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I. SUMMARY

1. On August 17, 1994, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition from The Lawyers Committee for Human Rights (hereinafter "the petitioners") against the Republic of Haiti (hereinafter "Haiti", "the Haitian State" or "the State"), alleging violation of the rights to life (Article 4), a fair trial (Article 8) and judicial protection (Article 25), all in conjunction with the duty to respect rights (Article 1(1)) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), to the detriment of Mr. Guy Malary and his surviving next-of-kin.

2. Mr. Guy Malary, appointed Minister of Justice by President Jean-Bertrand Aristide during his first term, continued to hold that office under the de facto military government of Raoul Cédras. The petitioners alleged that the murder of Mr. Malary was planned and carried out by security agents of the Haitian State under the military regime in Port-au-Prince on October 14, 1993. They say that the proceeding opened to investigate and punish those responsible was beset with flaws, such as bias of the jury that judged the two suspects who were acquitted, and negligence shown by the judicial authorities in the investigation. They allege that in the more than eight years since the murder of Mr. Malary, Haiti has not carried out an investigation of the events that was in any way adequate, and that it has intentionally failed to bring those responsible for the crime to justice and to compensate Mr. Malary's family.

3. The State initially argued that the events that gave rise to the petition occurred under the de facto regime, and, therefore, they did not lead to the international responsibility of the State. After the negotiations designed to arrive at a friendly settlement,[FN1] the State issued 11 arrest warrants for various persons suspected of the murder, and in July 1999, prosecuted two of the

alleged murderers, who were acquitted after their respective trials while a third person went out of the country making his trial impossible. The State has said that the investigation of the case is still open and has not progressed because certain key documents are in the possession of the Government of the United States and because of the structural problems of the new government, which is in a process of post-dictatorial transition. However, the State has recognized that agents of the State took part in the murder of Mr. Malary and that the jury that returned the verdict on the two suspects was bribed.

[FN1] The friendly settlement procedure was initiated at the hearing of the parties held before the IACHR on March 5, 1999, and lasted until the meeting of August 23, 2000 held in Haiti, in the framework of the on-site visit of the IACHR. See Report N° 113/00 of the IACHR which declares the instant case admissible.

4. The Inter-American Commission, meeting during its 109th Period of Sessions on December 4, 2000 decided to declare the instant case admissible, applying the exception to the requirement of prior exhaustion of domestic remedies contained in Article 46(2)(c) of the American Convention. That exception deals with unwarranted delay in rendering a decision under domestic remedies.[FN2] In February 28, 2002 at its 114th Session, according to Article 50 of the Convention the IACHR approved a preliminary Report on the merits and concluded that the State is responsible for violation of the right to life (Article 4) to the detriment of Mr. Malary; and the rights to fair trial (Article 8) and judicial protection (Article 25) of Mr. Malary's next-of-kin, all in conjunction with the obligation to ensure respect for the rights recognized in the American Convention (Article 1(1)).

[FN2] See Inter-American Commission on Human Rights, Report N° 113/00, Case 11.335, Guy Malary, Haiti, December 4, 2000 paras. 33-44 (hereinafter Report on Admissibility).

5. On March 28, 2002 the report was transmitted to the State, which had two months to comply with its recommendations, pursuant to Article 43(2) of the IACHR Rules. Also, the petitioners were notified of the adoption of the Report and its transmittal to the State, and were requested to present their opinion as to whether the case should be submitted to the Court according to Article 43(3) of the aforementioned Rules. After this period of two months the IACHR decided not to present the instant case before the Inter- American Court of Human Rights taking in account the position of the original petitioner. In this occasion, during its 116th Period of Sessions the IACHR decided to approve the final Report in accordance with Article 51 of the Convention

II. PROCESSING BY THE COMMISSION

6. The petitioners and the State had initiated a friendly settlement procedure at the hearing granted by the IACHR on May 4, 1999 and on November 19, 2000 an agreement was signed. Later, the petitioners sent a communication to the IACHR saying that they did not wish to

continue with this friendly settlement procedure because the State had not kept its part of the agreement. On December 4, 2000 the IACHR, meeting at its 109th Period of Sessions, adopted Report 113/00 of December 4, 2000 whereby it decided to declare case 11.335 admissible and to continue with the analysis of merits. On January 22, 2001 the parties were notified of that report, which was published in the 2000 Annual report of the IACHR to the General Assembly of the OAS.

7. On March 26, 2001 the petitioners asked the Commission to draw up a report under Article 50, and requested a hearing for the 113th Period of Sessions. On June 7, 2001 the petitioners stated to the Executive Secretariat of the IACHR their intention to draw up a memorandum on merits of the petition, which they forwarded on June 27, 2001 under the title "Memorandum in Favor of the Request for Compensation of the Petitioner." The pertinent parts of that document were transmitted on July 10, 2001 to the Haitian State which was given 30 days to reply. The State did not reply to that request.

8. On September 7, 2001 the petitioners sent a written communication to the IACHR in which they said that a hearing on merits of the petition would not be necessary since they regarded the information submitted to the Executive Secretariat as sufficient. Further, they expressed their desire to close the case with the elaboration of a report on merits by the IACHR. On February 28, 2002 during its 114th Period of Sessions, in accordance with Article 50 of the Convention, the IACHR approved a preliminary Report on the merits which was transmitted to the State on March 28, 2002 with two months to comply with the recommendations in accordance with Article 43(2) of the IACHR Rules. Also, the petitioners were notified of the adoption of the Report and its transmittal to the State, and were requested to present their opinion as to whether the case should be submitted to the Court in accordance with Article 43(3) of the aforementioned Rules. After this period of two months, the State had not presented its observations and the IACHR decided not to present the instant case before the Inter- American Court of Human Rights.

III. POSITIONS OF THE PARTIES

A. The Petitioners

9. Mr. Guy Malary was appointed Minister of Justice by President Jean-Bertrand Aristide during his first term and continued to hold that office under the de facto military government of General Raoul Cédras. According to the petitioners, in the course of carrying out his duties, Mr. Malary worked for the implementation of the Governor's Island Accord,[FN3] advocating the creation of an independent police force and carrying out a comprehensive review of the judicial system of Haiti, which brought him into direct conflict with the authorities in the country at the time. The attempts of Mr. Malary to promote respect for human rights and the rule of law, would have represented a direct threat to the power of the de facto government,[FN4] which led the latter to plan and carry out his murder. The petitioners allege that this murder was part of a campaign of violence and political intimidation.

[FN3] That agreement was signed on July 3, 1993 with the objective of facilitating a peaceful transition to a democratic government, a process that was to culminate with the return of President Aristide on October 15, 1993.

[FN4] Memorandum in Favor of the Request for Compensation of the Petitioner. Lawyers Committee for Human Rights, Debevoise & Plimpton. New York, New York, June 26, 2001 p. 25.

10. As regards the responsibility of the State for the homicide of Mr. Malary, the petitioners allege that there is evidence that it was planned (intellectual authorship) by a senior officer in the Haitian army and by various members of the Haitian Front for Advancement and Progress (Front pour l'Avancement et Progrès d'Haiti). They further say that this murder was carried out by the so-called attachés, which are paramilitary squads made up of civilians which the de facto government sometimes used,[FN5] with the complicity of the Anti-Gang Research and Investigative Service (Service d'Investigation et de Recherches Anti-gang, hereinafter the "Anti-gang Service"), which is a military security force of the State.[FN6]

[FN5] Attachés have no legally recognized status, yet in 1993 a group of them formed the organization known as FRAPH and other groups operate in criminal gangs known as "zenglendos". See: Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Haiti, February 1994 para. 73.

[FN6] The Anti-gang Service is a specialized unit of the military police in Port-au-Prince, whose offices are located in the Military Police headquarters under the command of Lt. Colonel François.

11. The petitioners based their allegations regarding the involvement of State agents on the fact that: a) the heavy assault weapons used in the murder were of the kind reserved for the Haitian military; b) eyewitnesses identified at least one of the members of the Anti-gang Service who were on the scene immediately after the murder of Mr. Malary; c) the witnesses from the International Civilian Mission to Haiti (hereinafter "MICIVIH"), who personally observed the commander of the Anti-gang Service as he was directing the round-up of witnesses of the murder and identified them; and, d) the similarity of the execution to other political murders that occurred in Haiti, are proof of the participation of agents of the State in the assassination of the alleged victim.[FN7] Furthermore, the petitioners mention that Mr. Marcel Morissaint, member of the Anti-gang Service,--one of the detainees suspected of involvement in these events, who was subsequently released--acknowledged to the foreign investigators that the Anti-gang Service was responsible for the killing.

[FN7] Final memorandum of the petitioners, pp. 12 and 13.

12. The petitioners explained that on the day of Mr. Malary's murder, when the MICIVIH observers arrived, a police guard armed with machineguns had already surrounded the scene of

the crime. For over an hour the police prevented the MICIVIH observers from approaching the vehicle in which the alleged victim was murdered.[FN8] They further mentioned that the observers also noticed that Captain Jackson Joanis,[FN9] commander of the Anti-gang Service, was supervising the round-up of frightened witnesses.[FN10]

[FN8] Final memorandum of the petitioners, pp. 11-12.

[FN9] This individual was later found guilty in absentia of the extrajudicial execution of Antoine Izméry in 1993.

[FN10] Final memorandum of the petitioners, p. 12.

13. The petitioners allege that the Haitian State has breached its basic international obligations with respect to the right not to be arbitrarily deprived of life. They say that although the murder of Mr. Malary was carried out with the complicity of the armed forces of the de facto government, the responsibility of the State for the murder of Mr. Malary is also attributable to later governments, not just to the regime that was in power at the time the event occurred, inasmuch as said violation has not been recognized and repaired, since the State has omitted to initiate any investigation and judicial proceeding that were at all adequate. Therefore, the Haitian State would be responsible under the American Convention, in spite of the fact that the current Government may have had no involvement in the murder.[FN11]

[FN11] Idem.

14. As regards the rights to a fair trial and to be provided a minimum degree of judicial protection, the petitioners alleged that, despite numerous promises regarding the investigation of the murder of Mr. Malary and the prompt availability of main suspects and new evidence, the Haitian State has repeatedly omitted to adopt measures designed to ensure a minimally adequate and effective investigation.[FN12] According to the petitioners, the fact that the Haitian State has not investigated the known suspects, has not accepted documents that are key evidence, has not kept the promises made during the friendly negotiations designed to reach a settlement, nor adopted any minimally adequate judicial measure, has meant that the investigation and prosecution of Mr. Malary's murderers has been ineffective, and the delay of eight years unwarranted.[FN13]

[FN12] Final memorandum of the petitioners, p. 21.

[FN13] Ibid, p. 22.

15. They alleged that in the initial investigation of Mr. Malary's murder by the Haitian State evidence was discovered of a broad conspiracy to assassinate him, yet the Haitian authorities have never arrested, nor even questioned, the majority of the suspects. Concretely, they say that at the start of the proceeding, in May 1996, the State ordered the arrest of 11 persons accused of

taking part in the murder. Of these 11 persons investigated, only three went on to stand trial in court and only two were eventually judged and acquitted by a Haitian tribunal. The third person was detained and later released without being brought to trial.

16. According to the petitioners, in the trial of the two persons implicated in the case of Mr. Malary, the attorney from the Office of the Public Prosecutor did not prepare the case or the witnesses; nor did he try to ensure the selection of an impartial jury, which gave rise to a mistrial.[FN14] They alleged that this deliberate lack of preparation prevented crucial facts from being established that could have determined responsibility for the murder of the victim.

[FN14] Ibid, p. 32.

17. They further allege that the Haitian State, inexplicably and without interrogating them, released the third person detained before determining the nature and degree of this person's involvement in the murder of Mr. Malary. That person is a key figure, there was evidence that they took part in the events, and they admitted their participation in the assassination of Malary to foreign investigators. The petitioners say that after his release, the Haitian authorities only issued a court summons which has been disobeyed. Further, the State has not made a serious effort to recapture Mr. Morissaint; nor has it arrested or interrogated the eight other suspects for whom an arrest warrant was issued.[FN15]

[FN15] The petitioners mention that in 1995, President Aristide formed a group of international attorneys in order to conduct investigations into human rights violations, such as the murder of Mr. Malary.

18. The petitioners alleged that the jury that acquitted the two accused was biased. To show the bias of the jury they said that, in their opinion, it was due to the improper relations that existed between the jurors and the accused, as well as the connections of said jurors with the previous government, which constituted a violation of the obligation of the State to provide an independent and impartial tribunal.[FN16] Specifically, one of the jurors was a television reporter employed by the de facto government, whom the attorney from the Office of the Public Prosecutor who took part in the trial had called an "enemy of democracy". Two other jurors seemed to be personal friends of the defense attorney, and a large proportion of the jury had openly shown contempt for the eyewitnesses for the prosecution, who were homeless beggars. They further alleged that the jurors applauded when the suspects entered the courtroom.

[FN16] Ibid, p. 34.

19. The petitioners alleged that following the verdict acquitting the two accused mentioned in the foregoing paragraph, the attorney from the Office of the Public Prosecutor filed an appeal,

yet it was never finalized and was refused for procedural reasons. They explained that Article 316 of the Code of Criminal Procedure of Haiti prevents the appeal and reversal of a jury verdict that acquits suspects. In other words, it only provides for appeal against convictions and not acquittals.

20. The petitioners also allege that the State is guilty of a series of omissions that have prevented a meaningful investigation from being carried out. Inter alia, the petitioners mention in first place that in 1996, President René Préval requested the collaboration of the United States in the extradition of Mr. Constant, a member of the FRAPH,[FN17] which was refused because of formal defects; this request has not been reiterated since 1996. In second place, the petitioners say that the State has refused to obtain FRAPH documents confiscated by the United States, which constitute crucial evidence in the murder of Mr. Malary, since they could contain useful information needed for the investigation to move forward. They hold that, although the Haitian State continues to demand, rightfully, that the United States return the documents completely unaltered, the fact that it refuses to accept anything but the full set of documents intact prevents it from taking advantage of the apparent readiness of the United States to hand over some documents unaltered for the purposes of the criminal proceeding. In the opinion of the petitioners, the “all or nothing” position adopted by the Haitian State represents another obstacle for this protracted investigation.[FN18]

[FN17] The petitioners cite CIA calls account of Malary killing unreliable, Jim Lobe, Washington, D.C., October 11, 1996. Interpress Service.

[FN18] Ibid, p. 31.

21. The petitioners allege that the breach of the obligation to investigate other suspects or to obtain information contained in the FRAPH documents on the part of the Haitian State are examples of its inexplicable and unjustifiable omission, and the Haitian State’s record of eight years of inaction is, of itself, a prima facie violation of the right to judicial protection. The State undertook on several occasions to request the release of some key documents seized by United States troops in Haiti and to continue with the investigation of other persons suspected of planning and carrying out the deed. It was shown that the Government of the United States has in its possession 160,000 documents that its soldiers seized in October 1994 from the offices of the Front pour l’Avancement et le Progres Haitien (FRAPH) and the Haitian Army (FAd’H) related to its organization. In this regard, the Haitian State made an official request for the return of said documents for the purposes of the criminal proceeding. In 1996, the Ambassador of the United States in Haiti, William Swing, informed in reply to that request, that access would be provided to the documents on the condition that the list of names of US citizens who were involved in the FRAPH or the FAd’H would be edited. The Haitian State refused to accept the documents altered, and insisted on the return of the documents in their original form. Nevertheless, the petitioners consider that this attitude of the State has led essential information for the arrest of the murderers of Mr. Malary to be unavailable and that this constitutes a violation of the American Convention by Haiti.[FN19]

[FN19] Memorandum on Admissibility of the petition, pp. 6-8.

22. The petitioners have said that the domestic legal remedies of the Haitian State have been ineffective, and that the failure by the State in its duty to carry out an effective investigation into the murder of Mr. Malary violates its obligations under the American Convention.[FN20]

[FN20] Ibid, p. 26.

23. The petitioners alleged that the prosecutors and judges of the Government of Haiti have not carried out an independent investigation of wrongdoings committed by agents of the State because the Government has not provided the institutions that investigated the murder of Mr. Malary with the necessary resources to conduct an effective investigation in keeping with the duties under the American Convention.[FN21] They said that the structural problems of the Haitian judicial system are no excuse for the government constantly to refuse to investigate and prosecute the Malary case.

[FN21] Ibid, p. 38.

24. To show the lack of independence of the court, the petitioners mentioned that, in practice, in the Haitian judicial system neither government attorneys, nor judges in charge of preliminary investigations are able to conduct an independent investigation of murders with delicate political consequences that implicate members of the armed forces. They alleged that since the government attorney depends on the police to investigate the facts, the former very seldom investigate the doings of the military or the police. Further, the Minister of Justice allegedly continues to use his power to close enquiries opened by investigating judges into delicate matters that involve illegal acts committed by the police. They added that investigating judges still have the authority to carry out their own investigations of facts, yet they lack either the staff or the resources to pursue such investigations and, in consequence, always have to depend on the local police. They add that the information provided by the local police is often incomplete or useless. According to the petitioners, investigating judges were unable to use any of their powers of independent investigation to collect evidence or summon witnesses for the Malary case.[FN22]

[FN22] Final memorandum of the petitioners, pp. 37-38.

25. The petitioners said that, unless investigating judges, or another institution, are furnished with the resources to carry out an independent enquiry into the Malary homicide, no effective investigation will be possible. They further mentioned that the Haitian State has not provided the institutions that investigated the Malary murder with the necessary resources to conduct an

effective investigation in keeping with the duties of the Haitian State under the American Convention.

26. The petitioners also suggested a series of measures to the Haitian State, in order to move forward the investigation of the case: a) request access to the FRAPH documents with the respective modifications; b) give fresh impetus to the search for the implicated persons named in the arrest warrants of 1996; and c) request the extradition of Mr. Morissaint, a crucially important suspect, for alleged complicity in the murder of Mr. Malary.[FN23]

[FN23] Ibid, p. 39.

27. The petitioners mentioned a series of proceedings relating to alleged human rights violations committed under the de facto government that the Haitian State actively investigated,[FN24] and they alleged that the fact that the Haitian State has declined to adopt similar measures in respect of the Malary homicide is proof of intentional and deliberate violation by the Haitian State of its obligations under the American Convention.[FN25]

[FN24] The petitioners said that in 2000, the Haitian courts sentenced 43 accused, 37 of them in absentia, for their part in the massacre of civilians in Raboteau on April 22nd., 1994. They also cited the trial in absentia of Captain Jackson Joanis, one of the leading figures in the Anti-gang Service implicated in the Malary murder, for his part in the murder of Antoine Izméry, one of the activists in favor of the reinstatement of Aristide as President of the country and creator of the Committee for the Emergence of the Truth (KOMEVEB).

[FN25] Final memorandum of the petitioners, p. 40.

28. Finally, the petitioners request the Commission to find that the deliberately insufficient and ineffective efforts of the Haitian State to investigate and prosecute those responsible for the murder of Mr. Malary, constitutes a violation of the American Convention under Articles 1(1), 4, 8, and 25 thereof.[FN26]

[FN26] See Ibid, p. 41.

B. The State

29. Initially, the Haitian State argued that it cannot respond for the human rights violations committed by the de facto government between September 30, 1991 and October 14, 1994, because the authors must respond personally for their actions.[FN27] However, that allegation was not sustained over the rest of the proceeding, since it later attested the existence of judicial proceedings, investigations, and arrest warrants connected with the murder of Mr. Malary that

were pending before the courts, which were presumably initiated when constitutional government returned to the country.[FN28]

[FN27] See Note of June 28, 1995 from the Minister of Foreign Affairs, Claudette Werleigh, to the Executive Secretary of the IACHR, Edith Marquez Rodríguez.

[FN28] Report on Admissibility, para. 26.

30. The State recognized the existence of an excessive delay in the proceeding, and said that it was due to the enormous problems faced by the State, obstacles of a technical and an economic nature, and the fact that many of the witnesses fear for their safety.[FN29]

[FN29] Idem.

31. With respect to the trial of the two accused, the State alleged that the competent authorities acted appropriately and in accordance with the obligations set forth in the American Convention to ensure an impartial proceeding. It mentioned that there were some problems in the preparation of the indictment presented by the State, but this was not attributable to the Prosecutor's Office, since, at least in the case of Mr. Robert Lecorps, the file was prepared in a single day by American attorneys assisting the petitioners, not by the attorney from the Office of the Public Prosecutor.

32. The State alleged that in addition to arrest warrants for the execution of Mr. Malary, the three detained persons were also arrested for other crimes. Specifically, one of them was arrested, tried, and convicted for attempted theft of a vehicle; another was arrested for attempted murder but he was subsequently released when the action against him for that offense was dismissed.[FN30]

[FN30] See Inter-American Commission on Human Rights, 102nd Period of Sessions, Hearing N° 43 of Friday, March 5, 1999, Literal transcription of the cassettes, pp.7-9 (hereinafter Record of Hearing N° 43).

33. As regards the participation of agents of the State in the murder of Mr. Malary, the State has recognized that at least two policemen were aware of the plan to assassinate Mr. Malary. One of them, a security agent at the Ministry of Justice, called Charles Avril, allegedly tried to tell Minister Malary about the plan to murder him, but he was supposedly prevented from doing so by a policeman of the Anti-gang Service.[FN31] The latter, according to the most recent allegation of the State, is currently in prison, and the former was apparently murdered along with Mr. Malary, since he was in the vehicle at the time of the attack. The State alleged that Mr. Charles Avril, the security agent, would have been a key witness in solving the Malary case, since he was privy to the plans to murder Mr. Malary. However, that witness was killed together

with the victim.[FN32] The State also said that on the day of the murder attachés and policemen from the Anti-gang Service were safeguarding the security of the killers, and that instead of protecting the Minister the police had protected the killers.[FN33]

[FN31] Record of Hearing N° 43, p. 8.

[FN32] Ibid, p.8.

[FN33] Record of Hearing N° 43, p. 18.

34. The State further mentioned that the files on Jackson Joanis, Emmanuel Constant and Michel Francois were connected with the above mentioned individuals, since the latter were under their command in the Anti-gang Service,[FN34] and that these three individuals were linked to the murder of Mr. Malary.

[FN34] Ibid, p. 18.

35. In addition, the State said there was an outstanding arrest warrant for Mr. Morissaint issued by the investigating judge and the reason it had not been served had to do with difficulties in finding said individual.[FN35]

[FN35] Ibid, p. 9.

36. With respect to the bias of the jury that acquitted the two persons charged with the murder of Mr. Malary, the State recognized the existence of several irregularities in the jury selection, inter alia, a smaller number than was legally required for the trial of Mr. Lecorps, a fact which the trial judge disregarded.[FN36] The State said that eleven persons regarded as suspects faced trial in abstencia or for contempt of court, and, because they had gone into exile, that it had not been possible to try them, but that court orders had been issued for their arrest.[FN37]

[FN36] Ibid, p. 14.

[FN37] Idem.

37. As to the appeal filed by the attorney from the Office of the Public Prosecutor following the acquittal of the two accused, the State said that it was presented in time and was denied in October 1996 on procedural grounds. The State added that under Haitian law, when a jury returns a verdict the Court of Cassation cannot take the contents of that decision under review but only ascertain that it was issued in accordance to law.[FN38]

[FN38] Report on Admissibility, p. 4.

38. With respect to the Haitian documents confiscated by the United States, the Haitian State held that it would accept their return only if they were complete, in other words, unaltered.[FN39] The Haitian State says that it has not rejected the offer made by the United States to hand over the documents, since these would determine the outcome and progress of the criminal proceeding, but that they are Haitian documents and, as such, belong to Haiti in their entirety.

[FN39] Record of Hearing N° 43, p. 16.

39. On February 2, 2000[FN40] the Haitian State informed the IACHR that a complaint had been filed with the Office of the Commissioner attached to the Court of First Instance for Port-au-Prince against an unknown person. This complaint had been transmitted to the Office of Investigations (Cabinet d'Instruction) for the necessary processing and identification of the unknown person, prior to a decision within the time provided in the Haitian Code of Criminal Procedure. The State also informed that the clerk of the Commissioner's Office responsible for two files on persons suspected of the murder of Mr. Malary had his car burgled; the two files were in his car and had never been found. It was not until January 6, 2000 that the files had been reconstructed and turned over to the Judge.

[FN40] Letter from the Minister of Justice and Public Security of Haiti to the IACHR and the petitioners to inform about the progress of the judicial proceeding. The annex is a notice from the Court of First Instance for Port-au-Prince of January 18, 2000 mentioning the status of the files.

40. The State also mentioned that the examination of the documents currently in the possession of the United States is a crucial element that would enable the prompt progress of the trial.[FN41] It added that Haiti is emerging from a period of dictatorship and, therefore, has many obstacles to surmount; but that despite that, it is working on various fronts to ensure respect for human rights. Examples of the foregoing are the judicial reform program, the creation of the "National Commission of Truth and Justice", and the creation of an Anti-Crime Brigade at the Ministry of Justice to investigate crimes and disappearances that occurred under the dictatorship.[FN42]

[FN41] Idem.

[FN42] Report on Admissibility, p.5.

41. Finally, the State said that the Malary case is open before the domestic courts and that difficulties outside the control of the officials have prevented its disposal.

IV. LEGAL ANALYSIS

A. Preliminary Observations

42. Initially the State alleged that it could not respond for the human rights violations committed by the de facto government between September 30, 1991 and October 14, 1994 because the authors should respond personally for their actions.[FN43] Nevertheless, the Commission reminds the Haitian State that one of the aims of the inter-American system of protection of human rights is to establish the responsibilities of the States for the human rights violations under their jurisdiction, and it is not that of establishing individual responsibilities for those violations. By the same token, according to the principle of the continuity of the State, international responsibility exists independently of changes of government,[FN44] and, therefore, Haiti is susceptible to international responsibility for human rights violations committed by any government, actual or previous, regardless of the regime it might have, de jure or de facto.

[FN43] See Report on Admissibility, para. 25.

[FN44] See Inter-Am. Ct. H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988 para. 184; IACHR, Report N° 61/01, Case 11.771, Samuel Alfonso Catalán Lincoleo, Chile, April 16, 2001.

43. In order to keep to the chronological order in which the events occurred, the analysis will deal first with the right to life, followed by the rights to a fair trial and judicial protection, and, finally, the duty of States to respect the rights recognized in the Convention and to adopt measures under their domestic laws in accordance with the provisions of the Convention.

B. Right to life (Article 4)

44. Article 4 of the American Convention provides that "[e]very person has the right to have his life respected," and that, "No one shall be arbitrarily deprived of his life." In accordance with the jurisprudence of the Court and the practice of the Commission, that right is non-derogable, even in emergency situations.[FN45]

[FN45] See Inter-Am. Ct. H.R., Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, para. 44; Judicial Guarantees in States of Emergency, Advisory Opinion, OC-9/87, para. 4.

45. The Commission observes that the State accepts that agents of the State took part in the murder of Mr. Malary. This fact, apart from anything else, is duly and sufficiently demonstrated

by various testimonial and documentary evidence collected during the processing of the instant case before the Commission.

46. As to the participation of agents of the State in the murder of the alleged victim, the petitioners have said that: a) the reports of eyewitnesses of the ambush and the shootout; b) the use of assault weapons that are only available to the military forces; c) the presence of officers of the Anti-gang Service at the scene of the murder; and, d) the similarity of the execution to other political assassinations are evidence of participation by agents of the State in the murder of the alleged victim. The petitioners allege that this evidence of the participation of the Haitian State signifies that it has violated its obligations to respect the right to life in accordance with Article 4 of the American Convention.

47. Further, the State has recognized that at least two policemen knew about the plan to assassinate Mr. Malary. One of them, a security agent at the Ministry of Justice, called Charles Avril, allegedly tried to tell Minister Malary about the plan to murder him, but he was supposedly prevented from doing so by a policeman with the Anti-gang Service.[FN46] The latter, according to the most recent allegations of the State, is currently in prison, and the former was apparently murdered along with Mr. Malary, since he was in the vehicle at the time of the attack. The State also mentioned that the three persons for whom arrest warrants had been issued were linked to the murder of Mr. Malary and had connections with the aforesaid security agents since the latter were under their command in the Anti-gang Service.[FN47]

[FN46] Record of Hearing N° 43, p. 8.

[FN47] Ibid, p. 18.

48. By the same token, the State recognized the possible link of the Anti-gang Service with the murder of Mr. Malary and the concealment of the murderers at the scene of the crime. Concretely, at the hearing before the Commission of March 5, 1999, the representative of the Haitian State[FN48] said that “on the day of the murder attachés and policemen from the Anti-gang Service safeguarded the security of the killers (...) the police, instead of protecting the Minister, protected the killers,” thereby clearing attesting to the participation of military security agents and agents of the Anti-gang Service in the concealment of Mr. Guy Malary’s murder.

[FN48] The representative of Haiti on this occasion took part in the trial of Messrs. Lecorps and Antoine in Haiti.

49. The petitioners, in turn, confirm these facts recognized by the State, alleging that when the MICIVIH observers arrived, the police guard armed with machineguns had already surrounded the scene of the crime. For over an hour the police prevented the MICIVIH observers from approaching the vehicle in which the alleged victim was murdered. They further mentioned that the observers also noticed that the commander of the Anti-gang Service was supervising the round-up of frightened witnesses.

50. Therefore, after examining the above facts, the Commission finds that there is no dispute between the parties with respect to the participation of agents of the State in the murder of Mr. Guy Malary. The parties differed over the degree of complicity of said agents in the deed, which could not be clarified because the judicial proceeding was not concluded that might have been able to determine the identities of the perpetrators and the intellectual authors. Nevertheless, the facts recognized by the State allow the Commission to determine that at least some agents of the Anti-gang Service and of the armed forces participated in the planning and concealment of the murder of Mr. Malary.

51. The Inter-American Court has held previously that, unlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the right to life has been violated, since "the sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention."^[FN49]

[FN49] Inter-Am. Ct. H.R., Paniagua Morales Case, Judgment of March 8, 1998 para. 48.

52. In the instant case, after examining the information supplied by the parties, the Commission finds that the State is responsible for the actions of its agents, as well as for the acts perpetrated by the individuals who, through its complicity, were able to carry out and conceal the execution of Mr. Malary in violation of his right not to be arbitrarily deprived of life. Accordingly, the Commission concludes that the Haitian State is responsible for the violation of the right to life of Mr. Guy Malary, provided in Article 4(1) of the American Convention.

C. Right to a fair trial (Article 8)

53. The right to a fair trial is one of the fundamental pillars of a democratic society. This right is a basic guarantee of respect for the other rights recognized in the Convention, because it limits abuse of power by the State. The organs of the American Convention are competent, pursuant to Article 33 thereof, to determine if the actions or omissions of any State organ, including the Judiciary, entail the responsibility of the former in accordance with the international obligations assumed in good faith when it ratified the American Convention.

54. Thus, the Commission is fully entitled to examine, for instance, if in the course of a criminal proceeding the judicial guarantees set forth in Article 8 of the Convention were respected. Whether or not a judicial proceeding meets the requirements under Article 8 must be determined based on the individual circumstances of each case and by examining the entire process. Accordingly, the Commission will examine several aspects that have been alleged by the petitioners: first, the obligation to provide judicial proceeding within a "reasonable time", and second, the obligation to establish "impartial" tribunals.

a. Right to a proceeding within a reasonable time (Article 8(1))

55. Article 8(1) specifically mentions the obligation of States to provide judicial proceedings within a "reasonable time" to avoid undue delays that lead to deprivation or denial of justice.

56. In order to determine what constitutes a reasonable time, the Inter-American Court of Human Rights has applied the concept of "global analysis of the proceeding", according to which, to determine its reasonableness, it is necessary to include the delays at the various stages of the proceeding as a whole.[FN50]

[FN50] Inter-Am. Ct. H.R., Genie Lacayo Case, Judgment of January 29, 1997 para. 81.

57. In the instant case, the IACHR notes that the petitioners and the State have mentioned 11 persons for whom arrest warrants were issued because they were allegedly implicated in the execution of Mr. Malary. Of those persons only two have been prosecuted by the competent judicial authority, with a final judgment rendered in October 1996. In the following analysis, the Commission will refer to the delay in the prosecution and final judgment in connection with Mr. Malary's murder of the nine other persons for whom an arrest warrant was issued and other unknown persons who are also under investigation.

58. As regards reasonable time to render a decision in the case, the petitioners alleged that the budgetary and other constraints of the Haitian judicial system do not justify the delay in the investigation of the instant case. Furthermore, the State did not deny that there was a delay in the investigation. Nevertheless, it has said that the delay has been justified by the fact that several suspects are in exile; the problems in locating them and in the collection of other evidence, such as the documents confiscated by the United States; and the reconstruction process in the country following the military dictatorship.

59. According to the jurisprudence of the Inter-American Court of Human Rights, three points must be taken into account in determining a reasonable time within which the trial must be conducted: a) the complexity of the matter; b) the judicial activity of the interested party; and, c) the behavior of the judicial authorities.

i. The complexity of the matter

60. With respect to the complexity of the case, the IACHR finds that the legal complexity of the proceeding was not particularly significant; however, the Haitian court managed to have difficulty collecting evidence. The IACHR finds that a case is not made complex merely by the presence of a large number of accused or suspects.[FN51] However, the IACHR considers that the criminal proceeding underway in Haiti became complex when the accused persons for whom arrest warrants were issued left the country, the place where the crime was committed.[FN52] The Haitian State submitted a request to the Government of the United States for the extradition of one of these persons; however, according to the petitioners' briefs, this request was denied. The IACHR considers extradition proceedings to be relatively complex, bearing in mind that they entail the jurisdiction of two or more States.[FN53] The Haitian State, where the events under investigation occurred, might find itself unable to secure the appearance in court of the

accused and to proceed to interrogate them. In addition to the foregoing there are the problems of formalities.

[FN51] See: European Court of Human Rights, Case of Foli, Judgment of 10 December 1982, Series A, N° 69, p.59 and Guincho v Portugal, Judgment of 10 July, 1984.

[FN52] See: European Court of Human Rights, Case of Sari v. Turkey and Denmark, Application N° 00021889/93, Judgment of 8 November 2001, para. 74 et seq.

[FN53] See: European Court of Human Rights, Case of Sari v. Turkey and Denmark. Ibidem, para. 75 et seq.

61. As regards the documents of the Haitian military and police forces that allegedly planned and carried out the murder of Mr. Malary, the petitioners and the State allege that they were confiscated by the United States and that they are currently in the possession of the latter. In the opinion of the IACHR, obtaining these documents--which both the State and the petitioners recognized as potentially crucial to the investigation of the facts--made the criminal proceeding complex.

62. Indeed, the petitioners have said that the Government of the United States has in its possession 160,000 documents pertaining to the FRAPH military organization and the FAd'H, and that the Haitian State made an official request for the return of said documents for the purposes of the criminal proceeding. In 1996, the Ambassador of the United States in Haiti, William Swing, informed in reply to that request, that access would be provided to the documents on the condition that the list of names of US citizens who were involved in the FRAPH or the FAd'H would be edited. The Haitian State refused to accept the documents altered, and insisted on the return of the documents in their original form. Nevertheless, the petitioners consider that this attitude of the State has led essential information for the arrest of the murderers of Mr. Malary to be unavailable.[FN54] The Haitian State says that it has not rejected the offer made by the United States to hand over the documents, since these would determine the outcome and progress of the criminal proceeding, but that they are Haitian documents and, as such, belong to Haiti in their entirety.

[FN54] Memorandum on Admissibility of the petition, pp. 6-8.

63. The IACHR finds that the Haitian State has requested the United States to return the aforesaid documents and inasmuch as that country has refused to give them back in their original form--exactly as they were when they were confiscated--, the Haitian State has refused to receive them. The IACHR considers that these circumstances make the judicial proceeding complex, insofar as they involve judicial cooperation and assistance between States.

64. Bearing in mind the foregoing factors, the IACHR finds that the instant case not only concerns a criminal proceeding, but also an extradition proceeding and the transfer of evidence from the jurisdiction of one country to another. Consequently, the IACHR concludes that those

proceedings are relatively complex and required particular diligence on the part of the Haitian judicial authorities to ensure the conclusion of the proceeding within a reasonable time.

ii. The judicial activity of the interested party

65. With respect to the second point to bear in mind for determining reasonableness of time, in other words, the judicial activity of the interested party, the fact that during the proceeding the attempt was made to reach a friendly settlement agreement between the petitioners and the State did not release the Haitian court from the obligation to ensure compliance with the Convention as regards reasonable time. Moreover, at no time has the State alleged any activity by the petitioners that prevented the court from carrying out a serious investigation in the instant case. The IACHR finds that the petitioners cannot be held responsible for a delay in the instant case.

iii. The behavior of the judicial authorities

66. Regarding the behavior of the judicial authorities, the third point under consideration, the IACHR regards as unreasonable the period of more than eight years that has elapsed between October 1993, the year of Mr. Malary's death, and the present. In spite of the complexity of the case, the IACHR finds that there were periods of procedural inaction on the part of the Haitian authorities that cannot be justified by the difficulties in the collection of evidence.

67. Indeed, examination of the body of evidence garnered over more than eight years since the death of Mr. Malary, reveals periods of inaction on the part of the authorities in charge of the investigation. Concretely, in the instant case, according to the allegations of the petitioners which have not been refuted by the State, after the events of October 1993, a serious investigation was not opened until the end of 1994, after the return of constitutional rule in Haiti, in other words almost a year later. The IACHR bears in mind that it was not until the end of 1994 that President Jean Bertrand Aristide returned to the country and constitutional rule was restored, and that during that time judicial remedies were either non-existent or ineffective. However, in accordance with the principle of the continuity of the State, international responsibility exists regardless of changes of government, and, therefore, this period of more than one year before the investigation stage was opened is attributable to the Haitian State.

68. The petitioners further alleged that it was not until May 1996 that 11 arrest warrants were issued for a number of persons suspected of the murder. In the opinion of the Commission the State has not justified the delay between the opening of the investigation at the end of 1994 and the issue of arrest warrants in May 1996.

69. The petitioners have alleged that in July 1996 two new files were sent to the judge in charge of the investigation in the case. The files contained the investigations into two other former military officers accused of the murder of Mr. Malary. According to the information available to the IACHR,[FN55] the file was transmitted to the tribunal in April of 1997 and, in June of the same year, was sent to the Prosecutor's Office (the Parquet), so that the last pleadings be prepared, and that from that date the state of the file is unknown. However, the State later reported that these files were stolen from the car of an assistant to the government

attorney,[FN56] and it was not until January 6, 2000 that the file was reconstructed for the respective investigation, which, to date, has yet to be carried out.

[FN55] Civilian Mission to Haiti, OAS-UN, 10 February 1999. Ref: SJ-X-030, 4HT. N 56-99 rev. Process and Investigation of the murder of the former Minister of Justice Guy Malary.

[FN56] See, Note of Mr. Bazelais, Director of Judicial Affairs of the Ministry of Justice and Public Security, to Mr. Beaglehole, attorney of the Lawyers Committee for Human Rights. February 2, 2000, Port-au-Prince.

70. The IACHR notes that the State has delayed the efforts that it had initiated. It notes that it has been informed that most of the accused had fled the country and that President René Préval, in 1996, had sought the collaboration of the Government of the United States in the extradition of Mr. Constant.[FN57] According to the petitioners, the extradition was refused due to formal defects and this request has not been reiterated. The State has neither denied nor refuted these facts, nor has it indicated that it has corrected or reiterated the extradition request, or that it has attempted to obtain evidence from Mr. Constant. The IACHR finds that this delay in expediting efforts to obtain evidence is imputable to the Haitian State despite the fact that in judicial cooperation between countries to obtain evidence each government depends on the collaboration of the other.

[FN57] The petitioners cite: CIA calls account of Malary killing unreliable, Jim Lobe, Washington, D.C., October 11, 1996. Interpress Service.

71. Further, the IACHR notes that the State has not provided information that it has requested the extradition from other countries of the other persons for whom an arrest warrant has been issued, or, in the event they are in the country, about any difficulties for their apprehension and prosecution. The Commission finds that these delays in taking steps to investigate and establish who is responsible for the death of Mr. Malary are imputable to the State and unwarranted.

72. The petitioners informed the IACHR that on February 2, 2000, the State sent a communication to the petitioners in which it informed them about the referral of the file on an unknown person to the judge in charge of the investigation in the case.[FN58] Since that communication, the case has remained at a halt.

[FN58] See Report of the Court of First Instance for Port-au-Prince of January 18, 2000.

73. The IACHR reminds the Haitian State that states party to the Convention are under obligation to organize their judicial systems so that their courts can ensure the right of each person to obtain a final decision on their rights and obligations within a reasonable time. Therefore, bearing in mind the three points analyzed above (the complexity of the matter, the

judicial activity of the interested party, the behavior of the judicial authorities)[FN59] the IACHR considers that the elapsed period of more than eight years between the homicide of Mr. Malary and the date of adoption of the instant report, without a final judgment issued or the identities of those responsible determined, exceeds the limits of reasonableness provided by Article 8(1) of the American Convention.

[FN59] Inter-Am. Ct. H.R., Genie Lacayo Case, Judgment of January 29, 1997 para. 77.

c. Right to an impartial tribunal (Article 8(1))

74. An impartial tribunal is one of the core elements of the minimum guarantees in the administration of justice. With respect to the scope of the obligation to provide impartial tribunals in accordance with Article 8(1) of the American Convention, the IACHR has said previously that impartiality supposes that the judge or tribunal does not have any preconceptions on the case sub judice.[FN60] Further, the Inter-American Commission, in the same way as other international organs for the protection of human rights,[FN61] has drawn a distinction between two aspects of impartiality, one subjective and the other objective.[FN62]

[FN60] See, Report N° 17/94, Guillermo Maqueda, Argentina, OEA/Ser. L/V/II.85, Doc. 29, February 9, 1994 para. 28. Not published. The European Court of Human Rights has found in the same sense in the Piersack case, Judgment of 1 October 1982, series A, N° 53, p.14, para. 30. The “Basic Principles on the Independence of the Judiciary” adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985, say that the impartiality of a judge requires, inter alia, that he must have no preconceptions or bias, nor take the side of any of the parties in a case before him. It is a psychological attitude of probity and rectitude for seeking the truth in the proceeding on the basis of the material truth.

[FN61] For the European Court, the impartiality of the judge is composed of subjective and objective elements. The European Court has developed extensive case law on this subject. See, for example, the cases of Piersack, De Cubber, Hauschildt.

[FN62] Idem.

75. The subjective aspect of the impartiality of the tribunal refers to the personal conviction of a given judge in a given case, and the subjective impartiality of the judge is assumed in a given case until proved otherwise.

76. As to the objective aspect of impartiality, the IACHR considers that this requires that the tribunal or judge offer sufficient guarantees to exclude any doubt in respect of impartiality in the proceeding.[FN63] If the personal impartiality of the tribunal or judge is assumed until proved otherwise, an objective evaluation must determine whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality.[FN64]

[FN63] See Case of Saint-Marie v. France Report of the European Commission of Human Rights, 16 E.H.R.R. 116, para. 50, and European Court of Human Rights, Case of Piersack v. Belgium (1982), 5 E.H.R.R. 169, para. 30.

[FN64] The European Court of Human Rights has found likewise. See Case of Hauschildt v. Denmark, Judgment of 24 May 1989, series A N° 154, p.21, para. 48.

77. In the instant case, the parties have discussed whether or not the jury that returned a verdict on the two persons accused of the murder of Mr. Malary was impartial. The Commission in the William Andrews v. United States case, examined if a jury that issues a verdict must comply with the impartial tribunal requirement provided in Article 8(1) of the American Convention.[FN65] Based on the reasoning contained in the aforementioned jurisprudence, the Commission finds that in the case sub judice there are a series of facts that raise doubts about the objective impartiality of the jury that decided whether or not the persons suspected of the killing of Mr. Malary bore responsibility for the deeds.

[FN65] The IACHR pronounced on the impartiality of the jury in Report N° 57/96, Case 11.139, William Andrews v. the United States, of December 6, 1996. Furthermore, the United Nations Committee to Eliminate Racial Discrimination has held that a reasonable suspicion of bias is sufficient for juror disqualification, and stated that: "it is incumbent upon national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased". See Case of Narrainen versus Norway, UN Ctte. Elim. Racial Discrim, Communication N° 3/1991, views adopted 15 March, 1994. In the Case of Remli versus France (Application No. 00016839/90, Judgment of 23 April 1996), the European Court of Human Rights referred to the principles laid down in its case-law concerning the independence and impartiality of tribunals, which applied to jurors as they did to professional and lay judges and found that there had been a violation of Article 6(1) of the European Convention.

78. The petitioners alleged a series of irregularities in the selection of the jury and in the way it acted. In their opinion, they were due to the improper relations that existed between the jurors and the accused, as well as the connections of said jurors with the previous government. Specifically, they alleged that two jurors seemed to be personal friends of the defense attorney, and one of the jurors was a television reporter employed by the de facto government, whom the government attorney assigned to the case allegedly called an "enemy of democracy"; that the jury allegedly applauded when one of the accused took the stand; that the attorney from the Office of the Public Prosecutor assigned to the case is purported to have said later that the jurors were bribed or expected to receive money from one of the accused after the trial.[FN66] The petitioners further said that a large proportion of the jurors had openly shown contempt for the eyewitnesses presented by the Office of the Public Prosecutor, who were homeless beggars. [FN67]

[FN66] Memorandum on Admissibility of the Petition on the Malary Case, Lawyers Committee for Human Rights and Debevoise & Plimpton, New York, New York, September 8, 2000, p.5 (hereinafter, Memorandum on Admissibility of the Petition).

[FN67] Ibid, p.34.

79. The State did not dispute the allegations of the petitioners. The State informed that on the day of the trial of one of the accused, the attorney from the Office of the Public Prosecutor objected to the composition of the jury for various reasons.[FN68] Inter alia, he said that there were only 27 jurors present, when the law stipulates at least 32 jurors, and that the judge was aware of that rule, yet he disregarded this fact and continued to try the case.[FN69] With respect to the false verdict of the jury, at the hearing of March 5, 1999 at the headquarters of the IACHR, the representative of Haiti gave the following answer to the question of the Commission as to whether or not the jury was bribed in the above-mentioned trial: "it is clear that the jurors were bribed. (...) During the trial proceedings one of the alleged murderers could be seen leaving his place and going to talk to the jurors."[FN70]

[FN68] Record of Hearing N° 43, p.14.

[FN69] Record of Hearing N° 43, p.14.

[FN70] Ibid, p. 15.

80. The IACHR also notes that the state Prosecutor's communication before the superior Court (pourvoi en appel), claimed that only 28 jury candidates were present when 30 were required; the presiding judge accorded to suspend the hearing when one of the defendant was standing before the jury--far from the chair of the defendant--instead of ordering him to go to its place; during the trial, the jury applauded one of the defendant when he was testifying. This information confirms the petitioner's arguments before the IACHR. The IACHR concludes that the jury in this trial of two suspects of Mr. Malary's murder was partial and, therefore there is a violation of the right of due process established in Article 8(1) of the American Convention by the Haitian State.

E. Right to judicial protection (Article 25)

81. Article 25(1) of the Convention says that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

82. The Inter-American Court has found that Article 25 obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered.[FN71] Under Article 25 of the American Convention, the Haitian State has the obligation to provide an effective judicial remedy against violations of the

fundamental rights it contains. An effective legal remedy requires an investigation that meets the due process standards set down in Articles 8 and 25 of the American Convention. Taken together, Articles 8 and 25 create a positive obligation “to provide access to justice with guarantees of legality, independence, and impartiality, within a reasonable period of time, as well as the general obligation to provide effective judicial recourse against acts that violate fundamental rights.”[FN72] The Court refers to this Article when it finds: “Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness.”[FN73]

[FN71] Velásquez Rodríguez Case, Judgment of July 29, 1988 para. 174.

[FN72] Inter-Am. Ct. H.R., Loayza Tamayo Case, Reparations, Judgment of November 27, 1998 para. 169.

[FN73] Inter-American Commission on Human Rights. Report N° 63/01, Case 11.710, Carlos Manuel Prada González y Evelio Antonio Bolaño Castro, April 6, 2001, para. 37; Inter-Am. Ct. H.R., Bámaca Velásquez Case, Judgment of November 25, 2000 para. 191.

83. In the instant case, the Commission finds that, to date, more than eight years and five months have passed since the events described in the petition occurred in October 1993, without a complete investigation carried out that might make it possible to establish responsibility and punish the persons guilty of the murder of Mr. Malary. The Commission has already explained that the effectiveness of a judicial remedy will be “gravely affected” by the “enormous time lapsed”[FN74] between the death of the victim and the decision on reparations.

[FN74] Velásquez Rodríguez Case, para. 63.

84. The Commission also finds in the instant case that the impetus to proceed with the investigation of the facts came from the petitioners, who constantly furnished evidence for the investigations carried out by the State and by the MICIVIH. The State displayed a certain amount of activity in that criminal proceeding by issuing arrest warrants for the multitude of suspects, most of which were never served. Subsequently, the State put on trial two of the suspects, who were acquitted of the charges by a biased jury (*supra*, paras. 74 et seq.). After that trial, the State proceeded with the investigations pending at an increasingly slow pace to the point where currently the proceeding is halted. The Inter-American Court is clear when it finds that the duty to investigate “must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.”[FN75]

[FN75] Inter-American Commission on Human Rights, Report N° 55/01, Case 11.286, Aluísio Cavalcante et. al. April 4, 2001 para. 40; See *ibid.* para. 23 and 167.2 (determination of delays of

8, 13 and 10 years to constitute violations of Articles 8 and 25); Report N° 39/98, Case 11.774, Héctor Hugo Boleso, 24 September, 1998, para. 26 (underscores the need to avoid “undue extensions which constitute an abridgement and a denial of justice” to the detriment of people who claim that their rights have been violated).

85. Accordingly, the Commission observes that the judicial remedies have not produced any result thus far, and the proceeding has been delayed for more than eight years without establishing the responsibility of any of the persons who carried out or planned the murder. Further no compensation has been provided to the victim’s next-of-kin. Therefore, the judicial remedies have been ineffective and the Haitian State has thus breached its obligation to provide judicial protection to victims whose fundamental rights have been violated.

86. The petitioners held that the international investigators appointed by President Aristide,[FN76] and, subsequently, the Lawyers Committee,[FN77] identified at least 20 persons who were either directly or indirectly involved in the planning and execution of the murder of Mr. Malary, and that warrants were issued for their arrest, yet the authorities of Haiti only arrested three people.[FN78] In that respect, the State alleged that the other arrest warrants were not served because most of these persons were in exile; that proceedings were instituted against 11 persons in abstencia or for contempt of court; and that the necessary measures had been adopted to determine the whereabouts of these individuals.[FN79]

[FN76] Velásquez Rodríguez Case, para. 177.

[FN77] The list prepared by the international investigators mentioned at least 11 suspects, nine of whom had arrest warrants issued for them.

[FN78] The Lawyer’s Committee carried out an investigation that yielded nine items of evidence relating to the murder of Mr. Malary, and resulted in the issue of a series of arrest warrants in May 1996. The list of suspects included the four persons identified by Mr. Morissaint along with seven other names.

[FN79] Final memorandum of the petitioners, p.12.

87. By the same token, with respect to one of the accused for whom an arrest warrant was issued but who later had been released, the State says that was due to a judicial decision, but that subsequently two arrest warrants were issued for him because of rumors that he was still in the country. The State mentioned that said capture was not achieved because of “enormous problems” finding him, and because the country was in a difficult period of adjustment after the dictatorship.[FN80] The IACHR finds that the omissions of the Haitian State in finding the people for whom arrest warrants were issued and who it says, are in exile, impair the effectiveness of the investigation.

[FN80] Record of Hearing N° 43, p.14.

88. The IACHR also notes that the obligation to carry out an effective investigation can be affected by delays in the adoption of measures to secure the collaboration of other countries in the collection of evidence and the appearance in the domestic courts of persons who have been accused. According to the information supplied by the petitioners, which have not been refuted by the State, the extradition request for Mr. Emmanuel Constant, --the leader and founder of the FRAPH implicated in the murder of Mr. Malary, who currently resides in the United States--, was found to be defective by the United States Government. Therefore it has not been processed and Haiti has made no further effort to correct or renew the request.[FN81]

[FN81] Ibid, p.9.

89. The Inter-American Court has found that “in certain circumstances, it may be difficult to investigate acts that violate an individual's rights”[FN82] and that "the duty to investigate, like the duty to prevent, is an obligation of means and is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.”[FN83]

[FN82] Memorandum on Admissibility of the Petition, p.10.

[FN83] Velásquez Rodríguez Case, para. 158; Inter-Am. Ct. H.R., Godínez Cruz Case, Judgment of January 20, 1989 para. 177.

90. The Commission considers that the cover up of the investigations of Mr. Malary's murder, the delays in adopting measures to move the investigation forward, the verdict of a biased jury that acquitted the two accused, constitute actions and omissions that impair the effectiveness of the domestic remedies as provided in Article 25 of the American Convention. The Inter-American Court of Human Rights has ruled that “if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”[FN84] In the instant case, the murder of Mr. Malary remains unpunished to date, without responsibilities established or punishment imposed, in spite of the large amount of evidence in the possession of the State, which still has several files open on the case.

[FN84] Idem.

91. Therefore, based on the above factual and legal arguments, the Commission concludes that the State has breached its obligation to investigate the execution of the victim and to prosecute those responsible in accordance with the standards provided in Article 25 of the American Convention.

F. Duty to respect rights (Article 1(1))

92. Article 1(1) of the American Convention provides that,

[recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth t]he States Parties to this Convention undertake to respect the rights and freedoms, or any other social condition.

93. The Commission reminds the Government of Haiti, that as a state party to the American Convention, it has the obligation to carry out investigations, impose punishment, and, as necessary, compensate the victims of alleged violations. The Commission is not oblivious to the difficult situation in the country, and is conscious of the efforts of the constitutional government to strengthen mechanisms for protection of human rights. States have the duty to investigate extrajudicial executions committed by its agents.[FN85] Measures intended bring about extrajudicial executions of persons, to tolerate them, to not adequately investigate them or punish, as necessary, those responsible, leads to the violation of the duty to respect the rights recognized by the Convention and to ensure the free and full exercise of those rights (Article 1(1)).

[FN85] Velásquez Rodríguez Case, Ibidem, para. 174; Case Godínez Cruz, Ibidem, paras. 174 and 176.

94. According to the provisions contained in Article 1(1), the State has the obligation to investigate violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[FN86] The Commission finds that according to the instant Report, the State violated Article 4 to the detriment of Mr. Guy Malary and Articles 8 and 25 to the detriment of Mr. Malary's next-of-kin, on which basis it has breached the general duty to respect the rights and freedoms recognized in the American Convention and to guarantee the free and full exercise thereof, in accordance with Article 1(1) of the Convention.

[FN86] See Principle N° 18 on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Recommended by the United Nations Economic and Social Council in resolution 1989/65, of May 24, 1989: "Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed."

V. ACTS TAKEN SUBSEQUENT TO REPORT N° 24/02

95. The IACHR examined this case during its 114^o session and approved its preliminary Report N° 24/02 on the merits of the case, in accordance with Article 50 of the American Convention, and makes proposals and recommendations as it saw fit. According to Article 51(1) of the Convention, within a period of three months from the date of the transmittal of the aforementioned Report to the State, the IACHR shall determine whether the matter has not either been settle or submitted by the Commission to the Court. In this case none of these circumstances have taken place.

96. On one side, the State has not settled the matter. In fact, since the date of the transmittal of the Report N° 24/02 to the Haitian State, it has not answered the IACHR's request, it has not been in contact with the Commission regarding this case, neither has taken any measure, in the knowledge of the IACHR, to comply with the recommendations.

97. On the other side, the IACHR have not submitted the case to the decision of the Court. According to Article 44(1) of the IACHR rules, unless there is a reasoned decision by an absolute majority of the members to the contrary, the Commission shall refer the case to the Court. In the instant case, the IACHR decided by a vote of absolute majority not to send the case to the Court considering, fundamentally, that the original petitioner, The Lawyers Committee for Human Rights, expressed that they did not want to continue the case before the Court.

98. The IACHR is aware of the nature and seriousness of the violation of human rights found in the instant case and appreciates the declarations made by the representatives of the State to the IACHR delegations during its two in situ visits to Haiti on 2002. In their statements, the representatives of the State expressed their willingness to investigate and pay a compensation to the next of kind of the victim, in accordance with the principle *pacta sunc servanda*, by which States must comply with their treaty obligations in good faith.

99. Accordingly and pursuant Article 51(2) of the American Convention, the Commission decides to reiterate the conclusions and recommendations contained in the preliminary Report N° 24/02, adopted by an absolute majority and as a final Report, in accordance with Article 45(1) of its Rules.

VI. CONCLUSIONS

100. Based on the factual and legal arguments given above, the Inter-American Commission on Human Rights concludes that the Haitian State has violated to the detriment of Mr. Guy Malary and his surviving next-of-kin, the following rights enshrined in the American Convention:

- a) The Haitian State violated the right to life enshrined in Article 4 of the American Convention to the detriment of Mr. Guy Malary.
- b) The Haitian State violated the right to a fair trial and the right to judicial protection enshrined in Articles 8(1) and 25 of the American Convention to the detriment of the next-of-kin of Mr. Guy Malary.

c) The above mentioned violations of human rights involves that the Haitian State breached the general obligation to respect and guarantee rights under Article 1(1) of the above-cited international instrument, to the detriment of Mr. Guy Malary and his next-of-kin, and that the Haitian State is obliged to investigate the facts, sanction those responsible and repair the consequences of these violations and pay compensation to Mr. Guy Malary's next-of-kin.

VII. RECOMMENDATIONS

101. Based on the foregoing analysis and the previous conclusions, the IACHR reiterates the following recommendations:

- a) Carry out a full, prompt, impartial, and effective investigation within the Haitian ordinary criminal jurisdiction in order to establish the responsibility of the authors of the violation of the right to life of Mr. Guy Malary and punish all those responsible.
- b) Provide full reparation to the next-of-kin of the victim, inter alia, the payment of just compensation.
- c) Adopt the measures necessary to carry out programs targeting the competent judicial authorities responsible for judicial investigations and auxiliary proceedings, in order for them to conduct criminal proceedings in the accordance with international instruments on human rights.

VIII. PUBLICATION

102. On November 20, 2002, a copy of report N° 61/02, adopted by the Commission under Article 51 of the Convention, was sent to the State, pursuant to Article 51(2) of the Convention. The Commission gave the State a period of 15 days to notify it of the measures it had taken to follow up on the Commission's recommendations. On November 27, 2002 a copy of report N° 61/02 was also sent to the complainants, in keeping with Article 45 of the Rules of Procedure of the Commission. The Commission gave them a period of 15 days to notify it of the measures taken by the State to follow up on the Commission's recommendations. The State did not submit its observations to the Commission, within the period the latter had established, concerning the measures it had taken to follow up on the Commission's recommendations. On December 12, 2002 the complainants submitted their observations in this regard to the Commission. They said that the State had not taken any measures with regard to the Commission's recommendations, notwithstanding the fact that it was in possession of documents seized by the American forces in 1994, which contained information on the FRAPH.

103. In view of the foregoing, the failure of the State to reply, and the observations made by the complainants on report N° 61/02, the Commission, acting pursuant to Article 51(3) of the Convention and Article 45(3) of its Rules of Procedure, decides to ratify the conclusions and reiterate the recommendations set forth in this report, to publish it, and to include it in its annual report to the General Assembly of the Organization of American States. The Commission, in keeping with the rules established by the instruments governing its mandate, will continue to evaluate the measures taken by the Haitian State in response to the recommendations and will continue to do so until such time as they have been fully implemented.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 27st day of the month of December, 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vicepresident; José Zalaquett, Second Vicepresident; Robert K. Goldman, Clare Kamau Roberts, Julio Prado Vallejo and Susana Villarán, Commissioners.