provide the State a period of 5 days to comply with the Commission's first recommendation, namely to commute Mr. Garza's sentence, and a period of 90 days to comply with the Commission's remaining recommendations.

115. By communication dated March 6, 2001 and received by the Commission on the same date, the State delivered a response to Report 109/00. In its response, the State indicated as follows:

With respect to admissibility, we reiterate the arguments set forth in our response of November 16, 2000, summarized in Part III(B), paragraphs 44-59 of Report 109/00. Our essential position is that the petition does not state facts that would constitute a violation of the American Declaration and is therefore manifestly groundless.

With respect to the Commission's reference to precautionary measures in Part IV(B), para. 66, we also reiterate our view that the Commission's authority to request "precautionary measures," based on Article 29 of the Commission's regulations, is non-binding in nature.

Finally, with respect to the Commission's conclusions in Part IV(C)(4) that Mr. Garza's rights to due process and a fair trial under Articles XVIII and XXVI of the American Declaration were violated, we note that these conclusions are in conflict with jurisprudence based on the Eighth Amendment to the U.S. Constitution.

This jurisprudence requires the provision of all relevant information to a capital jury before it makes a sentencing determination. Indeed, the rationale on which the Commission recommends invalidating Garza's death sentence was presented to the appropriate federal courts in collateral review and rejected by them as not affording a basis for relief.

116. Having considered the State's response, the Commission makes the following additional observations. With respect to the State's submission respecting the admissibility of the Petitioner's claims, the Commission notes that it would be improper to re-examine its pronouncement on admissibility at this stage in the proceedings; this would only be appropriate in exceptional circumstances when substantial material errors or elements of fact are present which, had they been taken into account, would have substantially modified the decision on admissibility. The Commission does not consider that the State has raised any such circumstances in the present case.

117. With respect to the State's submissions on the non-binding nature of the Commission's precautionary measures, the Commission previously expressed in this Report its profound concern regarding the fact that its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned persons, despite the fact that those individuals have proceedings pending before the Commission. It is for this reason that in capital cases the Commission requests precautionary measures from states to stay a condemned prisoner's execution until the Commission has had an opportunity to investigate his or her claims. Moreover, in the Commission's view, OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate. Particularly in capital cases, the failure of a member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint emasculates the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals,[FN69] and accordingly is inconsistent with the state's human rights obligations.

[FN69] Other international tribunals have similarly recognized interim stays of execution as fundamental prerequisites to the efficacy of proceedings pertaining to the imposition of capital punishment. See e.g. I/A Court H.R., James et al. Case, Order for Provisional Measures of 29 August 1998; Annual Report 1998, p. 317; Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, Nº 104, paras. 22-28; Eur. Court H.R., Ocalan v. Turkey, Indication of Interim Measures Pursuant to Rule 39 of the Rules of the European Court of Human Rights, 30 November 1999; UNHRC, Dante Piandiong and others v. The Philippines, Communication Nº 869/1999, U.N. Doc. CCPR/C/70/D/869.1999 (19 October 1999), paras. 5.1-5.4.

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118. In the present case, the Commission has not only requested precautionary measures from the State as an interim measure, but has examined Mr. Garza's complaint pursuant to the Commission's Statute and Regulations and has determined the State's international responsibility for violations of Mr. Garza's rights under the American Declaration. The Commission has also determined that these violations have vitiated the propriety of Mr. Garza's death sentence and has therefore recommended commutation as the appropriate remedy. For the State to proceed with Mr. Garza's execution in these circumstances would give rise to its responsibility for serious and deliberate violations of its international obligations under the OAS Charter and the American Declaration.

119. As for compliance with the Commission's recommendations, the State has not provided any information in this respect, but rather has objected to the Commission's determination of the State's responsibility for violations of Mr. Garza's rights under Articles XVIII and XXVI of the American Declaration because the United States considers this finding to be inconsistent with its domestic jurisprudence. Having considered the State's observations, and in light of the

fundamental principle according to which states may not invoke the provisions of their internal law as justification for their failure to perform a treaty,[FN70] the Commission has decided to ratify its conclusions and reiterate its recommendations, as set forth below.

[FN70] Vienna Convention on the Law of Treaties, Art. 27 (providing that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). See also I/A. Court H.R., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of 9 December 1994, Ser. A Nº 14 (1994), para. 35 (recognizing that "[p]ursuant 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.")

VI. CONCLUSIONS

120. The Commission, based upon the foregoing considerations of fact and law, and in light of the response of the State to Report 109/00, hereby ratifies its conclusion that the State is responsible for violations of Articles I, XVIII and XXVI of the American Declaration in condemning Juan Raul Garza to the death penalty. The Commission also hereby ratifies its conclusion that the United States will perpetrate a grave and irreparable violation of the fundamental right to life under Article I of the American Declaration, should it proceed with Mr. Garza's execution based upon the criminal proceedings under consideration.

VII. RECOMMENDATIONS

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE UNITED STATES:

1. Provide Mr. Garza with an effective remedy, which includes commutation of sentence.

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

VIII. PUBLICATION

122. In light of the above, and in conformity with Articles 53(3) and 53(4) of the Commission's Regulations, the Commission decided to transmit this Report to the State and to

the Petitioner's representatives, to publish this Report, and to include it in its Annual Report to the General Assembly of the OAS. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until they have been complied with by the United States.

Done and signed in Santiago, Chile, on the 4 day of the month of April, 2001. (Signed): Claudio Grossman, Chairman; Juan Méndez, First Vice-Chairman,. Marta Altolaguirre, Second Vice-Chair; Peter Laurie and Julio Prado Vallejo, Commissioners. The concurring opinion of Hélio Bicudo is included immediately following this report.

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 de Bogotá in May and June of 1948, affirms that "Every human being has the right to life, liberty and the security of his person" (Article I) 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 II).

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. This 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, 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 of protection of human rights.[FN71]

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[71] 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 Belem do Pará), approved in Belem 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 Belem 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 Belem 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.[FN72]

[FN72] 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, on 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, São Paulo, Brazil)

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 Protección 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 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 of 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 of 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 of 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 Cançado 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. (Cançado 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 context 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 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 the city of Santiago, Chile, April 4, 2001. (Signed): Hélio Bicudo.