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Decided by: President: Florentin Melendez;
First Vice-President: Paolo Carozza;
Second Vice-President: Victor Abramovich;
Commissioners: Evelio Fernandez Arevalos, Clare K. Roberts, Freddy Gutierrez.
Dated: 15 October 2007
Citation: Pinder v. Bahamas, Petition 12.513, Inter-Am. C.H.R., Report No. 79/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by: APPLICANT: Adela Williams
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I. SUMMARY

1. On January 15, 2003, the Inter-American Commission on Human Rights (“the Commission”) received a petition dated January 14, 2003, from Dr. Adela Williams, solicitor, of Arnold and Porter, in London, United Kingdom (“the Petitioner”), against the Commonwealth of The Bahamas (“The Bahamas” or “the State”). The petition was presented on behalf of Mr. Prince Pinder, a Bahamian national incarcerated in The Bahamas. According to the petition, on July 28, 1997 Mr. Pinder was convicted of two counts of armed robbery and one count of attempted armed robbery, contrary to the sections 360 (2) and 86 (2) of the Penal Code of The Bahamas and sentenced to a term of 30 years imprisonment.[FN1] Mr. Pinder was also sentenced to flogging of six strokes to be inflicted in two installments of three strokes each, as authorized by the Criminal Law (Measures) Act 1991 of The Bahamas. The petition also requested the Commission to grant precautionary measures in favor of Mr. Pinder to suspend the execution of sentence while the petition is pending.

[FN1] According to information supplied by the Petitioner, Mr. Pinder had also been indicted for seven other counts of armed robbery or related offences, but he was only sentenced for three counts. The offences were all alleged to have occurred between April 19 and April 29, 1987. See page 20 of the Judgment of the Court of Appeal of The Bahamas; *Prince Pinder v Regina*; Criminal Appeal 60 of 1997; delivered on January 29, 1999; at Appendix A of the Petitioner’s petition dated January 20, 2003.

2. The petition alleged that the imposition and/or execution of a flogging sentence violates Articles I, XI, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man (“the American Declaration” or “the Declaration”). Moreover, the Petitioner asserts that the overall delay in the criminal process and in anticipation of the flogging further violates Article XXVI of the Declaration.

3. By note of February 04, 2003, the Commission requested the State to take precautionary measures pursuant to Article 25 of the Commission’s Rules of Procedure to suspend the imposition of Mr. Pinder’s flogging sentence pending the Commission’s investigation of the claims raised by the petition.

4. The Commission has not received any response from the State to its requests for information with respect to the petition.

5. In Report 49/05, adopted on October 12, 2005 during its 123rd regular period of sessions, the Commission decided to admit the petition and to continue with the analysis of the merits of this case. As set forth in the present Report, having examined the information and arguments concerning the merits of the petition, and in the absence of any observations from the State, the Commission has concluded that the State, by authorizing and imposing a sentence of judicial corporal punishment on Mr. Pinder, is responsible for violating Mr. Pinder’s rights under Articles I, XXV, and XXVI of the American Declaration.

6. Based upon these conclusions, the Commission recommends to the State that it:

- a) grant Prince Pinder an effective remedy, which includes (a) commutation of the sentence of judicial corporal punishment and (b) rehabilitation;
- b) adopt such legislative or other measures as may be necessary to abolish judicial corporal punishment as authorized by its Criminal Law (Measures) Act 1991;

II. PROCEEDINGS SUBSEQUENT TO ADMISSIBILITY REPORT 49/05

7. In Report 49/05 adopted during its 123rd regular period of sessions on October 12, 2005, the Commission decided to admit the petition with respect to Articles I, XI, XVIII, XXV and XXVI of the American Declaration and to continue with the analysis of the merits of his case.

8. By communications of November 01, 2005, Report 49/05 was transmitted to the State and to the Petitioner, in accordance with Article 38(1) of the Commission’s Rules of Procedure. The Commission requested that the Petitioners provide any additional observations that they may have on the merits of the case within a period of two months. Pursuant to Article 38(2) of its Rules, the Commission also placed itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter and requested that the parties inform the Commission expeditiously whether they were interested in pursuing a friendly settlement of the case. Up to the date of this report, the Commission had received no responses from the parties to these communications.

III. POSITIONS OF THE PARTIES

A. The Petitioner

9. According to the information submitted by the Petitioner, Mr. Pinder was convicted by the Supreme Court of The Bahamas on July 28, 1997 of two counts of armed robbery and one count of attempted armed robbery and sentenced to 30 years imprisonment. Additionally, Mr. Pinder was sentenced to a flogging of six strokes to be administered in two installments of three strokes each pursuant to the Criminal Law (Measures) Act 1991 of The Bahamas. His subsequent appeals against this sentence were dismissed by the Court of Appeal of The Bahamas and the Judicial Committee of the Privy Council on January 29, 1999 and July 15, 2002, respectively.

10. According to the Petitioner, the Criminal Law (Measures) Act of The Bahamas provides, *inter alia*:

Section 3. (1) Subject to the provisions of this Act, any offender on being convicted by a court of any of the offences mentioned in the First Schedule[FN2] may be ordered by the court to undergo corporal punishment in addition to any other punishment to which the offender is liable.

Section 4. (1) Whenever an offender is sentenced to undergo corporal punishment, such punishment shall be inflicted privately either by flogging or whipping in accordance with the provisions of this section.

Section 4 (2) Flogging shall be administered with a cat or rod of a pattern approved by the Governor-General and, when with a cat, on the back of the offender and when with a rod, on his buttocks, and in either case only after an examination by and in the presence of a medical officer.

Section 5. (1) A sentence of corporal punishment shall specify the number of strokes which shall be administered, which in the case of flogging shall not exceed twenty-four and in the case of whipping twelve, and shall specify whether the prisoner shall receive the whole sentence at one time or by installments, and in the case of installments, the number of strokes at each installment.

Section 5 (2) The maximum number of strokes which may be administered at any one time shall be twelve in the case of a flogging and six in the case of a whipping and no person who has been flogged or whipped shall be again flogged or whipped within fourteen days.

[FN2] Section 1 of the FIRST SCHEDULE of the Criminal Law (Measures) Act contains many offences under the Penal Code of The Bahamas which may attract the infliction of corporal punishment, including the offences for which Mr. Pinder was convicted (armed robbery).

11. With respect to the merits of the complaint, the Petitioner contends that the State's laws[FN3] permitting the infliction of judicial corporal punishment represent a breach of the State's obligations under the American Declaration; and further, that the infliction of such a punishment upon Mr. Pinder would unquestionably do so. The Petitioner contends that the State

is in violation of Articles I, XI, XVIII, XXV, and XXVI of the Declaration, as particularized hereunder:

a) The sentence of flogging constitutes cruel, infamous or unusual punishment and a violation of the security of the person, in breach of Articles XXVI, XXV, XI and I of the Declaration. In support of this contention, the Petitioner notes that all of the judges of the Bahamian Court of Appeal and the Judicial Committee of the Privy Council identified flogging as inhuman and degrading.[FN4] The Petitioner also submits that during the hearing before the Judicial Committee of the Privy Council, the State had conceded that flogging is “torture or inhuman punishment”. [FN5]

b) In violation of Article XXVI, Mr. Pinder has been exposed to cruel, infamous or unusual punishment, by virtue of the overall delay in the criminal process of almost 5½ years (between his conviction and the presentation of the petition). In this respect, the Petitioner argues that the sentence of flogging has been aggravated by the mental agony of anticipating its infliction over this protracted period.

c) The sentencing judge violated Mr. Pinder’s rights under Articles XVIII and XXVI of the Declaration by: (a) failing to inform Mr. Pinder he was considering the sentence of corporal punishment, or to give Mr. Pinder the opportunity to make submissions against such sentence; [FN6] (b) failure to make any inquiries about Mr. Pinder’s character or antecedents, thus denying him an “individualized sentencing”. [FN7]

[FN3] Judicial corporal punishment was reintroduced (for certain offences) by the Criminal Law (Measures) Act, 1991, after it had been previously abolished in 1984 by the Penal Code (Amendment) Act.

[FN4] While all the judges of the Court of Appeal and the Judicial Committee of the Privy Council were ad idem on the nature of corporal punishment, both courts (by majorities of 3-2) held that corporal punishment is permitted under the Constitution of The Bahamas by virtue of Article 17 (2). This Article provides that “nothing contained in or done under authority of law shall be held inconsistent with or in contravention of this Article to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the Bahama Islands immediately before 10 July 1973”.

[FN5] See Petitioner’s petition of January 14, 2003, para. 1.

[FN6] See Petitioner’s petition of January 14, 2003, para. 4, where the Petitioner argues that this violation was exacerbated by the fact that Mr. Pinder was not represented by counsel at the sentencing hearing.

[FN7] Ibid, where the Petitioner contends that Articles XVIII and XXVI require that the sentencing judge should make proper inquiries before sentencing an individual found guilty of an offence, and that “given the nature of the sentence there was a need for a heightened standard of procedural fairness to ensure that the case was an appropriate one ...for corporal punishment.” [The Petitioner however rejects the idea that corporal punishment is appropriate in any case].

12. According to the Petitioner’s communication to the Commission of February 04, 2003, up to that time, the sentence of flogging had not yet been executed upon Mr. Pinder. To date, the

Petitioner has not responded to the Commission's later query of June 14, 2004, inquiring as to whether the flogging had yet been inflicted.

B. Position of the State

13. Apart from acknowledging the Commission's notes of February 04, 2003, and May 30, 2003,[FN8] the Commission has not received any information or observations from the State in response to Mr. Pinder's petition.

[FN8] By note of June 14, 2004, the Commission reiterated its request to the State for information, but has not so far received a response.

IV. ANALYSIS

A. Preliminary considerations

14. The Commission notes that the State has not disputed the Petitioner's allegations regarding the judicial proceedings culminating in the dismissal of Mr. Pinder's special leave to appeal to the Judicial Committee of the Privy Council of July 15, 2002. In this respect, the Commission has received no information or observations from the State with respect to the Petitioner's petition, despite repeated requests. Accordingly, the Commission invokes Article 39 of its Rules of Procedure, which provides that:

The facts reported in the petition whose pertinent parts have been transmitted to the Government in reference shall be presumed to be true if, during the time period set by the Commission, the Government has not provided the pertinent information requested, as long as other evidence does not lead to a different conclusion.

15. While the Commission acknowledges that the State is not a party to the American Convention on Human Rights, the Commission is authorized under Article 20(b) of its Statute "...to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights".

16. The Commission also considers that the information requested is information that would enable it to reach a decision in a case submitted to it. The Inter-American Court of Human Rights has indicated that cooperation by the States is an essential obligation in international proceedings in the inter-American system.

17. In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation. The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State.[FN9]

[FN9] Inter-American Court of Human Rights, Velásquez Rodríguez Case. Judgment of July 29, 1988, paras. 135 and 136.

18. The Commission and the Inter-American Court of Human Rights have also indicated that “the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law.”[FN10] The Commission therefore reminds the State of the Commonwealth of The Bahamas that it has a duty to cooperate with the organs in the inter-American human rights system, for optimal fulfillment of the latter’s functions to protect human rights.

[FN10] I/A Court of H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, para. 138. IACHR, Report N° 28/96, Case 11.297, Guatemala, October 16, 1996, para. 45.

19. In accordance with Article 39 of its Rules of Procedure, the Commission finds that:

- a) The Criminal Law (Measures) Act of The Bahamas provides for the infliction of judicial corporal punishment for certain offences under the Penal Code of The Bahamas, including armed robbery;
- b) On July 28, 1997, Mr. Pinder was convicted of two counts of armed robbery and one count of attempted armed robbery, contrary to the sections 360 (2) and 86 (2) of the Penal Code of The Bahamas and sentenced to a term of 30 years imprisonment[FN11]. Mr. Pinder was also sentenced to receive a flogging of six strokes in two installments of three strokes each, pursuant to the Criminal Law (Measures) Act;
- c) His subsequent appeals against this sentence were dismissed by the Court of Appeal of The Bahamas and the Judicial Committee of the Privy Council on January 29, 1999 and July 15, 2002, respectively;
- d) Mr. Pinder remains under sentence of judicial corporal punishment that appears not to have been carried out by the State to date.

[FN11] According to information supplied by the Petitioner, Mr. Pinder had also been indicted for seven other counts of armed robbery or related offences, but he was only sentenced for three counts only. The offences were all alleged to have occurred between April 19 and April 29, 1987. See page 20 of Court of Judgment of the Court of Appeal of The Bahamas; *Prince Pinder v Regina*; Criminal Appeal 60 of 1997; delivered on January 29, 1999; at Appendix A of the Petitioner’s petition dated January 20, 2003.

1. Application and Interpretation of the American Declaration of the Rights and Duties of Man

20. The Petitioner in the present case has alleged that the State of The Bahamas is responsible for violations of the rights of Prince Pinder under the American Declaration of the Rights and Duties of Man. As the Commission has noted on many previous occasions, the American Declaration constitutes a source of international legal obligation for all member States of the Organization of American States, including The Bahamas.[FN12] Moreover, the Commission is empowered under Article 20 of its Statute and Articles 49 and 50 of its Rules of Procedure to 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 OAS member States that are not parties to the American Convention.[FN13]

[FN12] The Bahamas deposited its instrument of ratification of the OAS Charter on March 03, 1982.

[FN13] 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, Ser. A N° 10 (1989) [hereinafter “Advisory Opinion OC-10/89”], paras. 35-45; I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49; OAS Charter, Articles 3, 16, 51, 112, and 150.

21. According to the jurisprudence of the inter-American human rights system, the provisions of its governing instruments, including the American Declaration, should be interpreted and applied in an evolutionary manner; taking into account evolving international standards, instruments and jurisprudence that have occurred since these instruments were first adopted. [FN14]

[FN14] See I/A Court of H.R., Advisory Opinion OC-10/89, supra, para. 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 the Due Process of Law, Ser. A N° 16 (1999) [hereinafter “Advisory Opinion OC-16/99”], para. 114 (endorsing an interpretation of international human rights instruments that takes into account developments in the corpus juris gentium of international human rights law over time and in present-day conditions); Report N° 52/02, Case N° 11.753, Ramón Martínez Villareal (United States), Annual Report of the IACHR 2002 [hereinafter “Martínez Villareal Case”], para. 60. See also American Convention, Article 29(b) (“No provision of this Convention shall be interpreted as: [. . .] b. 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”).

22. In particular, the organs of the inter-American system have previously held that developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments.[FN15] This includes 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.[FN16] Pertinent developments have also been drawn from the provisions of other multilateral treaties and instruments adopted inside and outside of the framework of the inter-American system, including the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the UN Standard Minimum Rules for the Treatment of Prisoners.[FN17]

[FN15] See Advisory Opinion OC-10/89, *supra*, para. 37; Advisory Opinion OC-16/99, *supra*, para. 115; Report N° 52/01, Case 12.243, Juan Raul Garza (United States), Annual Report of the IACHR 2000 [hereinafter “Garza Case”], para. 89.

[FN16] See IACHR, Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), para. 38; Garza Case, *supra*, paras. 88, 89 (confirming that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

[FN17] Standard Minimum Rules for the Treatment of Prisoners adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

23. Accordingly, in determining the present case, the Commission will, to the extent appropriate, interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law.

2. Articles I, XXV, XXVI, of the American Declaration and Judicial Corporal Punishment

24. Articles, I, XXV, XXVI of the American Declaration provide as follows:

Article I Every human being has the right to life, liberty and the security of his person.

Article XXV No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article XXVI 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.

25. The Petitioner contends that the State's laws[FN18] permitting the infliction of judicial corporal punishment represents a breach of the State's obligations under the American Declaration; and further, that the infliction of such a punishment upon Mr. Pinder would unquestionably do so. More particularly, the Petitioner contends that the sentence of flogging constitutes cruel, infamous or unusual punishment and a violation of the security of the person, in breach of Articles XXVI, XXV and I of the Declaration.

[FN18] Judicial corporal punishment was reintroduced (for certain offences) by the Criminal Law (Measures) Act, 1991, after it had been previously abolished in 1984 by the Penal Code (Amendment) Act.

26. Contemporary international human rights jurisprudence is unequivocal on the issue of judicial corporal punishment. The Commission notes that several international human rights and humanitarian law instruments expressly prohibit corporal punishment, and that numerous international and domestic courts, tribunals and other authorities have considered that corporal punishment, in and of itself is incompatible with international and national guarantees against torture and other inhumane treatment. In its judgment in the Case of Caesar[FN19], the Inter-American Court of Human Rights found that the infliction of corporal punishment "constitutes a form of torture and, therefore is a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected, as provided in Article 5(1)[FN20] and 5 (2)[FN21] of the (American) Convention." [FN22]

[FN19] I/A Court H.R., Case of Caesar. Judgment of March 11, 2005, Series C No. 123.

[FN20] Every person has the right to have his physical, mental, and moral integrity respected.

[FN21] No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

[FN22] I/A Court H.R., Case of Caesar., supra, para. 73.

27. After citing numerous international authorities, the Inter-American Court concluded that "there is a universal prohibition of torture and other cruel, inhuman or degrading treatment or punishment, independent of any codification or declaration, since all these practices constitute a violation of peremptory norms of international law". [FN23]

[FN23] Id. Para. 70.

28. In this regard, the UN Special Rapporteur on Torture, the UN Human Rights Committee and the European Court of Human Rights have all pronounced on the incompatibility of corporal punishment with international guarantees against torture and other cruel, inhuman or degrading treatment. According to the UN Special Rapporteur on Torture, Article 31 of the United Nations Standard Minimum Rules for the Treatment of Prisoners reflects the international prohibition of cruel, inhuman or degrading treatment, and more broadly, that “corporal punishment is inconsistent with the prohibition against torture, and cruel, inhuman or degrading punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention against Torture, Cruel, Inhuman or Degrading Punishment”.^[FN24]

[FN24] "Questions of the Human Right of all Persons subjected to any form of detention or imprisonment, in particular: torture and other Cruel, Inhuman or Degrading Treatment or Punishment". Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights res. 1995/37 B, 10 January 1997, E/CN.4/1997/7; cited at paragraph 61 of the I/A Court of Human Rights judgment in the Case of Caesar, supra.

29. Similarly, the United Nations Human Rights Committee has concluded that the prohibition of torture and cruel, inhuman or degrading treatment or punishment contained in Article 7 of the International Covenant on Civil and Political Rights should be extended to corporal punishment, “including excessive chastisement ordered as punishment for a crime, or as an educative or disciplinary measure”.^[FN25] With respect to the use of corporal punishment in Trinidad and Tobago, the Committee specified in its Concluding Observations on a report submitted by Trinidad and Tobago under Article 40 of the Covenant that it was “disturbed to learn that apart from prohibiting corporal punishment for persons under 18 years of age, the state party is still practicing the punishment of flogging and whipping which are cruel and inhuman punishment prohibited by article 7.” It thus recommended that the State immediately abolish all sentences of flogging or whipping.^[FN26]

[FN25] UNHRC, General Comment 20, Article 7 (44th sess., 1992), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 5; and UNHRC, General Comment 21, Article 10 (44th sess., 1992), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 3; cited at paragraph 62 of the judgment of the I/A Court of H.R in the Winston Caesar Case (supra).

[FN26] UNHRC consideration of reports submitted by states parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: Trinidad and Tobago, Seventieth session, November 3, 2000, CCPR/CO/70/TTO, para. 13; cited at paragraph 62 of the judgment of the I/A Court of H.R in the Case of Caesar (supra).

30. The Human Rights Committee has reached similar conclusions in its decisions on individual complaints from Trinidad & Tobago and Jamaica. In the cases of *Sooklal v. Trinidad and Tobago* and *Osbourne v. Jamaica*,^[FN27] the Committee ruled that the administration of birching (in the case of Trinidad & Tobago) and whipping with a tamarind switch (in the case of Jamaica) as provided for by the laws of these respective States as a sanction constituted cruel, inhuman or degrading treatment or punishment contrary to Article 7 of the Covenant.

[FN27] UNHRC, *Osbourne v. Jamaica*, Communication No. 759/1997, Report of the Human Rights Committee, April 13, 2000, CCPR/C/68/D/759/1997 para. 9.1; UNHRC, *Boodlal Sooklal v. Trinidad and Tobago*, Communication No. 928/2000, Report of the Human Rights Committee, November 8, 2001, CCPR/C/73/928/2000 para. 7.2.

31. In the case of *Tyrer v. United Kingdom*, where a minor had been subjected to three strokes of the birch, the European Court of Human Rights held such treatment violated the right to humane treatment under Article 3^[FN28] of the European Convention on Human Rights²⁵.

[FN28] Article 3 of the European Convention on Human Rights provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
²⁵ Eur. Court H.R., *Tyrer v. United Kingdom*, (5856/72), Judgment of April 25, 1978, Series A No. 26, para. 33. At paragraph 3 of its judgment the European Court of Human Rights observed that "[t]he very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalized violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State [...] Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalized character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender."

32. The Court in considering whether there were other circumstances of the applicant's punishment such as to make it "degrading" within the meaning of Article 3 of the European Convention on Human Rights, noted that "there had been an interval of several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out". Accordingly, in addition to the physical pain he experienced, the Court found that the punishment was also degrading to the extent that "the applicant was subjected to the mental anguish of anticipating the violence he was to have inflicted on him."^[FN29]

[FN29] Ibid. para. 33.

33. As the Inter-American Court observed in the Case of Caesar, "...a number of those States that still retained corporal punishment have recently abolished it",[FN30] and that "...an increasing number of domestic courts have concluded that the imposition of corporal punishment, regardless of the circumstances of the case and the modalities through which it is carried out, constitutes cruel, inhuman and degrading treatment, and represents a form of punishment no longer acceptable in a democratic society".[FN31]

[FN30] The I/A Court cited the following State laws that have abolished corporal punishment: the Abolition of Corporal Punishment Ordinance 1998 (Anguilla), Corporal Punishment (Abolition) Act 2000 (British Virgin Islands), the Prisons (Amendment) Law 1998 (Cayman Islands), the Criminal Law (Amendment) Act (Act No 5 of 2003) (Kenya), the Punishment of Whipping Act 1996 (Pakistan) (but still permitted for "Haddood" crimes), and the Abolition of Corporal Punishment Act 1997 (South Africa).

[FN31] In support of this proposition, the I/A Court cited the following authorities at footnote 24, of its judgment in the Case of Caesar (supra): State v. Ncube 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (Zimbabwe Supreme Court); Court of First Instance of the Netherlands Antilles, cited by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Government of the Netherlands on the visit to the Netherlands Antilles from 7 to 11 December 1997, December 10, 1998,CPT/Inf (98)17 [Part 1], at 10; and Hope v. Pelzer, 122 S. Ct. 2508, No. 01-309, Supreme Court of the United States of America 122 S. Ct. 2508; Gates v. Collier 501 F. 2d 1292 at 1306 (5th Cir.); Ex parte Attorney General of Namibia, In re Corporal Punishment by Organs of the State, 1991 (3) SA 76 (Namibia Supreme Court), at 95F; State v. Williams and Others, 1995 (3) SA 632 (South Africa Constitutional Court), para. 11; Simon Kyamanywa v. Uganda, Constitutional Reference No. 10/2000, 1 December 2001(Constitutional Court of Uganda); Naushad Ali v. State, Criminal Appeal No. HAA 0083/2001L, March 21, 2002 (Fiji High Court); y John Banda v. The People, HPA/6/1998 (High Court of Zambia).

34. The Bahamas continues to be one of those States that retains corporal punishment, pursuant to its Criminal Law (Measures) Act. Having regard to the array of authorities cited above, the Commission considers that the Criminal Law (Measures) Act to the extent that it authorizes judicial corporal punishment is plainly incompatible with the State's international obligations to protect the rights guaranteed under Articles I, XXV, and XXVI of the American Declaration. In the case of Mr. Pinder, the Commission must consider whether Mr. Pinder's rights under these Articles have been violated despite the apparent non-execution of the flogging sentence thus far. In this regard the Commission recalls that Mr. Pinder was sentenced to a flogging of six strokes in two installments of three strokes each.

35. Apart from the nature of corporal punishment, the jurisprudence canvassed by the Commission has broadly addressed two principal components of judicial corporal punishment: (a) domestic law and/or judicial sentences that authorize the infliction of judicial corporal

punishment; (b) the circumstances of the actual infliction of corporal punishment; both of which violate peremptory norms against torture or cruel, inhuman or degrading punishment or treatment. While there is no evidence before the Commission that Mr. Pinder has actually been subjected to corporal punishment, the Commission considers that the jurisprudence makes it palpably clear that the mere anticipation of flogging is within the parameters of the cruel, inhuman and degrading elements of judicial corporal punishment. Corporal punishment is not simply about the actual pain or humiliation of a flogging, but also about the mental suffering that is generated by anticipating the flogging. Based on the information before the Commission, it may be inferred that Mr. Pinder has been under sentence of flogging for almost a decade since his conviction on July 28, 1997, and has therefore been anticipating the infliction of corporal punishment for this period. As was recognized in the Caesar and Tyrer cases, delay between sentence and execution is a factor that serves to cause or aggravate the suffering of a person who is subject to corporal punishment. In the case of Mr. Pinder, the Commission considers that this is compounded even more by the fact that he has been sentenced to receive the flogging in two installments. In this scenario, Mr. Pinder is obliged to anticipate not merely one discrete infliction of corporal punishment, but two discrete inflictions.

36. In all the circumstances, therefore, the Commission finds that the State, by authorizing and ultimately imposing a sentence of judicial corporal punishment upon Mr. Pinder violated his rights under Articles I, XXV, XXVI of the American Declaration, to his detriment.

3. Other contentions by the Petitioner with respect to Articles XI, XVIII, and XXVI of the American Declaration

37. The Petitioner contended that the sentence of corporal punishment also constituted a violation of Article XI of the American Declaration. Given the Commission's preceding conclusions, the Commission does not consider it necessary to consider or decide on this issue.

38. The Petitioner has also claimed that the sentencing judge was in violation of Mr. Pinder's rights under Articles XVIII and XXVI of the Declaration by: (a) failing to inform Mr. Pinder he was considering the sentence of corporal punishment, or to give Mr. Pinder the opportunity to make submissions against such sentence; (b) failing to make any inquiries about Mr. Pinder's character or antecedents, thus denying him an "individualized sentencing".

39. Similarly, the Commission does not consider it necessary to consider whether the sentencing judge should have given Mr. Pinder an opportunity to be heard before imposing a sentence of corporal punishment, as it is the Commission's view that the judicial corporal punishment is entirely contrary to international standards of human rights, and therefore is not, and can never be an appropriate sentencing option, regardless of the circumstances or the individuals involved.

V. CONCLUSIONS

40. The Commission, based on the foregoing considerations of fact and law and in the absence of any response from the State, concludes that:

41. The State violated the rights of Mr. Prince Pinder under Articles I, XXV and XXVI of the American Declaration of Rights and Duties of Man by authorizing judicial corporal punishment under the Criminal Law (Measures) Act and sentencing him to receive a flogging of six strokes in two instalments of three strokes each.

VI. RECOMMENDATIONS

42. Based on the analysis and the conclusions in the present report,

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

1. To grant Prince Pinder an effective remedy, which includes (a) commutation of the sentence of judicial corporal punishment and (b) rehabilitation.
2. To adopt such legislative or other measures as may be necessary to abrogate the punishment of flogging as provided for under its Criminal Law (Measure) Act 1991.

VII. PUBLICATION

43. In accordance with Article 43 of the Commission's Rules of Procedure, the Commission transmitted the content of this report, adopted as Report N° 71/06 to the State and to the Petitioners by communications dated November 17, 2006. The State was granted a period of two months within which to inform the Commission of the measures taken to comply with the Commission's recommendations. By note of November 20, 2006, the State acknowledged receipt of the Commission's communication. However, the State has since failed to report on the measures it has adopted to comply with the Commission's recommendation within the time limit prescribed by the Commission.

44. Based upon the foregoing considerations, and in the absence of a response (save for an acknowledgment of receipt) by the State to Report N° 71/06, the Commission in conformity with Article 45(3) of its Rules of Procedure decides to ratify the conclusions and reiterate the recommendations in this Report, to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the State of the Commonwealth of The Bahamas with respect to the above recommendations until they have been complied with by the State.

Done and signed in the city of Washington, D.C., on the 15th day of the month of October, 2007.
Signed: Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Clare K. Roberts, and Freddy Gutiérrez, members of the Commission.