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Doc. Type: Report
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: Vaux v. Guyana, Case 12.504, Inter-Am. C.H.R., Report No. 81/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by: APPLICANT: Avril Solomon
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I. SUMMARY

1. On December 08, 2000, the Inter-American Commission on Human Rights (the “Commission”) received a petition from Mrs. Avril Solomon on behalf of her brothers Daniel and Kornel Vaux (hereafter collectively referred to as “the Vaux brothers” or the “alleged victims”). The Vaux brothers are currently incarcerated in Guyana under sentence of death. Mrs. Solomon subsequently submitted a revised petition to the Commission on July 03, 2001.

2. The petition alleges that the Vaux brothers were convicted and sentenced to death for the murder of Baiwant Jaikissoon on December 19, 1997, having been previously charged for his murder on July 11, 1993. Their subsequent appeal to the Guyana Court of Appeal (Guyana’s court of last resort) against conviction and sentence was dismissed on December 07, 2000.

3. The Petitioner contends that the Vaux brothers’ right to due process was violated by the failure of the judiciary to exclude confessions that were allegedly made by the Vaux brothers after being beaten by Guyanese police officers.

4. The State has not offered any observations on the admissibility or merits of the petition. The only communication from the State to the Commission relates solely to the status of the Vaux brothers’ case before the Advisory Council on the Prerogative of Mercy in Guyana.

5. After having considered the matter, the Commission has decided to declare admissible the claims presented on behalf of the Vaux brothers. In addition, upon consideration of the merits of the Vaux brothers’ complaint, the Commission reached the conclusion that the State is

responsible for violating the rights of the Vaux brothers under the American Declaration of the Rights and Duties of Man:

- a. by the infliction of violence by police officers on Daniel and Kornel Vaux while in their custody contrary to Article XXV and XXVI;
- b. by failing to accord a fair trial to the Vaux brothers particularly, in the treatment of the confession evidence by the Guyana courts, which prevented them from fully contesting the voluntariness of the confession evidence tendered by the prosecution contrary to Articles XVIII, XXV and XXVI.

6. The Commission further concluded that execution of the Vaux brothers based upon the criminal proceedings for which they are presently convicted and sentenced would be contrary to Article I of the Declaration.

II. PROCEEDINGS BEFORE THE COMMISSION

7. Following the receipt of Ms. Solomon's petition on December 08, 2000 and a revised petition on July 03, 2001, the Commission transmitted the pertinent parts of the revised petition to the State on August 02, 2001, with a request that the State supply information with respect to the communication within two months as established in the Article 30 (3) of the Commission's Regulations.

8. By letter of June 09, 2004, the Commission inquired the Petitioner whether the death sentences of the Vaux brothers had been commuted or whether Guyana's President or Advisory Council on the Prerogative of Mercy had yet considered the issue of commutation. By letter received by the Commission on September 07, the Petitioner advised that the Vaux brothers were still under sentence of death and that she was not aware of whether the issue of commutation had been yet considered by the State. By note of October 07, 2004, the Commission transmitted the pertinent parts of the Petitioner's observations to the State and requested a reply within a month. By note of June 08, 2005, the Commission reiterated its request to the State.

9. By note of September 01, 2005 the Commission informed the State that it had invoked Article 37(3) of its Rules of Procedure to open a case and to defer the treatment of admissibility until the debate and decision on the merits. Contemporaneously, the Commission advised the Petitioner of this decision, and requested the Petitioner to present additional observations on the merits within a period of two months.

10. By note dated September 19, 2005, the State advised the Commission that "Messrs. Daniel and Kornel Vaux have approached the Advisory Council on the Prerogative of Mercy in Guyana but to date no decision of the Council has yet been communicated to these two persons." Save for this communication, the State has not offered any observations on the admissibility or merits of the petition. The Commission conveyed this information to the Petitioner by letter of November 09, 2005. To date, the Commission has not received a response from the Petitioner to this communication or to its previous communication requesting additional observations on the merits of the petition.

A. Precautionary Measures

11. Contemporaneously with the transmission of the pertinent parts of the petition in this matter to the State, the Commission requested pursuant to Article 25(1) of its Rules of Procedure that the State take precautionary measures to stay the execution of the alleged victims until such time as the Commission had an opportunity to examine their case. This request was made on the basis that if the State were to execute the Vaux brothers before the Commission had an opportunity to examine their case, any eventual decision would be rendered moot in terms of available remedies and irreparable harm would be caused to them. The Commission did not receive a response from the State to its request for precautionary measures. Based on the communication received from the State on September 19, 2005, it appears that the executions have not been carried out.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

1. Background

12. According to the Petitioner, the Vaux brothers were arrested and charged with the July 1993 murder of Baiwant Jaikissoon and were subsequently sentenced to death after being convicted for the murder on December 19, 1997. They subsequently appealed their conviction to the Court of Appeal of Guyana, and their appeal was dismissed on December 07, 2000. The Vaux brothers were represented by counsel during the trial and appellate proceedings. At that time, Guyana's Court of Appeal was the State's court of final resort.[FN1]

[FN1] Since April 2005, Guyana has subscribed to the appellate jurisdiction of the Caribbean Court of Justice.

13. The prosecution alleged that the deceased was found strangled to death on July 09, 1993 along a highway in Guyana. The deceased had been last seen in the company of the Vaux brothers. Apart from this circumstantial evidence, the prosecution relied on oral and written confessions made by the Vaux brothers to the police on July 11, 2003, three days after their arrest. The oral statements were allegedly made almost immediately prior to the written confessions.[FN2]

[FN2] According to the transcript of the trial, the trial judge found in the case of Daniel Vaux that "... I have considered the flow of events immediately proceeding (sic) and I find that it was one continuing event." (page 135)

14. At the trial the Vaux brothers contended that these confessions had been involuntarily given to the police after beatings inflicted (on or about July 11, 2003) by certain police officers.

After a voir dire at the trial, the judge ruled that the confessions were voluntary and therefore admissible. Despite an alibi defence, the Vaux brothers were ultimately convicted of murder and sentenced to death.

DANIEL VAUX

15. According to the Petitioner, Daniel Vaux was arrested by the police on July 08, 1993, (page 79 of trial transcript). Daniel Vaux claims that later that evening, he was assaulted by a police officer known as “Meerai” (also spelt “Merai” in various parts of the trial transcript) and two other officers. He claims that he was gun-butted under his ribs and on his belly (page 82). Daniel Vaux states that three days later on July 11, 1993, Meerai and other police officers beat him again, to force him to make an oral statement and a written statement incriminating himself in the murder of Balwant Jaikissoon, the deceased.[FN3] Daniel Vaux alleges that he suffered injuries as a result of the beatings, but was not taken to see a doctor until July 13, 1993. At pages 4-5 of its judgment, the Court of Appeal of Guyana expressly found that on the day following the making of the oral and written statements, a senior police officer (Superintendent Leon Trim) observed that Daniel Vaux was suffering from a swollen and discoloured jaw.[FN4] A former magistrate (a Mr. Vic Puran) also testified during the trial that when Daniel Vaux first appeared before him at the preliminary inquiry, he saw black and blue marks on Daniel (and Kornel Vaux) between the chest and abdomen.[FN5]

[FN3] “...I remember 11th July 1993...When Merai said to me that he had information myself and my brother strangled Jaikissoon and slit his throat because he robbed me U.S. \$20,000, I said to him I do not know anything about that after I said that he came up to me and punched me in my belly twice, then the two black clothes who were armed came up and started to beat me with the butt of the gun across my belly I began to scream out. I then said to Merai; ‘Officer if you want me to say is myself and my brother strangle Balwant Jaikissoon’. I now say that I left out something I now say before he said those words he said to me ‘like I gon give him trouble’ then he came up to me and cuffed me then the two black clothes police armed with rifles came up to me and started to beat me across my belly. This is where I screamed out. I then to Merai, “Officer is you want me to say myself and my brother strangle Balwant Jaikissoon and slit his throat because he robbed me U.S. \$20,000”. I am going to say so. I said this because he beat me and I was felling pains. I signed the written statement because of the pain and the beating. [page 126].

[FN4] Under cross-examination at the trial, Superintendent Leon Trim testified that "When I first saw No. 1 [on July 09], it is true to say that the left side of his face was swollen and the area of his jaw slightly discoloured." (page 48 of trial transcript).

[FN5] According to the trial transcript (page 100), Mr. Puran testified that “...In their first appearance [on July 14, 1993] they [Daniel and Kornel Vaux] complained of being beaten by the police and requested that they be permitted to show the Court, the injuries they received. I invited them to the back and they both lifted up their top garment. I saw several black and blue marks on their top front between chest and abdomen.” The trial judge ultimately dismissed the testimony of the ex magistrate stating at page 135 of the trial transcript that:

....According to the accused he was beaten on two occasions 9th and 11th respectfully (sic) by Merai and two black clothes policemen. He was cuffed on his face and repeatedly cuffed by

Merai and beaten with gun butts by two black clothes policemen in the region of his belly and ribs. He was choked went down on the ground where he was picked by few persons. (sic) His face was visibly swollen. Yet , according to ex magistrate Puran he complained of being beaten and showed wales (sic) on his stomach. He did not point to his face and neither is there any evidence form the Magistrate to this effect...

16. At the trial, Daniel Vaux challenged the voluntariness of his statements, tendering medical evidence of injuries sustained and the evidence of a magistrate who had previously seen bruises on his body. However, the trial judge rejected Daniel's Vaux's claim of being abused by the police and ruled that both statements were voluntary and contemporaneous. In respect of the oral statement, the judge held that it was a "spontaneous outburst by the accused" and not an involuntary statement. (Page 132) "I have addressed my mind to the sequence of events which led to the spontaneous outburst by the accused. (Page 135-135) As regards the written statement, the trial judge ruled that:

"I have considered the flow of events immediately proceeding (sic) and I find that it was one continuing event. I have addressed my mind to the allegations of the accused and ... I am satisfied beyond a reasonable doubt that the allegations are unfounded. Accordingly I reject his story and rule the statement free and voluntary. In the exercise of my residual discretion I do not find any circumstances to exclude the statement on the ground of unfairness."

KORNEL VAUX

17. The Petitioner alleges that Kornel Vaux was also arrested on July 08, 1993, and like his brother Daniel, alleged that he was detained for three days before the police elicited similar oral and written statements by beating him.[FN6] The Petitioner claims that Kornel Vaux was also beaten by the police on July 09, 1993. The Petitioner further contends that Kornel Vaux was seen by a doctor subsequently, but that the medical records of his visit were not available for the trial, having been lost.[FN7] The police denied beating Kornel Vaux, despite evidence from a magistrate that he had seen evidence of black and blue marks on Kornel Vaux when he (Kornel Vaux) first appeared before the magistrate at a preliminary inquiry.[FN8] During the course of the trial, Kornel Vaux complained that he was beaten by police officers on the day after his arrest (July 09, 1993) and again on July 11, 1993. On the first occasion, Kornel Vaux claimed that he was beaten on his abdomen and chest by a Superintendent Merai and two other officers, while handcuffed. According to Kornel Vaux, one of the police officers put his foot on the chain between the handcuffs, causing him to scream in pain. This beating lasted for eight minutes, according to Kornel Vaux.[FN9] On the second occasion, Kornel Vaux states that he was gun-butted by two police officers in his chest and abdomen. Following the beatings, Kornel Vaux states that his hands and abdomen were swollen.[FN10]

[FN6] See pages 228-229 of the trial transcript where the trial judge noted the following: "Under cross-examination. He claimed that he was subjected to beatings for a duration of eight minutes and received about 4 to 5 blows in his abdomen, these were hard blows. He said he hollered. On 11th he alleged that the pattern of the beatings was repeated. Again he was twice cuffed by Merai

in his abdomen while the two black clothes policemen beat him with the butt of their guns and was forced to repeat an oral statement that Merai had concocted. Under cross examination he claimed that the beating by the black clothes lasted for three minutes. After this, Merai insisted that should (sic) sign a statement and on his refusal, the black clothes policemen took over and he was beaten for one minute actually receiving 6-7 blows in his abdomen and three blows in his chest. After this he was made to sit on a stool with hands handcuffed behind his back. Someone then pressed the chain on the handcuffs and because he could no longer bear the pains he signed the statement. He further claimed that his hands, belly and stomach were visibly swollen. There were black and blue marks on his abdomen about 1 ½ ‘ large about ten to twelve in number...”

[FN7] At page 230 of the trial transcript, the trial judge noted that “...Mr. Trim [a senior police officer] sent him to the hospital where he received medication as well as a medical certificate. The certificate according to Mr. Trim was tendered for identification before Mr. Puran [the magistrate before whom the Vaux brothers first appeared, after being charged] but neither could the certificate nor Mr. Puran’s notes could have been located (sic) despite a thorough search at the Magistrate’s Court.”

[FN8] See supra: According to the trial transcript (page 100), Mr. Puran testified that “...In their first appearance they [Daniel and Kornel Vaux] complained of being beaten by the police and requested that they be permitted to show the Court, the injuries they received. I invited them to the back and they both lifted up their top garment. I saw several black and blue marks on their top front between chest and abdomen.”

However, at pages 229 of the trial transcript, the trial judge rejected the testimony of Mr. Puran stating:

“Mr. Puran the Magistrate said he saw ‘weal’ and black and blue marks on the chest and abdomen of the prisoner, he could not remember the date when the prisoners first appeared neither did he remember where he made a note of seeing these injuries. It is important to note that it was the very afternoon Mr. Puran said he observed these marks that Ryan George [a police officer who accompanied Kornel Vaux to the doctor] said nothing. Is Mr. Puran mistaken from the lapse of times with no notes to aid his memory. (sic) I would accept George’s evidence to that of Puran’s.”

[FN9] See trial transcript, pages 203, 204, 209.

[FN10] Ibid. page 217.

18. At the trial, Kornel Vaux, like his brother, was unsuccessful in challenging the voluntariness of the oral and written statements. The trial judge rejected his allegations of physical abuse by the police to elicit the confessions. The judge ruled that:

(Page 232) As regards the oral statement: “I have considered the flow of events immediately preceding and find from the evidence both the oral and written statement were one continuing event. In the circumstances I rule the statement free and voluntary, the Prosecution having discharged the onus cast upon them that is beyond reasonable doubt. In the exercise of my residual discretion, I find no reason to exclude the statement on the ground of unfairness to the accused”.

19. The Vaux brothers appealed to the Guyana Court of Appeal against sentence and conviction, contending that the oral and written confessions were improperly admitted as

evidence by the trial judge. With respect to Daniel Vaux, the Court of Appeal ruled that the written confession was involuntarily given, (and therefore should not have been admitted), having regard for the evidence of beatings inflicted on Daniel Vaux. However, the Court held that the oral confession was a spontaneous response by Daniel Vaux to the police when confronted with the murder allegations[FN11], and was therefore properly admitted as evidence. Ultimately, the Court ruled that even if the written confession was excluded, the oral statement together with other circumstantial evidence was sufficient for a properly directed jury to convict Daniel Vaux of murder. Applying the proviso to section 13 (1) of Guyana's Court of Appeal Act, the Court of Appeal upheld the conviction and death sentence in respect of Daniel Vaux.[FN12]

[FN11] According to the record, Daniel Vaux said to the police (in Guyanese creole) "Me and me Buddy strangle Jai and me burst he throat because he owe me \$20,000 US" [standard English translation –"My brother (Buddy) and I strangled Jai and cut his throat because he owed me US\$20,000.]

[FN12] The Court of Appeal applied the proviso to Guyana's Court of Appeal Act Cap.3:01 Section 13. (1).

Section 13 (1) states that

The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard for the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

[source: http://www.gina.gov.gy/gina_pub/laws/Laws/cap301.pdf (visited January 30, 2006)]

20. With respect to Kornel Vaux, the Court of Appeal ruled that both the oral and written confessions were properly admitted into evidence during the trial and upheld the consequential conviction and death sentence. While the court regretted the absence of the medical certificates at the trial, it reasoned that in their absence, it was open to the trial judge to find that the oral and written confession was voluntarily made, based on the other evidence adduced during the voir dire.[FN13] As with Daniel Vaux, the court held that there was sufficient circumstantial evidence adduced at the trial to warrant a conviction for murder. Accordingly, the Court of Appeal upheld the conviction of Kornel Vaux and the death sentence imposed on him.

[FN13] After defence counsel for the Vaux brothers objected to the admissibility of the confession evidence on the ground of involuntariness, a voir dire (a trial within a trial) was conducted by the trial judge during the substantive trial to determine this issue. The trial judge ultimately ruled that the confession evidence was voluntary.

2. Position of the Petitioner on admissibility

21. The Petitioner contends that the petition is admissible, principally on the basis that the Vaux brothers have exhausted all available domestic remedies. The only possible remedy remaining, according to the Petitioner, is the possible exercise of the prerogative of mercy.

3. Position of the Petitioner on the merits

22. The Petitioner contends that the admission of the oral and written confessions deprived the Vaux brothers of a fair trial, and that accordingly, they were wrongly convicted and sentenced and that the subsequent appellate proceedings further violated their right to due process to the extent that the Court of Appeal declined to disturb the convictions and death sentences.

B. Position of the State

23. By note dated September 19, 2005, the State advised the Commission that “Messrs. Daniel and Kornel Vaux have approached the Advisory Council on the Prerogative of Mercy in Guyana but to date no decision of the Council has yet been communicated to these two persons.” Save for this communication, the State has not offered any observations on the admissibility or merits of the petition. The Commission conveyed this information to the Petitioner by letter of November 09, 2005. To date, the Commission has not received a response from the Petitioner to this communication or to its previous communication requesting additional observations on the merits of the petition.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*.

24. Upon considering the record before it, the Commission considers that it has the competence *ratione personae* to entertain the claims in the present petition. In accordance with the terms of Article 23 of the Commission’s Rules of Procedure, the Petitioner is authorized to file complaints alleging violations of rights protected under the American Declaration of the Rights and Duties of Man. Daniel and Kornel Vaux are persons whose rights are protected under the American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission’s Statute[FN14] and Article 49 of the Commission’s Rules of Procedure. Guyana has been subject to the jurisdiction of the Commission as a Member State of the OAS that deposited its instrument of ratification of the OAS Charter on January 01, 1991.[FN15] The Commission notes that the American Declaration became the source of legal norms for application by the Commission[FN16] upon Guyana becoming a member State of the Organization of American States in 1991.

[FN14] Article 20 of the Commission’s Statute provides as follows:

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in article 18:

- (a) To pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the rights and Duties of Man;
- (b) To examine communications submitted to it and any other available information, 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; and,
- (c) To verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

[FN15] Article 20 of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate in order to bring about more effective observance of fundamental human rights. See also Regulations of the Inter-American Commission on Human Rights, Arts. 26, 51-54; I/A. Court H.R., Advisory Opinion OC-10/8 “Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights,” July 14, 1989, Ser. A No. 10 (1989), paras. 35-35; 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.

[FN16] 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), 14 July 1989.

25. Given that the petition alleges violations of rights protected under the American Declaration of the Rights and Duties of Man that have taken place in the territory of a State Party, the Commission concludes that it has the competence *ratione loci* to take cognizance of it.

26. Further, the Commission has the competence *ratione temporis* to examine this matter. The petition is based on facts alleged to have occurred beginning in 1994, at which time the obligations undertaken by the State under the American Declaration were in effect.

27. In her petition, the Petitioner alleged violations of the right to fair trial. While the Petitioner has not cited the provisions of any Inter-American human rights instruments, it appears to the Commission that her allegations would fall to be considered under Articles XVIII, XXV and XXVI of the American Declaration (see *infra*). Insofar as these allegations engage these Articles of the American Declaration, the Commission is competent *ratione materiae* to examine the substance of the complaints. In this respect, Article 23 of the Commission's Rules of Procedure provides that:

Any person or group of persons, or non-governmental entity legally recognized in one or more Member States of the OAS, may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case

may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on the forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The Petitioner may designate an attorney or other person to represent him before the Commission, either in the petition itself or in another writing.

B. Duplication of proceedings and res judicata

28. The Petitioner has not indicated whether the substance of the petition is pending, or has already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member. Given that the State has not contested the issue of duplication of procedures, the Commission therefore finds no bar to the admissibility of the Petitioner's claims under Article 33 of the Commissions Rules of Procedure.

C. Other grounds of admissibility

1. Exhaustion of Domestic Remedies

29. Article 31 of the Commission's Rules of Procedure provides that the admissibility of a petition submitted to the Inter-American Commission pursuant to Article 23 of the Commission's Rules of Procedure is subject to the requirement that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to enable national authorities to have the opportunity to address the alleged violation of a protected right, and where appropriate resolve it, prior to any submission before an international mechanism.

30. The requirement of prior exhaustion applies when domestic remedies are available in practice within the national system, and would be adequate and effective in providing a remedy for the alleged violation. In this sense, Article 31(2) specifies that the requirement is not applicable when the domestic legislation does not afford due process for the protection of the right in question; or if the alleged victim did not have access to domestic remedies; or if there was unwarranted delay in reaching a final judgment in response to the invocation of those remedies. As indicated by Article 31 of the Commission's Rules of Procedure, when a Petitioner alleges one of these exceptions, it then falls to the State to demonstrate that domestic remedies have not been exhausted, unless that is clearly evident from the record.

31. According to the principles of international law as reflected in the precedents established by the Inter-American Commission and Court, it may first be noted that the State in question may expressly or tacitly waive the invocation of this rule.[FN17] Second, in order to be considered timely, the objection that domestic remedies have not been exhausted must be raised during the first stages of the proceeding; otherwise, it will be presumed that the interested State has tacitly waived its use.[FN18] Finally, the State that alleges non-exhaustion of domestic remedies must indicate which remedies should have been exhausted, as well as provide evidence

of their effectiveness.[FN19] Consequently, if the State in question does not provide timely arguments with respect to this requirement, it will be understood to have waived its right to argue the non-exhaustion of domestic remedies and thereby discharge the burden of proof that would correspond to it.

[FN17] See, e.g., IACHR, Report N° 69/05, petition 960/03, Admissibility, Iván Eladio Torres, Argentina, 13 October 2005, para. 42; I/A Court H.R., Ximenes Lopes Case. Preliminary Objections. Judgment of November 30, 2005. Ser. C No. 139, para. 5; I/ A Court H.R., Case of Moiwana Village v. Suriname. Judgment of June 15, 2005. Ser. C No. 124, para. 49; I/ A Court H.R., Case of the Serrano-Cruz sisters. Preliminary Objections. Judgment of November 23, 2004. Ser. C No. 118, para. 135.

[FN18] See, e.g., I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53, I/A Court H.R., Castillo Petruzzi Case. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 56; and I/A Court H.R., Loayza Tamayo Case. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, para. 40. The Commission and Court have established that “the first stages of the process” must be understood as the admissibility stage of the proceedings before the Commission, that is, “before any consideration of the merits.” See, for example, IACHR, Report N° 71/05, petition 543/04, Admissibility, Ever de Jesús Montero Mindiola, Colombia, 13 October 2005, which cites, I/A Court H. R, Herrera Ulloa Case. Judgment of 2 July 2004. Series C No. 107, para. 81.

[FN19] See, e.g., IACHR, Report N° 32/05, petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral and other persons affected by HIV/AIDS, Guatemala, 7 March 2005, paras. 33-35; I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections, supra, para. 53; I/A Court H.R., Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; and I/A Court H.R., Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.

32. In the present case, the Petitioners have alleged that they exhausted domestic remedies, which culminated with the judgment of the Guyana Court of Appeal which affirmed the death sentences of the Vaux brothers. The State has not controverted those arguments, given that it has submitted no observations with respect to the Petitioner’s petition. Accordingly, on the basis of: the terms of Article 31 of the Rules of Procedure; its review of the file, especially taking into account the judgment of the Guyana Court of Appeal; and in the absence of specific and concrete information indicating that domestic remedies were not duly exhausted, the Commission concludes that the requirement of prior exhaustion has been satisfied.

2. Timeliness of the Petition

33. Article 32 of the Commission’s Rules of Procedure provides that the admission of a petition is subject to the requirement that the petition be lodged with the Commission in a timely manner, namely within a period of six months from the date on which the party alleging violations of his rights was notified of the decision that exhausted domestic remedies.

34. The petition lodged on behalf of the Vaux brothers was received by the Commission on December 08, 2000; one day after their appeal to the Guyana Court of Appeal was dismissed. The Commission concludes that the petition was filed within six months of the final ruling in the case and finds that it is therefore admissible pursuant to Article 32 of the Commission's Rules of Procedure.

3. Duplication of Procedures

35. This petition satisfies the requirement of Article 33 of the Commission's Rules of Procedure because the information in the record does not reveal that the subject matter of the petition is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member; nor does it essentially duplicate a petition pending or already examined and settled by the Commission or by another international governmental organization of which the state concerned is a member, pursuant to Article 33 (1) and (2) of the Commission's Rules of Procedure.

4. Colorable claim

36. The Petitioner has alleged that the State has violated the right of the Vaux brothers to due process (presumptively under Articles I, XVIII, XXV and XXVI of the American Declaration). Pursuant to Article 34 of the Commission's Rules of Procedure, the petition states facts that tend to establish a violation of the rights referred to in the American Declaration, and the statements of the Petitioner indicate that the petition is not manifestly groundless or out of order. Therefore, the Commission concludes, without prejudging the merits of the case, that the petition is not barred from consideration under Article 34 of its Rules of Procedure.

5. Conclusions on Admissibility

37. In accordance with the foregoing analysis, and without prejudging the merits of this petition, the Commission decides to declare this petition admissible pursuant to Articles 37 of its Rules of Procedure.

B. The Merits

38. As noted previously, the State has not provided the Commission with any information pertaining to the exhaustion of domestic remedies and the claims raised in the petition. As a consequence, in determining the merits of this case, the Commission has presumed the facts as reported in the petition to be true, provided that the evidence does not lead to a different conclusion, in accordance with Article 39 of the Commission's Rules of Procedure.

1. Standard of Review

39. Before addressing the merits of the present case, the Commission wishes to reaffirm and reiterate its well-established doctrine that it will apply a heightened level of scrutiny in deciding capital punishment cases. As the right to life is widely-recognized as the supreme right of the human being, respect for which the enjoyment of all other rights depends, the Commission

considers that it has an enhanced obligation to ensure that any deprivation of life that an OAS member state proposes to apply the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This heightened scrutiny test is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty,[FN20] and has been articulated and applied by the Commission in previous capital cases before it.[FN21]

[FN20] See e.g. I/A Court H.R., Advisory Opinion OC-16/99 (1 October 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", supra, para. 136 (finding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result"); UNHRC, Baboheram-Adhin et al. v. Suriname, Communication nos. 148-154/1983, adopted 4 April 1985, para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trials to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.)

[FN21] See e.g. Report N° 57/96 (Andrews v. United States), Annual Report of the IACHR 1997, paras. 170-171; Report N° 38/00 (Baptiste v. Grenada), Annual Report of the IACHR 1999, paras. 64-66; Report N° 41/00 (McKenzie et al. v. Jamaica), Annual Report of the IACHR 1999, paras. 169-171.

40. This approach requires in particular strict adherence to the rules and principles of due process and fair trials in the context of capital cases. The Commission has previously emphasized that, due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.[FN22]

[FN22] See e.g. McKenzie et al. v. US, supra, para. 188, citing, inter alia, Woodson v. North Carolina, 449 L Ed 944, 961 (U.S.S.C.)

41. The Commission also notes that this heightened scrutiny test applicable to death penalty cases is not precluded by the Commission's fourth instance formula. According to this formula, the Commission in principle will not review the judgments issued by domestic courts acting

within their competence and with due judicial guarantees.[FN23] Where a possible violation of an individual's rights under applicable inter-American human rights instruments is involved, however, the Commission has consistently held that the fourth instance formula has no application and the Commission may consider the matter.[FN24]

[FN23] See Report N° 39/96, Santiago Marzioni, Argentina, Annual Report of the IACHR 1996, p. 76, paras. 48-52. See also Report N° 29/88 (Clifton Wright v. Jamaica), Annual Report of the IACHR 1987-88, p. 154.

[FN24] See e.g. Marzioni v. Argentina, supra; Wright v. Jamaica, supra; Baptiste v. Grenada, supra, para. 65; McKenzie et al. v. Jamaica, supra, para. 170.

42. The Commission will therefore review the Petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the right to life, the right to due process, and the right to a fair trial as prescribed under the American Declaration have been properly respected by the State.

2. Alleged Violations of the American Declaration

43. The principal claim of the Petitioner is that the Vaux brothers did not have a fair trial because of confessions allegedly obtained from them by the police through coercion and oppression. The Petitioner contends that the later decision to affirm the convictions and death sentences, despite the alleged forced confessions further violated the right of the Vaux brothers to due process. These complaints may fall to be considered under the following Articles of the American Declaration: Article XVIII (right to fair trial), Article XXV (right to humane treatment while in custody); and Article XXVI (right to due process of law, right not to receive cruel, infamous or unusual punishment).

4. Presumption of facts

44. The Commission notes that the State has not disputed the Petitioner's allegations regarding the judicial proceedings leading up to the death sentences imposed on the Vaux brothers. 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.

45. The Commission notes that the State at no time has responded to the Petitioner's allegations or questioned the petition's admissibility. 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”.

46. The Commission also considers that the information requested by it 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:

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.[FN25]

[FN25] Inter-American Court of Human Rights, Velásquez Rodríguez Case. Judgment of July 29, 1988, para. 135 and 136.

47. 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.”[FN26] The Commission therefore reminds the State of Guyana that it has a duty to cooperate with the organs in the inter-American human rights system, for optimal fulfillment of its functions to protect human rights.

[FN26] Inter-American Court of Human Rights, Velásquez Rodríguez Case. Judgment of July 29, 1988, para. 138. IACHR, Report N° 28/96, Case 11.297, Guatemala, October 16, 1996, para. 45

4. Right to physical integrity

48. The Petitioner contends that while in custody, both alleged victims were assaulted by police officers to extract confessions. In the case of Daniel Vaux, the Petitioner claims that he was beaten on two occasions on July 09, 1993 and July 11, 1993 by police officers; he alleges that he was hit in his face and gun-butted in the region of his torso, resulting in bruising and swelling. Daniel Vaux alleges that with respect to these injuries, he was not taken to see a doctor until July 13, 1993. At pages 4-5 of its judgment, the Court of Appeal of Guyana expressly found that on the day following the making of the oral and written statements, a senior police officer (Superintendent. Leon Trim) observed that Daniel Vaux was suffering from a swollen and discoloured jaw. A former magistrate (a Mr. Vic Puran) also testified during the trial that when Daniel Vaux first appeared before him at the preliminary inquiry, he saw black and blue marks on Daniel (and Kornel Vaux) between the chest and abdomen.

49. With respect to Kornel Vaux, the Petitioner contends that he was beaten and gun-butted by police officers on the day after his arrest (July 09, 1993) and again on July 11, 1993. On the first occasion, Kornel Vaux claimed that he was beaten on his abdomen and chest by a Superintendent Merai and two other officers, while handcuffed. According to Kornel Vaux, one of the police officers put his foot on the chain between the handcuffs, causing him to scream in pain. This beating lasted for eight minutes, according to Kornel Vaux . On the second occasion, Kornel Vaux states that he was gun-butted by two police officers in his chest and abdomen. Following the beatings, Kornel Vaux states that his hands and abdomen were swollen. Like his brother Daniel, Kornel Vaux claims that he was not taken to see a doctor about his injuries until July 13, 1993.

50. With respect to Daniel Vaux, the Court of Appeal of Guyana ruled that there was evidence of injury, and that the trial judge should have excluded the written confession. However, the Court of Appeal ruled that the oral confession was voluntary, and therefore admissible in evidence. With respect to alleged injuries to Kornel Vaux, the Petitioner alleges the medical certificates issued were lost, and were therefore not available to be tendered in evidence at the trial. The Petitioner claims that no viva voce medical evidence was available at the trial, because the attending physician could not be identified or located.[FN27]

[FN27] According to Mr. Justice Kennard, Chancellor of Guyana (who wrote the judgment for the Court of Appeal of Guyana), “I am convinced that the prosecution made determined efforts to locate the relevant records but to no avail. I cannot therefore fault the prosecution for failing to locate any of the records which may or may not have indicated whether these appellants, and especially this appellant [Kornel Vaux], was suffering from any injury and the identity of the doctors who had examined the appellants on the 13th of July 1993. If any of the records had been found which revealed the identity of the doctors at the High Court trial then I am sure that learned trial judge (sic) would have herself called the doctors in the interest of justice.” Court of Appeal judgment (Criminal Appeals nos. 30 & 31 of 1997) at pages 13-14.

51. In the Daniel Tibi Case[FN28] before the Inter American Court of Human Rights, the Petitioner in the custody of the State of Ecuador complained of being repeatedly assaulted by prison guards to extract a confession from him. On at least seven occasions, the Petitioner was punched, burnt with cigarettes and given electric shocks. In these circumstances, the Inter-American Court found that this treatment was a form of torture in violation of the Petitioner’s right to humane treatment under Article 5(2)[FN29] of the American Convention. In the case of Michael Edwards, et al, the Commission found violations of Articles XI, XXV, and XXVI of the Declaration, in circumstances (inter alia) where two of the Petitioners had been forced to sign confessions to murder by police officers. With respect to one of the Petitioners, “the police slammed his head against a desk, punched him on the ear, grabbed him in his stomach and choked him.” In respect of the other Petitioner, the police placed a plastic bag over his head, hit him on his wrist with a bamboo stick and “used a vice-like object and pressed his testicles together.”[FN30]

[FN28] I/A Court H.R., Case of Tibi. Judgment of September 7, 2004. Series C No. 114

[FN29] Article 5(2) 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.

[FN30] See IACHR Report N° 48/01 Case 12.067, Michael Edwards Case 12.068, Omar Hall Case 12.086, Brian Schroeter And Jeronimo Bowleg ,The Bahamas, April 4, 2001, paras.190, 196.

52. Having regard to this preceding jurisprudence and the Court of Appeal of Guyana's findings, it appears to the Commission that the evidence of injury inflicted on Daniel Vaux while in custody demonstrates that the State failed to satisfy the standard of humane treatment prescribed under Articles XXV (right to humane treatment while in custody), and XXVI (protection from cruel, infamous or unusual punishment) of the Declaration. As the Commission has already noted, the State has not addressed, much less contested the issue of injuries sustained by Daniel Vaux while in the custody of the Guyana police. The State has provided no information to suggest, much less confirm that it undertook an investigation into the injuries suffered by the Vaux brothers while in police custody. With respect to Kornel Vaux, the Commission notes that the medical evidence of injury was unavailable at the trial. However, given (a) the absence of any submissions from the State (to rebut Kornel Vaux's allegations of police abuse), and (b) the parallel account of Daniel Vaux, the Commission is prepared to invoke Article 39 of its Rules of Procedure to presume that Kornel Vaux was subject to assaults by the Guyana police as alleged. In the circumstances, the Commission similarly finds that the State violated the rights of Kornel Vaux under Articles XXV (right to humane treatment while in custody), and XXVI (protection from cruel, infamous or unusual punishment) of the Declaration.

5. Right to due process

53. The Petitioner contends that the oral and written confessions attributed to the condemned men should have been excluded from evidence, given that they were extracted by force. The Commission notes that the Court of Appeal of Guyana in upholding the convictions and death sentences of the Vaux brothers held, inter alia that:

a) there was ample evidence apart from the confession evidence upon which a jury could reasonably have convicted the Vaux brothers the defense of both men (alibi evidence) has been fairly put to jury (and rejected).

54. The Commission acknowledges that the voluntariness of the Vaux brothers' statements was fully ventilated before trial and appellate courts of Guyana, after which all the statements were reaffirmed by the Court of Appeal as voluntary, except the written statement by Daniel Vaux. At the trial, the trial judge relied primarily on police witnesses in arriving at her ruling on the voluntariness of all of the statements. In past decisions concerning issues of this nature, the Commission has observed that it is generally for the appellate courts of States Parties, and not the Commission, to review the conduct of domestic proceedings, unless it is clear that there was

judicial conduct that was arbitrary or amounted to a denial of justice or violated judicial obligations of impartiality.[FN31]

[FN31] See, e.g., Report 41/04, Case 12.417, Whitley Myrie, Jamaica, Annual Report of the IACHR 2004, paras. 55-56. See also Report 41/00, Case 12.023, McKenzie et al. v. Jamaica, Annual Report of the IACHR 1999, para. 298.

55. However, there are several aspects of the manner in which the Petitioners oral and written statements were taken and subsequently relied upon by the trial court that concern the Commission, having regard for previous cases considered by the Commission where criminal convictions have been grounded primarily in coerced confessions.[FN32]

[FN32] See for example, IACHR Report N° 2/99 Case 11.509 Manuel Manríquez, Mexico, February 23, 1999 where the public officers of the State of Mexico beat and tortured the petitioner to extract a confession that he had murdered Armando and Juventino López Velasco. The petitioner was later convicted of murder principally on the basis of this confession. The Commission found multiple violations of Mr. Manríquez's rights under the American Convention, the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial (Article 8), and the right to judicial protection (Article 25). The Commission also found that violations of Articles 8 and 10 of the Inter-American Convention to Prevent and Punish Torture.

56. Firstly, the Court of Appeal found that Daniel Vaux' written confession ought not to have been admitted as evidence at the trial in the face of evidence that it was given involuntarily. While the Court of Appeal acknowledged that Daniel's Vaux's right to due process had been violated by the admission of this written confession at the trial, the Court nevertheless upheld his conviction on the basis that there was other available evidence on which a conviction could be sustained and that there had been no substantial miscarriage of justice occasioned to Daniel Vaux.[FN33] Accordingly, Daniel Vaux was never accorded any remedy by the Court of Appeal or by any other organ of the State for this incursion on his due process rights.

[FN33] The Court of Appeal upheld the conviction by applying the proviso to section 13 of the Guyana's Court of Appeal Act (see footnote 3 supra).

57. Secondly, according to the record before the Commission, this confession was given at or around the same time as (a) the oral confession elicited from Daniel Vaux and (b) the oral and written confessions elicited from Kornel Vaux.

58. With respect to both Daniel and Kornel Vaux, the Court of Appeal upheld the ruling of the trial judge that their oral statements were admissible, on the basis that they represented spontaneous admissions, unprompted by coercion or the threat thereof.

59. In the absence of any evidence to the contrary, the Commission considers that all of the confessions were indivisible components of a single *res gestae*.^[FN34] In respect of both of the alleged victims, the trial judge considered that the oral and written statements were part of one continuing event.^[FN35] In the particular circumstances of this case, and having regard for the heightened scrutiny test adumbrated above, the Commission finds it difficult to accept that only a portion of the *res gestae* (namely the written statement of Daniel Vaux) was vitiated by coercion, but that the remaining contemporaneous statements were immune from such coercion.

[FN34] At page 15 of their judgment, the Court of Appeal quoted the trial judge's ruling that "I have considered the flow of events immediately preceding and find that the statements were one continuing event. In the circumstances I rule the statements free and voluntary...In the exercise of my residual discretion, I find no reason to exclude the statements on the ground of unfairness to the accused."

[FN35] *Ibid.*

60. It is evident to the Commission, based upon the information available, and the Commission's heightened scrutiny test, that the State's conduct had a potentially serious impact upon the fairness of the trial of the Vaux brothers, in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration. In a case such as the present, where the defendants' convictions have occurred as a result of proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy would be a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI. This was an option that was open to the Court of Appeal of Guyana, but which it declined to exercise. The Commission further notes that the State has provided no indication that it has taken steps to investigate and/or to sanction those who might have been responsible for coercing Daniel Vaux's confession. Similarly, there is no indication of any steps taken by the State to investigate and/or remedy the disappearance of the medical evidence regarding the alleged beating of Kornel Vaux. In the Commission's view, the absence of any remedial action by the State reinforces its view that the State is in violation of the due process and fair trial protections under Articles XVIII and XXVI, particularly with respect to the right of the Vaux brothers to be protected "from acts of authority that, to [their] prejudice, violate any fundamental constitutional rights."^[FN36]

[FN36] Article XVIII of the American Declaration.

61. The Commission's concern is heightened by the fact that according to the transcript of the trial (supplied by the Petitioners), Vic Puran, a former magistrate gave evidence that when the Vaux brothers first appeared before him (in a preliminary inquiry), they complained of

having been beaten by the police, and that he saw welts on their bodies about their stomachs/back[sic]. The former resident magistrate's files notes could not be found, and accordingly, he was compelled to rely on his memory. However, the trial judge in ruling on Kornel Vaux's allegations of coercion, rejected Mr. Puran's evidence, preferring the evidence of a police constable, Ryan George, who deponed that he had seen no signs of injuries.[FN38]

[FN37] At page 100 of the trial transcript, former resident magistrate Vic Puran is recorded as stating: "...In their first appearance the (sic) complained of being beaten by the police and requested that they be permitted to show the Court, the injuries they received. I invited them to the Back and the (sic) and the (sic) both lifted their top garment. I saw several black and blue marks on their top front between chest and abdomen. I made a note on the Magistrate's jacket of the marks which I saw. The jackets are kept by the clerk of the Court, and not by the Magistrate."

[FN38] According to the trial judge : "Mr. Puran, the Magistrate said he saw 'weal' and black and blue marks on the chest and abdomen of the prisoner (Kornel), he could not remember the date when the prisoners first appeared neither did he remember where he made a note of seeing those injuries. It is important to note that it was the very afternoon Mr. Puran said that he Ryan George observed nothing. Is Mr. Puran mistaken from the lapse of time with no notes to aid his memory. I would accept George's evidence to that of Puran's."

62. The Commission is further concerned about the unexplained disappearance (and consequent unavailability) of medical evidence that Kornel Vaux intended to (and was entitled to) rely on to corroborate his claim of being beaten to elicit a confession to murder. The Commission considers that this clearly impinged on Kornel Vaux's right to due process, particularly having regard for the doctrine of 'equality of arms' as is discussed below.

63. The Commission notes that according to the Court of Appeal of Guyana, the trial judge had a residual discretion to exclude the evidence of confessions, if it was thought that it would be unfair to the accused to do otherwise. The Court of Appeal ruled that:

In these days of ever mounting crime it is essential not to fetter the hands of the police of unnecessarily so as to hinder them in their difficult and vital task of the detection of crime and of bringing offenders to justice. To do this effectively they must be allowed a certain latitude, and after arrest, ought to be permitted to detain persons for reasonable time for enquiries. Once they act fairly and refrain from threats and any unlawful attempt to induce or exert any admission, the courts should not shut out any statement then made...

When regard is had to the circumstances surrounding the taking of the statements, as accepted by the Trial Judge, as well as to the fact that appellant had been in custody for about three (3) days prior to the taking of the statements, I cannot say that she had wrongly exercised her discretion to admit the statements in evidence.

64. With the greatest of respect to the Court of Appeal of Guyana, having regard for the Commission's observations on the doctrine of heightened scrutiny and the res gestae dimensions of the confession evidence, the Commission considers the Court's conclusion falls short of

Guyana's international obligation to protect the due process rights of the Petitioners, particularly with respect to the treatment of the confession evidence. In this regard, while the Commission appreciates the imperative of effective policing, it does not accept that this can or should occur at the expense of the rights of accused person in their custody. As the Court of Appeal itself acknowledged, the written confession of Daniel Vaux ought to have been excluded at the trial, given the clear evidence that it had been coerced. Given this fact, together with the contemporaneity of all of the confessions, the Commission is unable to accept the Court of Appeal's implicit finding that (a) these other confessions were untainted by unlawful threats or inducements and (b) were undeserving of a favourable discretion to exclude them. As indicated previously, the Commission considers that this approach of the Court of Appeal failed to conform with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration. In the Commission's view, this situation is compounded by the fact the Vaux brothers were in custody for almost a week before they were taken before a magistrate.[FN39]

[FN39] According to trial transcript provided by the Petitioner, the Vaux brothers were both arrested on July 08, 1993 and appeared before a magistrate (Magistrate Puran) for the first time on July 14, 1993; see pages 358, 422, 428, 448. They were in custody for three days before the police elicited confessions from them; see pages 433, 438.

65. Apart from considerations revolving around the doctrine of "heightened scrutiny", the Commission also considers that this case reflects a clear inequality of arms as between the Petitioners and the State, particularly as it relates to the issue of the missing medical evidence. The Commission notes that all international human rights systems, including the Inter-American system, stress the importance of "equality of arms" before a tribunal[FN40]. For example, the United Nations Covenant on Civil and Political Rights indicates this equality in the first sentence of Article 14, and Article 5 of the American Convention refers to it in relation to criminal proceedings. Case-law from the European system, for example has held that the doctrine of equality of arms is indispensable for a fair trial. For example, in the case of *Ofner and Hopfinger v Austria*,[FN41] the European Commission of Human Rights (as it then existed) observed that "what is generally called the equality of arms, that is the procedural equality of the accused with the public prosecutor, is an inherent element of a 'fair trial'". In a matter involving a sentence of death and the right to information on consular assistance, the Inter-American Court in its Advisory Opinion, OC-16/99, expressed the following view:.....[paras 118-119, 135-136]

"the Court has held that the procedural requirements that must be met to have effective and appropriate judicial guarantees "are designed to protect, to ensure, or to assert the entitlement to a right or the exercise thereof" and are "the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination."

To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or

eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.

States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases... 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.

[FN40] See *Judicial Process and Human Rights*, United Nations, European, American and African Systems, Texts and Summaries International Case-Law, by Louise Doswald-Beck and Robert Kolb, published by N.P.Engel, Publisher*Kehl*Strasbourg*Arlington, VA, 2004, page 144.

[FN41] European Commission of Human Rights, Applications Nos. 524/59 and 617/59, Report of 23.11.1962, Yearbook No.6 at page 680. See also ECHR, Case of Nikolova v Bulgaria 1999-II, pages 83, 96 and 106, where the European Court of Human Rights (EurCt) found there was an inequality of arms in breach of Article 5 (4) of the European Convention on Human Rights, where the petitioner/accused had not been permitted to consult the evidence in a case file prepared by a prosecutor or to respond to comments made by the prosecutor on the case file. Similarly in the case of Foucher v. France, Rep. 1997-II, page 157, the EurCt found that a petitioner/accused had been deprived of 'equality of arms when he was deprived access to the prosecution case file in order to make copies of documents therein for the preparation of his defence.

66. In the case of Derrick Tracey[FN42] from Jamaica, (dealing with the right to counsel within the context of a right to a fair hearing) , the Commission considered that the due process rights of the Petitioner had been violated where the Petitioner alleged that he had been forced to sign a confession after being beaten by the police. The Petitioner's confession was given in the absence of counsel. At the trial, the arresting police officers were unavailable to give evidence relating to this, but despite this, the Petitioner's confession was ruled admissible. The Commission considered that unavailability of at least one of the arresting officers to testify at the trial was "contrary to Mr. Tracey's right to defend his interests effectively and in full procedural equality".[FN43] The Commission also took this into account when deciding that "counsel was required [for the Petitioner] to ensure that proceedings against him were fair and to obtain appearance of persons who could throw light on issue of coerced statement...in connection with the use of the statement against him at the trial".[FN44]

[FN42] IACHR, Report No. 75/05 Jamaica, October 15, 2005.

[FN43] *Ibid*, para. 33.

[FN44] *Ibid*. para. 34.

67. In the case under consideration, the Court of Appeal of Guyana was content to rely on the assertions of the prosecution that the medical evidence was simply unavailable. Despite the unavailability of the medical evidence at the trial, the Court of Appeal was “unable to find that the learned Trial Judge had acted wrongly in admitting the [confession] evidence as being free and voluntary”, holding that “there was no misapplication by her of the relevant law nor did she fail to assess the evidence properly...” On behalf of the Court of Appeal, the Chancellor of Guyana opined:

I am convinced that the prosecution had made determined efforts to locate the relevant records but to no avail. I cannot therefore fault the prosecution for failing to locate any of the records which may or may not have indicated whether these appellants and especially [Daniel Vaux] was in fact suffering from any injury and the identity of the doctors who examined the appellants on the 13th of July 1993. If any of the records had been found which revealed the identity of the doctors who had examined these appellants and the prosecution had not called the doctors at the High Court then I am sure that learned trial judge would have herself have called the doctors in the interest of justice...

Having regard to the state of evidence led at the Voir Dire, the learned Trial Judge had to do her best on the available evidence to determine whether or not the statements allegedly made by this appellant [Kornel Vaux], were proved by the prosecution to have been voluntarily made by him...

Not having the benefit of the evidence of the doctor, the Trial Judge was left with the evidence of Detective Constable Parsram and Raymond Hall who were present when this appellant made the statements, Ryan George, who took this appellant to the Georgetown Prisons on the 14th July, 1993 and saw no injuries on him, Clement Duncan, the Medex at the Georgetown Prisons who saw no injuries on the appellant on 15th July, 1993 and the appellant himself...

68. In the Commission’s view, there appears to be conspicuous inequality of arms reflected primarily in the unavailability of critical medical evidence and or judicial notes by a former resident magistrate at the time that the confession evidence was considered by the trial court. Ultimately, the court was left to rely principally on agents of the State who (a) had control of the medical evidence and judicial notes; and (b) could hardly be considered to be disinterested parties in resolving the issue of whether the confession evidence was voluntary or not. The Commission notes that a former resident magistrate gave evidence of having seen injuries on the Vaux brothers, but his evidence was dismissed by the trial judge in the absence of any corroborating notes from the magistrate’s court file. These notes had been lost or mislaid. In the circumstances, in the case of Kornel Vaux, he was deprived of the opportunity to fully contest the voluntariness of his statements, as alleged by the prosecution.

69. In these circumstances, the treatment of the confession evidence by the courts of Guyana, together with the unavailability of medical evidence affected the fairness of the proceedings against the Vaux brothers (particularly Kornel Vaux) by hindering their ability to effectively raise and argue serious deficiencies in the proceedings against him and thereby contravened their

rights under Articles XVIII, XXV, and XXVI of the American Declaration. The Commission further finds that should the State execute the Vaux brothers based upon the criminal proceedings for which they are presently convicted and sentenced, that this would constitute an arbitrary deprivation of the lives of the Vaux brothers contrary to Article I of the Declaration.

V. CONCLUSIONS

70. The Commission, on the basis of the information presented, and the due analysis under the American Declaration, concludes that:

- a. the State of Guyana violated Articles XXV (right to humane treatment while in custody), and XXVI (protection from cruel, infamous or unusual punishment) of the Declaration by the infliction of violence by police officers on Daniel and Kornel Vaux while in their custody .
- b. the State of Guyana violated Articles XVIII, XXV and XXVI of the American Declaration, by failing to accord a fair trial to the Vaux brothers particularly, in the treatment of the confession evidence by the Guyana courts, which prevented them from fully contesting the voluntariness of the confession evidence tendered by the prosecution; and that the execution of the Vaux brothers based upon the criminal proceedings for which they are presently convicted and sentenced would be contrary to Article I of the Declaration.

VI. RECOMMENDATIONS

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE STATE OF GUYANA THAT IT:

1. Grant an effective remedy, which includes compensation for the maltreatment inflicted on the Vaux brothers; a re-trial of the charges against the Vaux brothers in accordance with the fair trial protections under the American Declaration, or failing that, an appropriate remission or commutation of sentence.
2. Adopt such legislative or other measures as may be necessary to ensure that criminal defendants are afforded access to evidence under the control of the State that they might reasonably require necessary to challenge the voluntariness of confession evidence.
3. Undertake an investigation to identify the direct perpetrators of the beatings inflicted on Daniel Vaux and Kornel Vaux while in custody to extract confessions and to apply the proper punishment under law;
4. Adopt such legislative or other measures as may be necessary to ensure that any confession of guilt by an accused is valid only if it is given in an environment free from coercion of any kind, in accordance with Article XXV of the American Declaration.

VII. PUBLICATION

72. In accordance with Article 43 of the Commission's Rules of Procedure, the Commission, transmitted the content of this report, adopted as Report N° 76/06 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. The State failed to present a response within the time limit prescribed by the Commission.

73. Based upon the foregoing considerations, and in the absence of a response by the State to Report N° 76/06, 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 Guyana 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 15 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.