

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 68/06; Case 12.477
Session: Hundred Twenty-Sixth Regular Session (16 – 27 October 2006)
Title/Style of Cause: Lorenzo Enrique Copello Castillo, Barbaro Leodan Sevilla Garcia and Jorge Luis Martinez Isaac v. Cuba
Doc. Type: Report
Decided by: President: Evelio Fernandez Arevalos;
First Vice-President: Paulo Sergio Pinheiro;
Second Vice-President: Florentin Melendez;
Commissioners: Clare K. Roberts, Freddy Gutierrez Trejo, Paolo G. Carozza, Victor E. Abramovich.
Commissioner Freddy Gutierrez has adopted a dissenting and reasoned vote, which follows the instant report.
Dated: 21 October 2006
Citation: Copello Castillo v. Cuba, Case 12.477, Inter-Am. C.H.R., Report No. 68/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
Represented by: APPLICANTS: Claudio Grossman, Helen Jimenez, Courtney Nogar, Laura W. Phillips and Felipe Eduardo Sixto
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I. SUMMARY

1. On October 10, 2003, the Inter-American Commission on Human Rights (hereinafter “the Commission,” the “Inter-American Commission,” or the “IACHR”) received a petition lodged by Messrs. Claudio Grossman, Helen Jiménez, Courtney Nogar, Laura W. Phillips, and Felipe Eduardo Sixto (hereinafter “the petitioners”). The petition alleged that the Republic of Cuba (hereinafter “Cuba” or the “State”) failed to honor its obligations under Articles 1 (Right to life, liberty, and personal security), XVIII (Right to a fair trial), XXVI (Right to due process of law) of the American Declaration of the Rights and Duties of Man^[FN1] (hereinafter “the Declaration” or “American Declaration”) by trying and sentencing to death without due process of law, and subsequently executing, Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac (hereinafter the “alleged victims”).

[FN1] Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

2. On October 14, 2004, the Commission approved Admissibility Report No. 58/04 and concluded that the case was admissible and that it had competence to study the petition lodged

by the petitioners concerning the alleged violation of Articles 1, XVIII, and XXVI of the American Declaration, in accordance with Articles 28 to 37 and 39 of the Rules of Procedure of the Commission. In the same report, the Commission decided: 1) to declare the petition admissible in relation to Articles I, XVIII, and XXVI of the American Declaration; 2) to notify the decision to the State and to the petitioners; 3) to begin the analysis of the merits of the case, and; 4) to publish the decision and include it in its Annual Report to the General Assembly of the OAS.[FN2]

[FN2] See at: <http://www.cidh.org/annualrep/2004sp/Cuba.844.03.htm>

3. The petitioners in their arguments on the merits stated that Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac were sentenced to death and shot in violation of their human rights as established in Articles I, XVIII, and XXVI of the American Declaration.

4. For its part, the State in response to the request that it should present any comments it considered relevant to the arguments on the merits by the petitioners, stated that the Inter-American Commission did not have competence, nor did the Organization of American States have the moral authority to study this or any other matter concerning Cuba.

5. The Commission concluded that the State of Cuba violated Articles I, XVIII, and XXVI of the American Declaration, to the detriment of Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac, by judging and sentencing them without observing guarantees of due legal process, and by subsequently executing them.

II. PROCESSING BY THE COMMISSION

6. On February 18, 2004, the IACHR proceeded to process petition No. 844/2003, in accordance with the provisions of the Rules of Procedure in force since May 1, 2001, and transmitted the pertinent parts of the complaint to the State, granting it a period of two months in which to lodge observations and any information relevant to the material facts of this communication. The State did not file the observations requested by the Commission.

7. On October 14, 2004, the Commission approved Admissibility Report No. 58/04.

8. On October 27, 2004, at the request of the petitioners, a hearing on this case was held during the 121st Regular Session.

9. On November 8, 2004, the Commission notified the Admissibility Report to the State and the petitioners in accordance with Article 38(2) of the Rules of Procedure, and put itself at the disposal of the parties in order to achieve a friendly settlement in accordance with Article 41 of the Rules of Procedure, and requested them to respond to this offer as soon as possible. In the same note, the Commission asked the petitioners, in accordance with Article 37(2) of the Rules

of Procedure of the Commission to present their additional observations on the merits of the case within a period of two months from the date of the notification of the report.

10. On December 6, 2004, the Commission received a communication signed by the Head of the Cuban Interests Section in Washington stating that the Commission had no competence to study this or any other matter concerning Cuba.

11. On the same day, December 6, 2004, the Commission received a note from the petitioners acknowledging the offer made by the Commission to put itself at the disposal of the parties in order to achieve a friendly settlement and requesting the Commission to continue processing the case in view of the fact that the State of Cuba had not responded to requests from the Commission for information.

12. On August 5, 2005, the petitioners restated the arguments presented in their petition on the merits of the case and lodged their arguments concerning reparation. This information was transmitted to the State for its observations.

13. On September 1, 2005, the IACHR received a note signed by the Head of the Cuban Interests Section in Washington saying once more that the IACHR had no competence to study this subject.

14. On October 17, 2005, during the 123rd Regular Session, and at the request of the petitioners, a hearing was held on the merits of the case. The State was invited to participate in said hearing.[FN3] However, it did not attend.

[FN3] By note of September 16, 2005, which appears in the file.

III. POSITIONS OF THE PARTIES

A. The Petitioners

1. As to the facts

15. The petitioners allege that on April 2, 2003, eleven Cuban citizens, including the alleged victims, hijacked a ferry going from La Havana to Regla, with 40 people on board. The petitioners indicate that the intention of the hijackers was to take control of the ferry and travel with it to the United States of America. They add that when they ran out of fuel 45 kilometers from the Cuban coast, the Cuban coastguards proceeded to tow the vessel to the island. During the journey, the group maintained control of the boat.

16. The petitioners say that while they were being towed, the group of hijackers threatened to murder the passengers they were holding hostage, who included two French women tourists. They added that the situation ended without violence when the security forces encouraged the passengers to throw themselves overboard and then captured the hijackers. They state that

according to an official note, the authorities reported that “all of those who had been on board were rescued and saved without so much as a shot or a scratch.”[FN4]

[FN4] Report dated October 10, 2003, page 5.

17. The petitioners point out that the hijackers, including the alleged victims, were tried by the Court for Crimes against State Security of the People’s Court of Havana. The Court had applied the specially expedited summary proceeding contemplated in Articles 479 and 480 of the Criminal Procedure Act. The petitioners add that the trials took place from April 5 to 8, 2003.

18. The petitioners state that at the end of the expedited summary trial, the alleged victims were sentenced to death for violating the “Cuban Law against Acts of Terrorism,” of December 2001. They add that said law was wrongfully applied, because for the legally defined type of offenses committed by the alleged victims, the law prescribes imprisonment, not the death penalty.

19. They add that the defense attorneys for the victims were court-appointed and that the “extremely short duration of the proceedings reveals that there was not enough time to prepare an appropriate defense,”[FN5] and that “the convictions do not mention arguments adduced by the defense and are repeatedly based on political arguments.”[FN6] According to the petitioners, these facts would constitute violations of Articles I, XVIII, and XXVI of the American Declaration.

[FN5] Report dated October 10, 2003, page 4.

[FN6] Report dated October 10, 2003, page 4

20. According to the petitioners, the alleged victims appealed against their death sentences to the Supreme People’s Court, Cuba’s highest judicial organ. This Court, according to the petitioners, ratified the sentences in a one-day trial. The petitioners add that in keeping with current laws in Cuba, these death sentences were submitted for consideration by the Council of State, which proceeded to ratify them, condemning the alleged victims to death.

21. The petitioners also say that in the early morning of April 11, 2003, following the decision handed down by the Council of State, the sentences were carried out and the alleged victims executed.

2. As to the Law

22. With regard to the merits, the petitioners allege that the State of Cuba violated Articles I, XVII, and XXVI of the American Declaration and in this respect state the following:

a. Right to life

23. The petitioners argue that the State of Cuba violated Article I of the American Declaration because the death penalty was not applicable in these cases and was applied in violation of the right of the victims to life. They say that this recognition of the right to life is such that it forms part of the principles of jus cogens.

24. The petitioners state that the Cuban State itself voted for this right in the United Nations, specifically with reference to Article 3 of the Universal Declaration of Human Rights.

25. They add that the Cuban State did not observe the three requirements necessary for the imposition of the death penalty established by the Inter-American Court of Human Rights, that are: 1. The imposition or application of the death penalty is subject to certain procedural requirements whose compliance must be strictly observed and reviewed; 2. The application of the death penalty must be limited to the most serious common crimes not related to political offenses; and 3. Certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.[FN7]

[FN7] Report dated October 10, 2003, page 9.

26. They state that in this case, the death penalty was applied without complying with these requirements. The impartiality of the judges has been documented by the IACHR[FN8] and the death sentence was against Cuba's own legislation because the crime did not qualify as "most serious"[FN9] given that Article 29 of the Cuban Criminal Code establishes the exceptional nature of the death penalty, reserving its application only for the most serious crimes. They state that Messrs. Copello Castillo, Sevilla García, and Martínez Isaac were sentenced to death after an expedited summary trial[FN10] for "the crime of possessing a weapon" in the context of seizing a ship.[FN11] Punishable acts of this nature were not typified amongst laws punishable by the death penalty. They add that the execution of the condemned men for the crime of terrorism in this case amounts to a direct violation of the right to life and of Cuban legislation because it does not meet the definition of a "most serious crime."

[FN8] Report dated October 10, 2003, page 10.

[FN9] Report dated October 10, 2003, page 10.

[FN10] Report dated October 10, 2003, page 4.

[FN11] Report dated October 10, 2003, page 11.

27. Furthermore, they argue that the execution of the condemned men for the crime of terrorism amounts to an additional violation of the right to life because the Republic of Cuba had declared a de facto moratorium on executions.[FN12] According to the petitioners, this had created an expectation that use of the death penalty was being restricted in the spirit of the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights.

[FN12] Report dated October 10, 2003, page 17.

b. Right to Justice

28. The petitioners argue that the State of Cuba violated Article XXVIII of the Declaration because in their expedited summary trial, the victims were not provided with the minimum judicial guarantees. In this respect the petitioners say that there was neither sufficient time nor procedural means. The executions of Messrs Copello Castillo, Sevilla García, and Martínez Isaac took place less than one week after they were accused. The petitioners claim that this amounts to a violation of Article 8(2)(c) of the Convention which states that “every person accused of a criminal offense...is entitled to adequate time and means for the preparation of his defense” and they state that the IACHR has interpreted it in this way, as has the Inter-American Court of Human Rights itself.”[FN13]

[FN13] Report dated October 10, 2003, page 15.

29. The petitioners also allege a violation of Article 8(2)(e) of the Convention, the right to be assisted by counsel.[FN14] This arises from the petition which states, “It is known that the other eleven accused persons did not have the opportunity to be represented by lawyers of their own choosing. Therefore, it can be assumed, that the three persons who were summarily executed were not represented during their trial in Cuba by defense counsel of their own choosing.”[FN15]

[FN14] Report dated October 10, 2003, page 15.

[FN15] Report dated October 10, 2003, page 17.

30. They say that the norm set out in Article 8(2) of the American Convention is a fundamental part of human rights law.

c. Right to due Process of Law

31. The petitioners argue that the State of Cuba violated Article XXVI of the Declaration because the trial of the three executed men was neither public nor impartial.

32. They say in this regard that there was no publicity concerning the trial of the three persons in question. “The international press wanted to cover the trial but the Cuban government did not allow media access.”[FN16]

[FN16] Report dated October 10, 2003, page 17

33. They also claim that the hearing was not impartial. According to the petitioners, “the IACHR has exhaustively documented that Cuba does not possess an independent judiciary. The government controls the judiciary...The National Assembly and regional bodies select all the judges in the country and a single political party controls all those bodies,”[FN17] and not even lawyers are free from this control.

[FN17] Report dated October 10, 2003, page 17.

34. The petition also states that in this case the death penalty was “cruel, inhumane, and degrading,” particularly given that it was against the background of a victim-less crime, and those sentenced were not granted the right to spend their last moments of life with their loved ones. This is in line with the statement by the petitioners to the effect that “the IACHR has stated that arbitrary sentences are a cruel, inhumane, or degrading penalty.”[FN18]

[FN18] Report dated October 10, 2003, page 17.

35. However, they also claim that the arbitrariness of the penalty derives from the fact that Cuba’s own Penal Code of 1979 (Law 21) states that the death penalty is an exceptional one and can only be applied by a Court in cases where the most serious crimes have been committed. And they state that “possession of a weapon (in accordance with other provisions of the Cuban penal code) does not constitute a “most serious” conduct that merits the imposition of capital punishment.” The petitioners therefore conclude that the prohibition of arbitrariness enshrined in the American Declaration has been violated.

d. As to the reparations

36. The petitioners state that according to the Inter-American Court of Human Rights, the beneficiaries[FN19] are, in the first instance, the direct victims (the three men who were executed), and secondly, the members of their families, as successors and indirect victims of the violations. Their claims are based on the following assertions:

[FN19] A writ by the petitioners concerning reparations dated August 8, 2005, that details the beneficiaries of reparations, page 2.

37. The violation of an international obligation, in this case protected by the American Declaration, necessarily implies the obligation to remedy[FN20]. This reparation is governed by the principle of Restitutio in integrum, which implies returning the situation as far as possible to

its original state, and to compensate for where this is not possible. Steps should also be taken to ensure that the violation is not repeated.

[FN20] American Convention on Human Rights, Article 63(1).

38. The petitioners are of the opinion that Cuba should be declared responsible for the violation of rights protected by the American Declaration, take steps to remedy the violations and offer guarantees that the violations will not be repeated, pay fair compensation in reparation for material, moral, and psychological damage suffered by the victims, and pay the legal costs of the proceedings before the Inter-American system.

39. For the damage caused in detriment to the right to life, the petitioners say that compensation should be made under the following headings:

1) Material Damage must be remedied. The petition here argues that as it is not possible in this case to determine each victim's job and respective salary, justice demands that the minimum legal wage at the time of death be used: this would be US\$125.00 monthly. The calculation of loss of income should be based on the age of the individual at the time of his death.[FN21]

2) Moral Damage must be remedied. This, according to the petitioners, includes the suffering and pain experienced by the petitioners and the members of their families, and should be calculated on the basis of justice and need.[FN22]

3) For the damage caused by the violation of the rights to justice and due process of law, each family should receive compensation of US\$50,000.00 and this should be distributed according to table 2 in the writ on reparations lodged with the IACHR on August 5, 2005.[FN23]

[FN21] A writ by the petitioners concerning reparations, dated August 8, 2005, page 10.

[FN22] A writ by the petitioners concerning reparations, dated August 8, 2005, pages 10, 11, and 12.

[FN23] A writ by the petitioners concerning reparations, dated August 8, 2005, pages 11 and 12.

40. The petitioners also request that the relevant steps be taken and the guarantees extended to ensure no repetition in accordance with the different international instruments in force. They therefore request the State of Cuba to carry out a complete, impartial, and effective investigation in order to identify, try, and criminally punish those agents of the State who were responsible, both materially and intellectually, for the shooting of Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac.”[FN24]

[FN24] A writ by the petitioners concerning reparations, dated August 8, 2005, page 18.

41. They also request that Cuban law should recognize all inter-American standards relating to the due process of law, and in addition make all the modifications necessary to adapt domestic law accordingly, and ratify the principal international human rights instruments of which Cuba is not yet part.[FN25]

[FN25] A writ by the petitioners concerning reparations, dated August 8, 2005, page 20.

42. They also request that the State should pay all the legal costs incurred throughout this process before the inter-American system.[FN26]

[FN26] A writ by the petitioners concerning reparations, dated August 8, 2005, page 20.

B. The State

43. In the present case, Cuba has responded to requests for information and observations by the IACHR via the Cuban Interests Section in Washington. Communications from the State, received by the Commission on December 6, 2004 and September 1, 2005, state that the Inter-American Commission on Human Rights has no legal competence, and nor does the Organization of American States have moral authority to judge the human rights situation in Cuba.

44. The Commission observes that the deadlines established in the Rules of Procedure for the State to supply information have long since expired without Cuba disputing the allegations lodged by the petitioners in this case.

IV. ANALYSIS OF THE MERITS

A. Preliminary

45. The Commission reasserts its competence[FN27] to study the facts of this case. The Commission's jurisdiction in this case derives from the OAS Charter, the Commission's Statute, and its Rules of Procedure. In accordance with the Charter of the OAS, all member states undertake to respect the fundamental rights of individuals, which in the case of states that are not party to the Convention are those established in the American Declaration. In accordance with Article 20(a) of its Statute, the Commission is required to pay particular attention to the observance of the human rights referred to Articles I, II, III, IV, XVIII, and XXVI of the Declaration in exercising its powers in relation to countries that are not parties. In accordance with Article 49 of its Rules of Procedure, the IACHR shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration in relation to Member States that are not parties to the American Convention on Human Rights (hereinafter, "Convention" or "American Convention").

[FN27] The Commission has stated repeatedly that the Cuban State “is juridically responsible to the Inter-American Commission in matters that concern human rights” because it is “party to the first international instruments established in the American hemisphere to protect human rights,” and because under Resolution VI of the Eighth Consultation Meeting it was “the Cuban government that was excluded from the inter-American system, and not the Cuban State.” On that matter, the IACHR stated that “[...] it has always considered that the purpose of the Organization of American States when it excluded the Cuban Government from the inter-American system, was not to leave the Cuban people without protection. That Government’s exclusion from the regional system in no way means that it is no longer bound by its international human rights obligations.” See IACHR, Annual Report 2004, Vol. II, Chapter IV, paragraph 56. Also, the competence of the IACHR to examine individual petitions concerning human rights violations in Cuba has been uniformly reiterated in its reports No. 56/04, 57/04, and 86/99.

46. Cuba deposited its instrument of ratification of the Charter of the OAS on July 16, 1952, and since that time has been a State Party to the Organization of American States.

47. By virtue of the foregoing, the IACHR decided, in its Admissibility Report No. 58/04, that it has competence to examine the material facts of this case.

B. Application and interpretation of the American Declaration of the Rights and Duties of Man

48. The petitioners in the present case allege that the State of Cuba is responsible for the violation of the rights enshrined in Articles I, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man to the detriment of Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac.

49. As the Commission has stated on many occasions, the American Declaration is a source of international juridical obligation for all member states of the Organization of American States, including Cuba. Furthermore, the Commission is empowered by Article 20 of its Statute, and by Articles 49 and 50 of its Rules and Procedures, to receive and examine any petition that contains a denunciation of alleged violations of human rights set forth in the American Declaration, in relation to Member States of the OAS that are not parties to the American Convention.[FN28]

[FN28] See also 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, Series A, No. 10 (1989)(hereinafter “Advisory Opinion OC-10/89”), paragraphs 35-45; IACHR, James Terry Roach and Jay Pinkerton vs. United States, Case 9647, Res. 3/87, September 22, 1987, Annual Report 1986-7, paragraphs 46-49; Charter of the OAS, Articles 3, 16, 51, 112, and 150.

50. In accordance with the jurisprudence of the inter-American human rights system, the provisions of its guiding instruments including the American Declaration should be interpreted and applied in the light of the evolution experienced in the field of international human rights law, 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.[FN29]

[FN29] See Advisory Opinion OC-10/89, *supra*, paragraph 37; I/A Court H.R., Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance. In the Framework of the Guarantees of due Process of Law*, Series A, No. 16 (1999) (hereinafter, “Advisory Opinion OC-16/99”), paragraph 114. (See Report No. 52/02, Case No 11,753, Ramón Martínez Villareal (United States), Annual Report of the IACHR 2002 (hereinafter, “Martínez Villareal Case”), paragraph 60. See also American Convention Article 29(b) No provision of this Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party).

51. In particular, the bodies of the inter-American system have previously maintained that 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.[FN30] 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[FN31] and its respective protocols such as the protocol relating to the abolition of the death penalty.[FN32] Similarly, relevant evolution has resulted from the provisions of other multilateral treaties approved both within and outside the framework of the inter-American system, including the Geneva Conventions of 1949[FN33] and the International Covenant on Civil and Political Rights.[FN34]

[FN30] See Advisory Opinion OC-10/89, *supra*, paragraph 37; Advisory Opinion OC-16/99, *supra*, paragraph 115; Report No 52/01, Case No 12,243, Juan Raúl Garza (United States), IACHR Annual Report 2000 (hereinafter the “Garza Case”), paragraph 89.

[FN31] See IACHR, Report on Human Rights of Asylum Seekers in Canadian Refugee System, Doc. OA/Ser.L/VII.106, doc.40 rev. (February 28, 2000), paragraph 38; Garza Case, *supra*, paragraphs 88 and 89 (that confirms that even though the Commission clearly does not apply the American Convention in relation to member states that have still not ratified that treaty, its provisions can still be relevant and inform an interpretation of the principles of the Declaration.)

[FN32] Approved in Asunción, Paraguay, on June 8, 1990 in the twentieth regular session of the General Assembly.

[FN33] See, for example, Report No. 55/97, Case 11,137, Juan Carlos Abella (Argentina), IACHR Annual Report, 1998, paragraphs 157-171.

[FN34] Adopted and opened for signature, ratification and accession by the General Assembly in its Resolution 2200 A (XXI) of December 16, 1966. Came into effect: March 23, 1976, in accordance with Article 49.

52. In order to give an opinion on the present case, the Commission in as far as it is appropriate, will interpret and apply the provisions of the American Declaration in the light of the latest developments in the field of international human rights law, as reflected in the treaties, current practice, and other relevant sources of international law.

53. Consequently, the Commission will take into consideration and apply the pertinent provisions of the American Declaration in order to decide if the State of Cuba has violated the rights set out in Articles I (Right to life, liberty and personal security), XVIII (Right to a fair trial), and XXVI (Right to due process of law) of the American Declaration, in accordance with Report N° 58/04

C. The facts

54. The Commission observes that in spite of its repeated requests, to date the State has provided no observation, information, or evidence concerning the allegations made by the petitioners. The Commission also notes that the facts alleged by the petitioners describe in specific detail the situation of the alleged victims and that these are corroborated by evidence documented in other sources.

55. On the basis of these considerations and taking into account the absence of convincing evidence that leads to a different conclusion, the Commission decides to apply Article 39 of its Rules of Procedure, which states:

The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion.

56. Without prejudice to the foregoing, for its examination, the Commission considered information from public statements by the Ministry of Foreign Affairs in Cuba and from the 11/2003 judgment of the People's Provincial Court of the City of Havana on April 8, 2003.

57. Therefore, the Commission assumes that the facts concerning the alleged victims described in the foregoing paragraphs are correct.

1. Events leading to the arrest of Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac

58. Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac, all of them Cuban citizens, were accused of taking part on April 2, 2003, along with eight other people,[FN35] in the hijacking of a ferry making the crossing between Havana and the area of Casablanca and Regla, with approximately 40 persons on board.[FN36] The intention of the hijackers was to take the ferry to the coast of Florida, United States of America.

[FN35] The following people also took part in the hijacking of the ferry: Maikel Delgado Aramburo; Ramon Henry Grillo; Wilmer Ledea Perez; Yoanny Thomas González; Yolanda Pando Rizo; Dania Rojas Gongora; Ana Rosa Ledea Rios, and Harold Alcala Aramburo. Judgment 11/2003, the People’s Provincial Court of the City of Havana, dated April 8, 2003. Case 17/2003, filed for the crime of Acts of Terrorism.

[FN36] A Statement from the Cuban Ministry of Foreign Affairs on April 2, 2003 said: “At dawn today, April 2, barely 24 hours after the previous air hijacking, another dangerous event took place: the hijacking of a passenger vessel traveling between Havana and Casablanca with many passengers on board. At 1.30am approximately, the ferry was seen leaving the bay and taking what is the usual direction in these cases, towards Florida. Once this was detected, two vessels of the Frontier Guard Service set out to sail alongside them, as is also usual in these cases, as the policy has always been not to intercept them at sea in order to avoid accidents, and only to follow them in order to be able to lend assistance in case of sinking or other serious risk to the lives of those on board, who often include women and children. At 2.40am, the head office of the Frontier Guard Service, as is also usually the case, communicated with the Seventh District of the US Coast Guard in Miami. At 3.00am, the hijackers of the ferry that was 15.28 meters long, almost 5 meters wide and with a capacity of 100 passengers, communicated by radio with the command post of our frontier guard service and informed them that they were carrying 50 passengers on board, including six to eight children; that they were armed with three pistols; a Makarov, two caliber 38s and one knife, and demanded that a vessel be provided in order to continue their journey to the United States, and if this demand was not met, that they would begin to throw persons overboard. See in: <http://www.cubaminrex.cu>.

59. At dawn on April 2, 2003, the hijackers took control of the vessel a short while after having boarded her, threatening the passengers and the crew with knives and firearms. At midday on April 2, and at a distance of some 45 kilometers from Cuba, the ferry ran out of fuel. The hijackers communicated with the Cuban authorities, demanded a supply of fuel, and threatened to throw overboard the three French hostages. The authorities tried to persuade the hijackers to desist from this attempt because the type of vessel was not suitable for travel on the high seas. At around three in the afternoon, the hijackers agreed to be towed towards the port of Mariel against a promise that they would be given fuel. During the return journey, they kept control of the vessel and threatened to kill the passengers they were holding as hostages. In port, the Cuban security forces encouraged the passengers to jump into the water and then arrested all those who had taken part in the hijacking, with no one being wounded or injured. The hijacking came to an end at approximately 4 pm on April 2, 2003.[FN37]

[FN37] From briefs by the petitioners; Official information from the Cuban Government, and Judgment 11/2003 of the People’s Provincial Court of the City of Havana, dated April 8, 2003.

2. Judgment

60. On April 5, 2003, the persons who took part in the hijacking of the ferry were brought before the Court for Crimes against State Security of the People's Provincial Court[FN38] of the City of Havana.

[FN38] People's Courts Law, Law No. 82 of 11-07-1997 (National Assembly of People's Power, Extraordinary Official Gazette, No. 8, of 14-07-1997). The law sets out the organization of people's Courts in line with reforms of the Constitution of the Republic, and establishes that the Courts constitute a system of state bodies, the structure of which ensures they function independently of any other, and subordinate in hierarchy to the National Assembly of People's Power and to the Council of State; and sets out the jurisdiction and competence of these at their different levels. Repeals Law 70/1990. At <http://www.gacetaoficial.cu/>.

61. All those who had taken part in the hijacking were accused by the Prosecutor of committing terrorist acts as set out in the Law against Terrorist Acts[FN39], of December 2001.

[FN39] Law 93 of December 20, 2001.

62. The People's Provincial Court applied the proceeding of expedited summary trial[FN40], set forth in Articles 479 and 480 of the Law of Criminal Procedure, which states that in exceptional cases the Attorney General may advise the President of the People's Supreme Court that the proceeding of expedited summary trial may be used to judge certain criminal acts.

[FN40] From Cuban Ministry of Foreign Affairs statement dated April 11, 2003. At <http://www.cubaminrex.cu>.

Expedited Summary Trial

Article 479: In a case where exceptional circumstances apply, the Attorney General may influence the President of the People's Supreme Court and decide that specific criminal acts within the competence of any of the Courts of justice should be tried by expedited summary trial, except where these acts are within the competence of the People's Municipal Courts.

Article 480: In the expedited summary trial, the terms established by this Law for processing prior formalities, the oral hearing and the remedies, are reduced to the extent considered necessary by the competent Court.[FN41]

[FN41] Law of Legal Process. From Special Proceedings. Title X. Expedited Summary Procedure. Articles 479 and 480. At <http://www.gacetaoficial.cu>.

63. During the trial before the People's Provincial Court, the accused had defending counsel who had been appointed by the court.[FN42]

[FN42] In Judgment 11/2003 of the People's Provincial Court of the City of Havana, dated April 8, 2003. VISTA.

64. In its judgment[FN43] of April 8, 2003, the People's Provincial Court states that the hearing was oral, public, and summary. The judgment regards as proven that the eleven accused, "having agreed amongst themselves, and encouraged by the Cuban Adjustment Act as well as by earlier cases of airplane hijacking, conceived the idea to flee illegally from Cuba by hijacking one of the passenger ferries that cross the Havana Bay between the Muelle de Luz, Casablanca, and Regla [.]"[FN44] The judgment goes on to describe the events that took place on April 3, 2003, and the records of the accused.

[FN43] In judgment 11/2003 of the People's Provincial Court of the City of Havana. Case 17/2003, brought for the crime of Acts of Terrorism.
[FN44] In Judgment 11/2003 of the People's Provincial Court of the City of Havana on April 8, 2003. First Finding.

65. With regard to Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac, the judgment describes the following records:[FN45]

That the accused LORENZO ENRIQUE COPELLO CASTILLO, was sentenced previously in cases three hundred and sixty-four of one thousand nine hundred and ninety-four, and one hundred and eleven of one thousand nine hundred and ninety-five, both brought before the People's Municipal Court of Central Havana, for the crime of fraud, and fined 200 quotas of one peso each, and one year of imprisonment, and very bad social conduct has been identified on twenty-nine occasions, almost always for pestering tourists.

That the accused BÁRBARO LEODÁN SEVILLA GARCÍA, was sentenced in Case number sixty-six of one thousand nine hundred and ninety-eight at the People's Provincial Court of the city of Las Tunas, for the crime of house breaking, to 2 years imprisonment, his conduct continues to be very anti-social in his neighborhood, he prides himself on being good-looking, disturbs the peace, and spends time with antisocial elements.

That the accused JORGE LUIS MARTINEZ ISAAC, was sentenced previously in Cases five thousand five hundred and ninety-eight of one thousand nine hundred and eighty-eight; two hundred and eight of one thousand nine hundred and ninety-four, and nine hundred and twenty of two thousand and one at the People's Provincial Court of the City of Havana and the People's Municipalities of Melena del Sur in Old Havana, for the crimes of involuntary manslaughter,

eluding arrest, and threats, to eight years and six months respectively in prison and fined three hundred quotas of two pesos each for normal behavior in society.”

[FN45] With regard to the eight other people who took part in the hijacking, the judgment states that one of them has a criminal record and all have records of anti-social behavior.

66. The judgment states that in order to establish the facts proven it relied on “statements by the accused in which they described the events; statements from witnesses who were in the hijacked vessel and recounted their experiences on board the boat and the threats to which they were subjected by some of those charged; a statement from the witness who described how he recovered one weapon from under the water and another who described one confrontation he had had with one of the accused and whom he pushed into the water. Evidence was heard from a specialist in Legal Medicine, Ernesto Pérez González, who described the states of mind of COPELLO CASTILLO, SEVILLA GARCIA and MARTINEZ ISAAC; evidence was also given by specialists in finger prints; graphology; firearm residues on hands, blood, hairs, and textile micro-fibers, writing, and judicial ballistics experts. Documentary evidence came from complementary investigation of the accused, certificates of criminal records, amongst others.”[FN46]

[FN46] Judgment 11/2003 of the People’s Provincial Court of the City of Havana, dated April 8, 2003, Second Finding.

67. The judgment establishes that the facts declared proven constitute a crime under the law against terrorist acts, set forth and sanctioned in Articles 10, 11(c), 14(1), and 16(1)(a) “is established when the perpetrators, acting in a group, one of them with a pistol which he shoots twice, seize a group of persons and hold them hostage, threatening them with shooting them to death, and manage to take control of a passenger vessel in order to take themselves to the United States of America. The crime of carrying arms is not included because the use of the pistol and knives was the means to carrying out the terrorist action.”[FN47] Articles 10, 11(c), 14(1), and 16(1) of the law against terrorist acts state:

Article 10: Any person who makes, facilitates, sells, transports, remits, brings into the country or has in his possession, in what ever form or place, arms, munitions or materials, inflammable, asphyxiant, or toxic substances or instruments, plastic explosives or of any other class or nature, or chemical or biological agents, or whatever other element from the study, design, or combination of which it is possible to derive products so described, or any other similar substance or explosive or lethal device, shall be punished by from ten to thirty years imprisonment, life imprisonment, or death.

Article 11: The same sanction shall apply to any person who delivers, places, throws, disseminates, detonates, or uses in any other way, an explosive or lethal device, or any other

means or substance described in Article 10, against c) a public transport network or any of its components;

Article 14(1): Any person who seizes another person, or holds him against his will, and threatens him with death, wounding or imprisonment, in order to force a State, an inter-governmental organization, an individual or a legal entity, or group of persons, to act or fail to act, as an explicit or implicit condition for the release of a hostage, shall be punished by from ten to twenty years' imprisonment.

Article 16(1): The punishment of from ten to thirty years' imprisonment for any person who: a) seizes a boat or exercises control over it by means of violence, threat of violence or any other form of intimidation;

[FN47] Judgment 11/2003 of the People's Provincial Court of the City of Havana, dated April 8, 2003, First Whereas.

68. All the accused were described in the judgment as perpetrators, liable to the aggravating circumstances contemplated in Article 53(a), (c), (f), (h), and (o) because the judgment states that "it is certain that the acts were committed by a group of eleven persons who were well organized in themselves, they caused serious economic consequences because of the time that the vessel was out of service, to commit the crime they used a pistol which they fired and might therefore have caused the death or injury of other persons, they took advantage of the cover of night and the small numbers of people crossing at that time, and they used French tourists as hostages, although tourism is known to be a high priority activity for Cuba.[.] [FN48] The relevant clauses of Article 53 of the Penal Codes state:

Article 53: The following can be aggravating circumstances: a) to commit the act as part of a group made up of three or more persons; c) by the offense, to cause serious consequences; f) to commit the act in such a way as to cause public danger; h) to commit the act at night, or in a deserted place, or in a place with little public transit or where it is dark, having chosen these circumstances on purpose and exploiting them; o) to commit the act against persons or goods connected with activities that are prioritized for the economic and social development of the country.

[FN48] Judgment 11/2003 of the People's Provincial Court of the City of Havana, April 8, 2003, Third Whereas.

69. In addition, because several aggravating circumstances coincided, all the accused were subjected to the extraordinary aggravating circumstance defined in Article 53(2) of the Penal Code that states:

Article 53(2): When several aggravating circumstances exist, or when one of them is very strongly manifest, the court may increase by up to half the maximum punishment envisaged for the crime.

70. The judgment states that criminal responsibility in this case implies civil responsibility in accordance with Article 70 of the Penal Code.

71. With regard to matching the punishable act to the punishment, the following is stated in the final (fifth) “Whereas” clause of the judgment:

“In order to ensure the appropriate scale of the punishment to be imposed, the Court must take account of the provisions of Articles twenty-seven[FN49] and forty-seven[FN50] of the Penal Code; the extreme dangerousness of the events, not just in the way they were executed, that endangered the lives of a number of people who were merely traveling in that passenger boat or were returning to their homes, but also in the means they employed by using knives and firearms which they fired twice in order to scare their hostages even more. The above combines with their personal characteristics, being people who live like social parasites and engage in no useful activity, with criminal records as in the case of COPELLO CASTILLO and MARTINEZ ISAAC, who has two or more different kinds, to whom applies the special rule of aggravation as described in Article fifty-five paragraphs one and three, sub-paragraph h) of the Penal Code; and SEVILLA GARCIA and THOMAS GONZALES who each have a different category of criminal record, and to whom can be applied the rule established in the abovementioned Article fifty-five, paragraphs one and three, sub-paragraph c) of the substantive law. In order to decide on the appropriate punishment, the Court had not only to evaluate the circumstances described above, but also to take into account that the Cuban people have constantly been the victims of many acts of terrorism causing serious human and material damage, as a result of which Cubans are maligned throughout the world, and this imposes on us the obligation to act with the strictest rigor, [...] In view of the fact that some conduct and behavior damages society in such a way that in exceptional circumstances it is necessary for the perpetrators to be punished most severely for it, in order to purge surrounding society, as applies in the case of the accused COPELLO CASTILLO, SEVILLA GARCIA, and MARTINEZ ISAAC, who were the leaders and principal perpetrators of this crime, and who, in the opinion of this Court, should be sentenced to the maximum penalty.”

[FN49] Article 27: The purpose of the punishment is not just to punish the crime committed, but also to re-educate those punished in the principles of an honest attitude to work, strict compliance with the law, and respect for the norms of life in a socialist community, and also to prevent the committing of more crimes either by the persons already punished or by others. In Penal Code. Title VI. Punishments. Chapter I. The Purposes of Punishment.

[FN50] Article 47(1): The Court sets the extent of the punishment, within the limits established by law, guided by a socialist juridical morality, and bearing in mind especially, the degree of danger to society of the act, the circumstances in which it took place, any extenuating or aggravating circumstances, the accused person’s motives, as well as his previous record, his personality as an individual, his behavior subsequent to the crime, and the likelihood of his correction. Penal Code. Chapter V. Suitability of the Punishment.

72. The judgment goes on to state: WE RULE: to punish LORENZO ENRIQUE COPELLO CASTILLO, BARBARO LEODAN SEVILLA GARCIA AND JORGE LUIS MARTINEZ ISAAC, perpetrators of the crime of ACTS OF TERRORISM, with DEATH.”[FN51]

[FN51] Judgment 11/2003 of the People’s Provincial Court of the City of Havana, April 8, 2003.

73. The judgment ordered the resolution to be notified to the parties and copy to be sent to the Provincial Department of Prisons of the Ministry of the Interior. Finally, it states “The remedies of appeal and cassation respectively can be brought against this judgment, within eight hours from the moment of its notification because it is an expedited summary proceeding. And in the case of those sentenced to death, the appeal is considered lodged.”

74. Copello Castillo, Sevilla García, and Martínez Isaac appealed the sentence of the death penalty in the People’s Supreme Court,[FN52] which ratified the penalty.

[FN52] Article 15(1): The People’s Supreme Court exercises the highest judicial authority and its decisions at this level are definitive. Law of People’s Courts. At <http://www.gacetaoficial.cu/>.

75. Subsequently, the death penalties were submitted for consideration by the Council of State[FN53], which body has the power to grant pardons to those condemned to death, however, it ratified the death penalties.

Given that the death sentences were submitted officially to the Council of State for their consideration, the Council, at a specially convened meeting, spent hours scrutinizing the evidence on which the convictions were based, the gravity of the evidence, the potential dangers implied not only for the lives of numerous innocent people but also for the security of the country – currently the target of a sinister series of provocations plotted by the most extreme sectors of the United States government and its allies in the terrorist mafia in Miami, the only purpose of which is to create the conditions and pretexts necessary to further injure our country, which we will defend at whatever price is necessary -, considered the decisions of both courts absolutely just and in strict accordance with the law and therefore ratified the judgments.[FN54]

[FN53] Article 74 of the Cuban Constitution: The National Assembly of People’s Power elects, from its deputies, the Council of State, that consists of a President, a first Vice President, five Vice Presidents, one Secretary and twenty-three more members. The President of the Council of State is the Head of State and Head of Government.

[FN54] Statement from the Ministry of Foreign Affairs of Cuba, April 11, 2003. At <http://www.cubaminrex.cu>.

76. At dawn on April 11, 2003, Copello Castillo, Sevilla García, and Martínez Isaac were executed.[FN55]

[FN55] The protection of human rights in Cuba was dealt another severe blow with the decision by the Cuban authorities to send three men to their deaths by firing squad effectively bringing to an end the de facto moratorium on executions practiced by the Cuban Authorities for the last three years. The three men, Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac, were part of a group who, according to reports, on April 2, hijacked a Cuban ferryboat carrying several tens of passengers and attempted to force it to sail to the United States. They were subjected to summary trial and the Supreme Military Court and the Council of State reviewed their cases in summary and inadequate fashion. They were executed less than one week after the beginning of the trial. Coming shortly after the arrest and summary trials of great numbers of dissidents, these executions reflect a serious deterioration in the human rights situation in Cuba. Amnesty International Report 2003, May 28, 2003.

D. The Law

77. Before pronouncing on the merits of the present case, the Commission wishes to reaffirm and reassert its firm doctrine that a heightened scrutiny should be applied to those cases punishable by the death penalty. 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 has an enhanced obligation to ensure that any deprivation of life resulting from the application of a death penalty comply strictly with the requirements of the relevant inter-American human rights instruments, including the American Declaration. This “proof of heightened scrutiny” is in line with the restrictive focus adopted by other international human rights authorities for the application of the death penalty,[FN56] and has been articulated and applied by the Commission when examining previous cases where it was possible that the death penalty might be imposed.[FN57]

[FN56] See, for example, I/A Court of H.R., Advisory Opinion OC-16/99 (October 1, 1999) “The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law” paragraph 136 (which concludes that “because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.”); UNCHR, Baboheram-Adhin and others vs. Surinam, Communications Nos. 148-154/1983, adopted on April 4, 1985, paragraph 14.3 (which concludes that the law should control and limit rigorously the circumstances in which a person can be deprived of his life by State authorities); Report by the United Nations Special Rapporteur on Extrajudicial Executions, Mr. Bacre Waly Ndiaye, lodged in accordance with Resolution 1994/82 of the Commission on Human Rights. Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent territories, United Nations document E/CN.4/1995/61 (December 14, 1994) (hereinafter “Ndiaye Report”), paragraph 378

(which emphasizes that in cases of capital punishment, it is the application of the standards for 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 violations of the right to life.)

[FN57] See, for example, Report No 57/96 (Andrews vs. United States), IACHR Annual Report 1997, paragraphs 170-171; Report No 38/00 (Baptiste vs. Grenada), IACHR Annual Report 1999, paragraphs 64-66; Report No 41/00 (McKenzie and others vs. Jamaica), IACHR Annual Report 1999, paragraphs 169-171; Report 1/05 (Roberto Moreno Ramos vs. United States), paragraphs 43-44.

78. Therefore, the Commission will be more stringent in its examination of the allegations by the petitioners in the present case, to ensure particularly, that the State has adequately guaranteed the right to life, the right to due process of law, and the right to a fair trial, as established in the American Declaration.

79. The Commission also wishes to state that without prejudice to the fact that international law obliges member states to adopt all measures necessary to prevent terrorism and other forms of violence and to ensure the safety of their citizens, at the same time, member states are equally obliged to continue complying strictly with their other international obligations, including those assumed within the frameworks of international human rights law and international humanitarian law.[FN58] The application of legislation designed to prevent and punish conduct considered terrorist, shall not provide an excuse for States to consider themselves exempt from guaranteeing basic human rights.

[FN58] IACHR, Report on Terrorism and Human Rights, OAS/Ser.L/VII.116.Doc.5 rev.1 corr. October 22, 2002, paragraphs 3 and 4.

1. The right to justice and the right to a fair trial

80. Article XVIII of the American Declaration states:

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

81. And Article XXVI of the American Declaration states:

Every accused person is presumed to be innocent until proved guilty

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

82. The petitioners maintain that the counsel defending Copello, Sevilla, and Martínez were appointed by the court; that the very short length of the proceedings indicate that there was insufficient time in which to prepare an adequate defense; that the judgments make no reference to arguments made by the defense and; that on many occasions, the judgment was based on political arguments. The petitioners therefore argue that the victims were condemned to death in violation of the Cuban Law against Acts of Terrorism, and that the penalties laid down for the offenses committed by the victims do not include the death penalty, but imprisonment.

83. As has already been stated, the State did not present any arguments in this context.

84. The Commission has specified that several fundamental due process guarantees are necessary in capital prosecutions. These include basic substantive requirements, including 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, 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. They also include fundamental procedural due process protections, including the right to be presumed innocent until proven guilty according to law, the right to prior notification of charges, the right to adequate time and means for the preparation of his or her defense, the right to be tried by a competent, independent and impartial tribunal, previously established by law, the right of the accused to defend himself or her self personally or to be assisted by legal counsel of his own choosing and to communicate freely and privately with his counsel, and the right not to be compelled to be a witness against himself or herself or to plead guilty.[FN59]

[FN59] IACHR, Report on Terrorism and Human Rights, October 22, 2002, paragraph 95.

85. In the present case, the first question for the Commission to decide is whether Messrs Copello Castillo, Sevilla García, and Martínez Isaac were subjected to a fair trial that was compatible with the requirements enshrined in the American Declaration.

86. Having examined the available arguments and information, including those presented by the petitioners as well as those obtained from public statements by the Cuban government concerning the circumstances that gave rise to the complaint lodged with the IACHR, the Commission must re-state the importance of strict compliance with the norms concerning a fair trial, especially in actions that might produce the application of the death penalty. The Commission has previously recognized that the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, in part due to its irrevocable and irreversible nature, and because of that justifies an especially rigorous need for reliability in the determination that death is the appropriate punishment in a specific case.[FN60] The Inter-American Court of Human Rights has pointed to 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,” because “ if the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important

when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.”[FN61]

[FN60] See, for example, *McKenzie and others vs. United States*, supra, paragraph 188, in which reference is made in part to *Woodson vs. North Carolina*, 449 L Ed 944,961 (U.S.S.C); Report 1/05 (*Roberto Moreno Ramos vs. United States*), paragraph 47.

[FN61] Advisory Opinion OC-16/00, supra, paragraph 135. See similarly, United Nations Commission on Human Rights, *Champagne, Palmer and Chisholm vs. Jamaica*, Communication No 445/991, United Nations Doc. CCPRC/C/51/D/445/1991 (1994), paragraph 9 (which concludes that in cases in which the death penalty might be imposed, “the obligations on States parties to rigorously observe all the guarantees of a fair trial established in Article 14 of the Pact [of Civil and Political Rights] admit no exceptions in this respect”).

87. Because the right to life and to freedom are considered basic human rights, it is essential that any person who is arrested has access to adequate judicial process within a reasonable period during which the appropriate arguments and evidence can be studied seriously, all of which requirements must be even more rigorous in cases where the persons are accused of crimes punishable by the death penalty.

88. The trial against Messrs. Copello, Sevilla, and Martínez, began on April 5, 2003, and finished on April 11, 2003, during which time they were even sentenced to death. In this regard, in order to determine whether the length of the trial was reasonable or not, the Commission is obliged to take into account the complexity of the matter, the part played in the trial by the accused person, and the conduct of the judicial authorities.[FN62]

[FN62] These three criteria have repeatedly been applied by the Commission and the Inter-American Court when evaluating the reasonable length of a trial: Report No. 12/96, supra, note 108; *Suárez Rosero Case*, supra note 112, paragraph 25; *Caso Genie Lacayo*, Judgment January 29, 1997, paragraph 77.

89. From the information provided by the petitioners, and the content of public statements by the Ministry of Foreign Affairs of Cuba, and from the judgment of first instance dated April 8, 2003 by the People’s Provincial Court of the City of Havana, it is clear that the proceedings in which the alleged victims were tried was an expedited summary trial, in which the most serious punishment envisaged by Cuban legislation was imposed, i.e. the death penalty.

90. Although Articles 479 and 480 of the Cuban Law of Criminal Process envisage the possibility of holding an expedited summary proceeding, the law itself only envisages it in the case of exceptional circumstances. The Commission in this regard observes that the judgment of first instance dated April 8, 2003, does not lay down any exceptional reasons by virtue of which an expedited summary trial could have been applied in this case.

91. The Cuban Law of Criminal Process stipulates that in the case of an expedited summary trial, the competent Court may, in as far as it judges necessary, reduce the periods for processing prior proceedings, the oral hearings, and the appeal.

In an expedited summary trial, the competent Court may, in as far as it judges necessary, reduce the periods for processing prior proceedings, the oral hearings, and the appeal.[FN63]

[FN63] Article 680, Law of Penal Procedure. On Special Proceedings. Title X. Expedited Summary Proceedings, Articles 479, and 480. In <http://www.gacetaoficial.cu>

92. With regard to the attribution granted by Article 480 to Cuban courts of justice, the Commission observes that the decision to apply an exceptional proceeding is left to those who must hand out justice on the ground; therefore, the decision of how long the periods should be for the proceedings of the trial, including the prior proceedings, the proceedings of the hearing, and the appeal, are all also left to the judge to decide.

93. The judgment pronounced on April 8, 2003 by the Court of first instance in this case, neither refers to nor presents arguments relating to the motives that lead the Court to decide to apply such an exceptional procedure, and nor did it explain any grounds for reducing the time periods.

94. The Commission considers that all procedural guarantees should apply to all the aspects of the criminal trial of an accused, independently of the manner chosen by the State to organize its criminal trials. Consequently, when, as in this case, the State has opted to apply an exceptional process like the expedited summary trial, the Commission considers that the guarantees of due legal process should also apply to that process too.[FN64]

[FN64] See also, Garza, *supra*, paragraph 102. See, also, European Commission of Human Rights, *Jespers vs. Belgium*, 27 D.R. 61 (1981) (in which at the moment of pronouncing judgment the principle of equality of weapons is applied).

95. Without prejudice to the foregoing, the Commission notes that trying the alleged victims by expedited summary trials was not proportional to the complexity of the case and the gravity of the penalties imposed, for which reason their trials can not be considered either appropriate or fair.

96. Although Article XVIII of the American Declaration refers to the simple and brief procedure whereby the courts will protect persons from acts of authority that violate any fundamental rights, the requirement of simplicity and brevity can not be applied to a trial that does not allow the accused to defend themselves with all the guarantees of due process of law, and even more so in cases where the penalty that could be applied is irreversible by nature, that is, death.

97. Extending the analysis, the Commission observes that the application of a procedure that was so reduced in character, amongst other things, prevented the victims from adequately exercising their right to a defense.

98. As said above, in trials where the application of the death penalty is a possibility, basic guarantees of due legal process are necessary, as is the right to the proper time and means for constructing a defense.

99. It is clear from the length of the trial itself that the accused did not have sufficient time to meet their lawyers in order to prepare a defense.

100. In the present case, no information is available as to whether the defense lawyers appointed by the State carried out a serious investigation into the acts imputed to their clients, into the attenuating circumstances that might have reduced the penalty proposed by the prosecutor and accepted by the court. The only reference made in the judgment regarding the role played by the defense lawyers is the following: "That defense lawyers Jorge Betancourt Ortega and Ramón Manso Janet[FN65] changed their conclusions as recorded on folios number sixty-nine and three of the roll, the other lawyers made conclusive what had been provisional on folios number thirty-two and thirty-four of the above mentioned roll."[FN66]

[FN65] Ramón Manso Janet was the court appointed defense counsel for Lorenzo Enrique Copello Castillo and Bárbaro Leodán Sevilla García. Jorge Betancourt Ortega was the court-appointed defense counsel for Jorge Luis Martínez Isaac.

[FN66] In Judgment 11/2003 of the People's Provincial Court of the City of Havana, dated April 8, 2003. Fourth Finding.

101. Nor is it clear from the judgment that the defense counsel presented any evidence regarding the possible existence of attenuating circumstances or that they took issue with any of the facts accepted by the court of first instance as aggravating circumstances, such as for example the description of aggravating circumstances in the case of accused Sevilla García, when the court in addition to reporting a crime for which he had previously been accused stated that "his conduct continues to be very anti-social in his neighborhood, he prides himself on being good-looking, he disturbs the peace, and spends time with anti-social elements."

102. The failure by the defense lawyers in the trial against Messrs Copello, Sevilla, and Martínez, to properly investigate and, if appropriate, lodge evidence of possible attenuating circumstances, prevented the accused from benefiting from an examination by the court of information that was potentially important for its decision regarding the appropriate punishment. Consequently, Messrs Copello, Sevilla, and Martínez were not provided with adequate legal advice and representation which is a fundamental element of their right to a fair trial. In the present case, the responsibility of the State derives directly from its power to appoint the public prosecutors in the trial against Messrs. Copello, Sevilla, and Martínez.

103. Therefore, given the brevity of the trial, the accused had no opportunity to question the competence of their defending counsel during the trial at first instance, and in the later stages of the proceedings taken against them. In the opinion of the Commission, this constitutes a serious failure to guarantee the basic right of the accused to due legal process in the domestic courts of the State for crimes punishable by the death penalty.

104. Having regard to the foregoing, the Commission considers that the right of Messrs. Copello, Sevilla, and Martínez to be provided with adequate legal advice and representation was not recognized in the proceedings taken against them, and consequently concludes that the State is responsible for violating the right of Messrs. Copello, Sevilla, and Martínez to a fair trial according to Article XVIII of the American Declaration, and their right to due process of law according to Article XXVI of the American Declaration.

105. Furthermore, Article XXVI of the Declaration includes the right to be given a public hearing. The facts of this case indicate that entry to the trial against the alleged victims was denied to the families of the accused, and to the press. However, in certain circumstances access may be restricted to hearings, although these are generally public, because it may be considered convenient in order to protect certain rights better

106. Concerning the allegation by the petitioners that Messrs. Lorenzo Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Marínez Isaac were condemned to death in violation of the Cuban Law against Acts of Terrorism, the Commission observes that the aforementioned law envisages the death penalty for application in some crimes.

107. However, the legal definition of criminal acts covered by Articles 10, 11(c), 14(1), and 16(1)(a) referred to, the death penalty is only envisaged in Article 10 which states: “Any person who makes, facilitates, sells, transports, remits, brings into the country or has in his possession, in what ever form or place, arms, munitions or materials, inflammable, asphyxiant, or toxic substances or instruments, plastic explosives or of any other class or nature, or chemical or biological agents, or whatever other element from the study, design, or combination of which it is possible to derive products so described, or any other similar substance or explosive or lethal device, shall be punished by from ten to thirty years imprisonment, life imprisonment, or death.”

108. The Commission further observes that the court of first instance itself did not consider that the crime of carrying weapons fell within the legal definition of the criminal act because “because the use of the pistol and knives was the means to carrying out the terrorist act.”[FN67]

[FN67] Judgment 11/2003 of the People’s Provincial Court of the City of Havana, April 8, 2003, First Whereas.

109. In accordance with the facts of the present case and taking into account that the judgment of the court of first instance was available, the criminal act that is the subject of this action and that was committed by Messrs. Copello, Sevilla, and Martínez and the other persons who took part in the hijacking, in fact corresponds to the definition established in Article 16(1) of the

aforementioned law, that states: “The punishment of from ten to thirty years’ imprisonment for any person who: a) seizes a boat or exercises control over it by means of violence, threat of violence or any other form of intimidation.” This norm does not envisage the death penalty as punishment.

110. Therefore, the court might have used the same criterion to avoid applying Article 10 of the Law against Acts of Terrorism which envisages the death penalty as punishment.

111. In criminal law, the tribunal has to remain strictly within the boundaries of the law and has to observe the greatest precision when applying the legal description of a crime to the facts of a particular case. The Commission observes that this error in defining the crime in relation to the actions of the accused, in the present case, represented the difference between life and death, to the detriment of Messrs. Copello, Sevilla, and Martínez.

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

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

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

115. Therefore, the Commission concludes that the State of Cuba violated Articles XVIII and XXVI of the American Declaration to the detriment of Messrs. Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac.

4. Right to life

116. The most basic of the human rights protected in the inter-American and other human rights systems is the right to life, given that without complete respect for this right it is impossible to effectively guarantee or have full enjoyment of any other human rights or freedoms.

117. The Inter-American Commission has concluded on many occasions that Article I of the Declaration forbids the application of the death penalty when this would result in an arbitrary deprivation of life.[FN68] Furthermore, the Commission included amongst the irregularities that would amount to an arbitrary deprivation of life through use of the death penalty the State's failure to provide strict and rigorous guarantees of an accused person's right to a fair trial.[FN69] Consequently, when the right to a fair trial of a person sentenced for acts that have led to the imposition of the death penalty has been infringed, the Commission upholds that to execute that person by virtue of that sentence would constitute a further deliberate and most egregious violation of the right to life enshrined in Article I of the American Declaration.[FN70]

[FN68] See, for example Roach and Pinkerton, *supra*; Andrews, *supra*; Garza, *supra*, paragraph 90.

[FN69] See, for example, Andrews, *supra*; paragraph 172; Garza, *supra*, paragraphs 110, 111.

[FN70] See, for example, Garza, *supra*, paragraph 111.

118. In the present case the Commission concludes that the State is responsible for violations of obligations imposed on it by Articles XVIII and XXVI of the American Declaration, basing this conclusion on that the State did not provide Messrs. Copello, Sevilla, and Martínez with a fair trial. Therefore, by executing Messrs. Copello, Sevilla, and Martínez on the basis of the death sentence upheld against them, it committed a deliberate and most egregious violation of Article 1 of the American Declaration.

V. ACTIONS SUBSEQUENT TO REPORT N° 52/06

119. On March 28, 2006, during its 124th regular session, the IACHR adopted Report No. 52/06, pursuant to Article 43 of its Rules of Procedure, with the dissenting vote of Commissioner Freddy Gutiérrez.

120. Report No. 52/06 was transmitted to the State via a note dated April 12, 2006, with the request that the State provide information within two months regarding the measures it had adopted to comply with the recommendations contained in the report, in accordance with Article 43.2 of the Commission's Rules of Procedure. The petitioners were also notified on the same date, in accordance with Article 43.3 of the Commission's Rules of Procedure that the report had been approved.

121. On May 9, 2006, a communication was received, dated May 3, 2006, signed by the Head of the Cuba Interests Section in Washington, which read as follows:

”Attached to this note, I am returning the copy of the note and report on case 12.447 of the Inter-American Commission on Human Rights, which you sent us on April 12, 2006.

As on previous occasions, I reiterate that the Inter-American Commission on Human Rights is not competent, and the Organization of American States lacks the moral authority, to analyze this or any other issue regarding Cuba.”

122. Consequently, in light of the response from the Cuban State, the Commission has decided to ratify its conclusions and reiterate its recommendations in this case, as indicated below.

VI. CONCLUSIONS

123. Based on the foregoing conclusions of fact and law, and given the lack of a response from the Cuban State, the Commission concludes the following:

1. The State is responsible for violating Articles XVII and XXVI of the American Declaration to the detriment of Messrs Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García and Jorge Luis Martínez Isaac, by not providing them with a fair trial.
2. The State is responsible for violating Article 1 of the American Declaration, to the detriment of Messrs. Lorenzo Enrique Copello Castillo, Bárbaro Leodán García, and Jorge Luis Martínez Isaac, by executing them on the basis of a sentence handed down in a proceeding that did not ensure due judicial guarantees.

VII. RECOMENDATIONS

124. Based on the examination and conclusions of the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE STATE OF CUBA:

1. Adopt the measures necessary in order to adapt its laws, proceedings, and practices in line with international human rights law, especially those that relate to situations described in the present report.
2. Reform its Constitution to ensure the independence of its judiciary.
3. Make compensation to the families of the victims for the material and psychological damage they have suffered by virtue of the violations of the American Declaration established here.
4. Adopt all measures necessary to ensure that similar events may not occur again, in accordance with the duty of the State to protect and guarantee human rights.

VIII. NOTIFICATION AND PUBLICATION

125. In light of the above, and given the exceptional circumstances of the instant case, in which the State of Cuba declared that the Commission was not competent to analyze this case, the Commission has decided, pursuant to Article 45.2 and 45.3 of its Rules of Procedure, not to

allow the parties more time prior to publication of the report to submit information on compliance with the recommendations, to transmit the Report to the State and to the representatives of the petitioners, to publish the Report, and to include it in its Annual Report to the General Assembly of the Organization of American States. In accordance with the provisions of the instruments governing its activities, the Commission will continue to evaluate the measures adopted by the State of Cuba with respect to the aforementioned recommendations until that country complies with them.

Done and signed in the city of Washington, D.C., on the 21st day of the month of October, 2006. (Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President; Florentín Meléndez, Second Vice-President; Clare K. Roberts, Freddy Gutiérrez Trejo, Paolo G. Carozza and Víctor E. Abramovich Commissioners. Commissioner Freddy Gutiérrez has adopted a dissenting and reasoned vote, which follows the instant report.

Washington, D.C., October 21st of 2006

Dissenting and reasoned vote

Case 12.477

Freddy Gutiérrez

I hereby declare and explain my dissenting vote regarding the Report on the Merits adopted by the Inter-American Commission on Human Rights in relation to Case 12.477, which refers to occurrences that apparently took place in the Republic of Cuba.

It is unconceivable that deeds expounded in an abstract, general, and vague manner, recounted by one side only and expressing a single, exclusive point of view, with no possibility, past or present, of being contested, for which the sources are dubious, and which are, one should add, taken from media that systematically oppose the right of the Republic of Cuba freely to determine its own destiny as well as its right not to accept outside interference, should induce the Commission to declare a case admissible without it meeting the requirements stipulated in the American Convention.

The legal basis on which the description of the deeds rests is flimsy and insubstantial, particularly since it invokes the American Declaration of 1948 and the Rules of Procedure of the IACHR. There is no universally accepted doctrine nor peaceful jurisprudence regarding the Declaration, given that, by definition, it involves adherence to certain values and general principles, which are important but contained in imperfect norms that establish no punishments, which therefore relativizes the greater or lesser commitment of states in accepting the enunciation of the rights enshrined therein. The Declaration has played an enormously valuable part in the history of civilization, and its contents have to concur with the American Convention, but it is not licit to use it circumstantially against a state that has even been denied the possibility of accounting for its departure from or approximation to the values it once ratified.

Moreover, as I have consistently stated, the operating Rules of Procedure of the Commission constitute by their nature a sub-legal act, which is binding upon the Commissioners in the performance of their tasks and functions, but which may never be construed as an international norm based on *pacta sunt servanda* and therefore to be applied obligatorily by the states parties to the American Convention. Indeed, it is inexplicable and incomprehensible in the interpretation of law that rules of procedure, resolutions, or instructions of a sub-legal nature could create duties, rights, and even punishments for states that have not agreed to their contents. It is necessary to emphasize that the states are parties to the American Convention and to the Commission's Statute, and are therefore bound by what they agreed to, but they cannot be bound by what they legitimately did not agree to. This is the case of the Rules of Procedure, the contents of which were not examined, discussed, or ratified by the member states of the hemispheric Organization. This applies with even greater force to the Republic of Cuba, which was not allowed to be a state party to the Convention, or to discuss the Statute, and has no inkling of the existence of Rules of Procedure that might, apparently, be the basis for some sanction against it.

Perhaps the most serious misapprehension is the failure to refer to the expulsion of the Republic of Cuba agreed upon by the Organization of American States in 1962. Since then, Cuba cannot validly nominate anyone to a position of responsibility within the hemispheric Organization, have either voice or vote, elect or be elected, or exercise any right at all. It is therefore an aberration in fact and in law to seek to scrutinize and even condemn the acts of one who has been denied the exercise of his basic powers, of the rights that are intrinsic to a people, and the rights that are also intrinsic to the man and women who constitute that people.

It is also contrary to any sound interpretation of the law to seek to initiate, pursue, and issue a condemnation of someone who cannot defend himself. It is contrary to the rules of due process contained in the American Convention, the pillar upon which the Commission stands, that the Republic of Cuba, which is not cognizant of the contents of any notification, cannot make itself heard, cannot argue in its defense, cannot contradict the statements of someone calling himself a party, and which has even been denied the right to be a counterparty, should be condemned. I should not omit the fact that this act of the Commission concerns admissibility or inadmissibility of a complaint. The necessary condition for admitting it or not is that the complaint exists or may exist, and in this case the Republic of Cuba cannot even be a complainant; ergo, there cannot strictly be a complaint in the instant case, nor any admission or rejection of admission.

The foregoing arguments explain my dissenting vote in the matter at hand.