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**REPORT No. 12/14**

**CASE 12.231**

REPORT ON MERITS (PUBLICATION)

PETER CASH

COMMONWEALTH OF THE BAHAMAS

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**INDEX**

I.	SUMMARY .....	3
II.	PROCEEDINGS BEFORE THE COMMISSION.....	3
III.	POSITION OF THE PARTIES ON ADMISSIBILITY OF PETITION .....	4
	A. Petitioner’s Position.....	4
	1. Background .....	4
	2. Petitioners’ position on admissibility.....	6
	B. State’s Position on Admissibility.....	6
IV.	ANALYSIS ON ADMISSIBILITY .....	6
	A. Competence of the Commission.....	6
	B. Other Grounds of Admissibility .....	7
	1. Exhaustion of Domestic Remedies.....	7
	2. Timeliness of the Petition .....	8
	3. Duplication of Procedures .....	8
	4. Colorable Claim.....	9
	C. Petitioners’ Position on the Merits.....	9
	1. Articles I, II, and XXVI of the Declaration - The Mandatory Death Penalty.....	9
	2. Articles XXVI, II, and XVIII - The Prerogative of Mercy.....	9
	3. Articles I, XXV, and XXVI – Alleged Involuntary Confessions; Right to Humane Treatment/Not to Be Tortured.....	10
	4. Articles XVIII and XXVI - Right to a Fair and Impartial Trial.....	10
	5. Article XXV - Right to Be Tried Without Undue Delay.....	11
	6. Article XVIII - Right to a Fair Trial; Access to the Courts .....	11
	7. Articles XI, XXV, XXVI - Inhumane Conditions of Detention .....	11
	D. State's Position .....	11
V.	ANALYSIS.....	11
	A. The Merits.....	11
	1. Standard of Review.....	11
	2. Presumption of Facts .....	12
	B. Application and Interpretation of the American Declaration of the Rights and Duties of Man.....	12
	1. Alleged Violations of the American Declaration .....	13

	2.	Articles I, II, XVIII, XXIV, XXVI - The Mandatory Death Penalty and Pardon/Commutation Process.....	14
VI.		ALLEGED VIOLATIONS OF DUE PROCESS.....	18
	A.	Alleged violations of Due Process: Alleged Involuntary Confession; Treatment of Confession by Trial Judge (in third trial) and Court of Appeal of The Bahamas; Undue Delay in Trying Cash .....	18
	1.	Articles XVIII, XXVI - Right to a Fair and Impartial Trial/right to physical integrity.....	18
VII.		TORTURE.....	22
	A.	Article XXV of the Declaration - Right to be Tried Without Undue Delay .....	23
	B.	Articles XI, XXV, and XXVI - Conditions of Detention .....	25
	C.	Articles XVII, XVIII, and XXVI of the Declaration - Unavailability of Legal Aid for Constitutional Motions .....	25
VIII.		ACTIONS SUBSEQUENT TO REPORT N° 70/06 .....	26
IX.		FINAL CONCLUSIONS AND RECOMMENDATIONS .....	27
X.		PUBLICATION .....	29

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**I. SUMMARY**

1. On October 18, 1999, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the IACHR") received a petition from Burton Copeland, solicitors in London, The United Kingdom (hereinafter "the Petitioners") against The Commonwealth of The Bahamas (hereinafter "The Bahamas" or "the State"). The petition was filed on behalf of Peter Cash, ("Mr. Cash" or "Cash") a Bahamian citizen who is under sentence of death at the Fox Hill Prison in The Bahamas, following conviction for the murder of Joyce Elaine Adderley. Mr. Cash was convicted primarily on the strength of confession evidence.

2. In their petition, the Petitioners have alleged that the State violated Mr. Cash's rights under Articles I, II, XI, XVIII, XXV, and XXVI of the American Declaration on the Rights and Duties of Man ("the American Declaration" or "the Declaration"). More particularly, the Petitioners alleged that these rights were violated by: the imposition of a mandatory death penalty; the torture/ill-treatment by State officials; inhumane detention conditions; and the failure to accord Mr. Cash certain due process guarantees during the domestic criminal proceedings against him. To date the State has not presented any arguments on the admissibility or merits of the petition.

3. On October 16, 2006, during its 126th regular sessions, the IACHR examined the contentions of the petitioners on the question of admissibility and merits, and concluded in Preliminary Report No. 70/06 that the claims brought on behalf of Peter Cash were admissible and that the Commonwealth of The Bahamas was responsible for violating Articles I (Right to life, liberty and personal security), II (Right to equality before the law), XVIII (Right to a fair trial), XXIV (Right of petition), XXV (Right of protection from arbitrary arrest) and XXVI (Right to due process of law) of the American Declaration with respect to Peter Cash. In the instant final report the Inter-American Commission, in view of the available information, decides to reiterate its conclusions and recommendations.

**II. PROCEEDINGS BEFORE THE COMMISSION**

4. Mr. Cash's petition was presented to the Commission on October 18, 1999, which included a request for precautionary measures. The Commission forwarded the pertinent parts of the petition to the State and requested its observations, within 90 days, with regard to the exhaustion of domestic remedies and the claims raised in the petition. The Commission also requested that the State "take the measures necessary to stay Mr. Cash's execution pending an investigation by the Commission of the alleged facts".

5. In letters dated April 06 and September 14, 2000, the Commission reiterated its request to the State for information on the petition. The Commission also requested that the State take whatever measures it deemed necessary to provide the Commission with the relevant information pertaining to the case within 30 days of receipt.

6. On October 2, 2000, the Commission received additional observations from the Petitioners to correct information in the petition relating to the number of times that Mr. Cash had been tried for murder in the Bahamian courts. The pertinent parts of this information were forwarded to the State by notes of October 06 and 10, 2000, with a request for a response within 30 days. By notes of October 17 and 24, 2000, the State acknowledged receipt of the Commission's communications of October 06 and 10, 2000.

7. On December 12, 2000, the Petitioners informed the Commission that they had lodged a second petition for leave to appeal to the Judicial Committee of the Privy Council (hereinafter "JCPC" or "Privy Council") on behalf of Mr. Cash on October 02, 2000. On April 05, 2001, the Petitioners informed the Commission that this petition for leave to appeal to the Privy Council was heard and dismissed on March 22, 2001.

8. On August 20, 2001, the Commission wrote the parties, informing them that it was placing itself at their disposal with a view to reaching a friendly settlement of the case pursuant to Article 41(1) of the Commission's Rules of Procedure. The Commission also requested that the parties provide a response to its offer within seven days of receipt of the communication. The Commission has not received a response from either party to its offer.

9. By letter of February 28, 2002, the Petitioners reconfirmed that Mr. Cash had been tried three times by the Bahamian courts in August 1996, November-December 1996 and October-November 1997.

10. On May 22, 2002, the Commission wrote to both parties informing them that pursuant to Article 37(3) of the Commission's Rules of Procedure, it had decided to defer the treatment of admissibility until the decision on the merits and requested that the Petitioners submit their additional observations on the merits of the case within a period of two months from the date of the letter.

11. On July 11, 2002, the Petitioners requested a two month extension in order to submit additional observations on the merits of the case. By letter dated July 19, 2002, the Commission granted an extension of one month. On August 21, 2002, the Petitioners requested an additional extension to submit additional information by the end of September 2002, which was granted by the Commission by communication of August 23, 2002.

12. On December 26, 2002, the Commission wrote to the State and, pursuant to Article 38(1), requested that the State submit its additional observations in the case. On January 23, 2003, the State acknowledged receipt of the Commission's letter of December 26, 2002. To date the State has not presented any arguments on the admissibility or merits of the petition, nor has it indicated its willingness to accept the Commission's offer to facilitate a friendly settlement.

13. By letter of February 06, 2003, the Petitioners advised the Commission that they were not yet in a position to make further submissions on the merits, as such submissions had not yet been completed by the Counsel instructed to do so.

14. By letter of October 06, 2003, the Petitioners submitted further observations, the pertinent parts of which were transmitted to the State by note of October 08, 2003 with a request for response within a month. By communication of June 03, 2004, the Commission reiterated its request to the State. By letter of the same date, the Commission advised the Petitioners of this repeated request.

15. By letter of December 14, 2005, the Commission requested further documentation from the Petitioners on the Bahamas *Court of Appeal Act* and the Bahamian Constitution, which was supplied by the Petitioners by letter of March 01, 2006.

### **III. POSITION OF THE PARTIES ON ADMISSIBILITY OF PETITION**

#### **A. Petitioner's Position**

##### **1. Background**

16. The Petitioners claim that Mr. Cash, a national of The Bahamas, was tried on three occasions in the Supreme Court of The Bahamas for the murder of Joyce Elaine Adderley, ("the deceased"). Ms Adderley was killed between August 30 and September 01, 1994.

17. The Petitioners state that Mr. Cash was tried for the first time for the deceased's murder from August 6 to August 19, 1996, and the jury was unable to reach a verdict. Mr. Cash was tried for a second time between November 18 and December 07, 1996 when he was convicted of murder, and sentenced to a mandatory death sentence, pursuant to section 312 of the Penal Code of The Bahamas. On October 06, 1997, the Court of Appeal of The Bahamas heard Mr. Cash's appeal against conviction and sentence, and ordered a re-trial, because the trial judge who presided over Mr. Cash's second trial was the same judge who presided over the first trial.

18. The Petitioners advise that Mr. Cash was re-tried between October 26, 1997 and November 18, 1997. Mr. Cash was again convicted of murder and sentenced to a mandatory death sentence pursuant to Section 312 of the Penal Code of The Bahamas.<sup>1</sup> According to the prosecution, Mr. Cash made three oral statements and one written statement to the police allegedly confessing to the murder of Ms. Adderley. Two of the oral statements were later challenged by Mr. Cash in trial proceedings as having never been given, while the written statement and third oral statement were challenged as being involuntarily given.

19. The Petitioners contend that Mr. Cash appealed his conviction and sentence arising out of the third and final trial. The Court of Appeal of The Bahamas heard his appeal on October 23, 1998, and upheld Mr. Cash's conviction and sentence despite acknowledging that the trial judge had made substantive errors in his treatment of Mr. Cash's written confession and one of his oral statements to the police.<sup>2</sup> According to the Petitioners, Mr. Cash had complained of being beaten by the police in order to extract a confession. The Court of Appeal stated that there was evidence that Mr. Cash had sustained injuries while in custody, and that in the circumstances, the prosecution had failed to prove that the subsequent confessions in question had been given voluntarily. As a consequence, the Court of Appeal ruled that the confessions in question ought to have been excluded by the trial judge.

20. The Petitioners submit that the Court of Appeal held that in "ordinary circumstances either of these omissions on the part of a trial judge may well have resulted in the appeal being allowed", but ruled nevertheless that "the remainder of the evidence was too compelling to warrant any such result." Accordingly, the Court of Appeal upheld the conviction and sentence of Mr. Cash by applying the proviso to section 12 of the *Bahamas Court of Appeal Act*. This proviso permits the court to uphold a conviction in the face of defects in the preceding trial, if "no substantial miscarriage of justice has actually occurred".<sup>3</sup>

21. The Petitioners inform that on October 04, 1999, the JCPC dismissed Mr. Cash's petition for special leave to appeal against the ruling of the Court of Appeal. Mr. Cash re-petitioned the JCPC on December 12, 2000 (superseded by further petition on February 20, 2001) because the first petition was based on the erroneous assumption that Mr. Cash had been tried on two occasions instead of three. According to the Petitioners, this second petition to the JCPC was dismissed on March 22, 2001.

22. For ease of reference, a chronological table of the domestic proceedings is set out below:

DATE	EVENT
September 01, 1994	Peter Cash arrested for murder
September 01, 1994	Peter Cash allegedly makes two oral statements to investigating officers, and later that day makes a written statement.
September 03, 1994	Peter Cash allegedly makes a further oral statement to another police officer. [Peter Cash later denies that he made the first two oral statements and that the third (written) and fourth (oral) statements were extracted from him by force]
September 05, 1994	Peter Cash is formally charged with murder

<sup>1</sup> The Statute Law of The Bahamas, Revised Edition 1987, Prepared under the authority of The Law Reform and Revision Act 1975, Chapter 77, p. 1124.

<sup>2</sup> The prosecution alleged that Mr. Cash had made two other oral statement to the police upon arrest, but Mr. Cash subsequently denied making them; accordingly, the Court of Appeal of the Bahamas did not review their voluntariness.

<sup>3</sup> Court of Appeal Act of the Bahamas; Chap 40, Laws of the Commonwealth of the Bahamas.

August 06, 1996- August 19, 1996	First trial – jury unable to reach a verdict
November 11, 1996 – December 07, 1996	Second trial- convicted of murder; sentenced to death
October 06, 1997	Court of Appeal of Bahamas quashes conviction arising out of second trial and orders a re-trial
October 26, 1997 – November 11, 1997	Third trial- convicted and sentenced to death
October 23, 1998	Court of Appeal acknowledges that there were irregularities in the third trial, but applies proviso of Court of Appeal Act <sup>4</sup> and ultimately dismisses appeal.
October 04, 1999	Petition to Judicial Committee of Privy Council for special leave to appeal is dismissed. (Petition included complaint relating to being subjected to three trials; complaint was not pursued based on erroneous information from Bahamas government that there had not been two re-trials).
December 12, 2000	Second petition filed before JCPC for special leave to appeal, based on corrected information regarding number of trials undergone by Peter Cash.
February 20, 2001	Further petition submitted, superceding second petition
March 22, 2001	Petition dismissed by JCPC

## 2. Petitioners' position on admissibility

23. The Petitioners argue that Mr. Cash's petition is admissible because he has exhausted the domestic remedies of The Bahamas. The Petitioners indicate that Mr. Cash appealed his conviction and mandatory death sentence to The Bahamas' Court of Appeal, which dismissed his appeal on October 23, 1998, and that Mr. Cash's application for special leave to appeal to the Privy Council was dismissed by the Court on October 04, 1999. The Petitioners maintain that on October 02, 2000, Mr. Cash's filed second petition to the Privy Council for leave to appeal was heard and dismissed on March 22, 2001. In addition, they argue that Mr. Cash should be excused from exhausting domestic remedies in relation to a Constitutional Motion pursuant to Article 37(2) of the Commission's former Regulations because no legal aid is provided by the State to pursue such a motion.

### B. State's Position on Admissibility

24. The State has not addressed or presented arguments on the admissibility of the petition.

## IV. ANALYSIS ON ADMISSIBILITY

### A. Competence of the Commission

25. The Petitioners have alleged violations of I, II, XI, XVIII, XXV, and XXVI of the Declaration. Article 23 of the Commission's Rules of Procedure provides that:

[a]ny 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 or her before the Commission, either in the petition itself or in another writing.

<sup>4</sup> According to the proviso, the Court of Appeal "may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred".

26. The petition in this case was lodged by the Petitioners on behalf of Mr. Cash who is a national of the State of The Bahamas.

27. The Declaration became the source of legal norms for application by the Commission<sup>5</sup> upon The Bahamas becoming a Member State of the Organization of American States in 1982. In addition, the Commission has authority under the Charter of the Organization of American States, Article 20 of the Commission's Statute,<sup>6</sup> and the Commission's Rules of Procedure to entertain the alleged violations of the Declaration raised by the Petitioners against the State, which relate to acts or omissions that transpired after the State joined the Organization of American States. Consequently, the Commission has jurisdiction *ratione temporis*, *ratione materiae*, and *ratione personae* to consider the violations of the Declaration alleged in this case. Therefore, the Commission declares that it is competent to address the Petitioners' claims relating to the alleged violations of the American Declaration.

## **B. Other Grounds of Admissibility**

### **1. Exhaustion of Domestic Remedies**

28. 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.

29. 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.

30. 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.<sup>7</sup> Secondly, in order to be considered timely, the objection that

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> See, e.g., IACHR, Report N<sup>o</sup> 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 30 November 2005. Ser. C No. 139, para. 5; I/ A Court H.R., *Case of* [continues ...]

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.<sup>8</sup> 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.<sup>9</sup> 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.

31. In the present case, the Petitioners have alleged that they exhausted domestic remedies which culminated with the dismissals of Mr. Cash's applications for special leave to appeal to the Privy Council on October 04, 1999, and March 22, 2001.<sup>10</sup> Alternatively, the Petitioners argue that Mr. Cash should be excused from exhausting domestic remedies in relation to a Constitutional Motion pursuant to Article 37(2) of the Commission's former Regulations because no legal aid is provided by the State to pursue such a motion.

32. The State has not disputed these arguments given that it has not submitted any observations on the admissibility or merits of the petition. Accordingly, on the basis of Article 31 of the Rules of Procedure, review of the file (especially taking account of the Privy Council's dismissals of Mr. Cash's applications for leave to 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. In light of this finding, the Commission does not consider it necessary to consider the alternative contention of the Petitioners that Mr. Cash is entitled to an exemption from exhausting the remedy of a Constitutional Motion before the Bahamian courts.

## 2. Timeliness of the Petition

33. In accordance with Article 32 of the Commission's Rules of Procedure, a petition must be presented in a timely manner to be admitted, namely, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. The six-month rule ensures legal certainty and stability once a decision has been taken.

34. With respect to the present petition, the Commission considers that domestic remedies were effectively exhausted pursuant to the first decision of the Privy Council of October 4, 1999, and that the petition was presented before the Commission on October 18, 1999. Consequently, the Commission concludes that this requirement has been satisfied.

## 3. Duplication of Procedures

35. The Petitioners state that this petition has not and is not pending settlement before another international body. The State has not provided the Commission with information concerning this

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[... continuation]

*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 v. El Salvador*. *Preliminary Objections*. Judgment of November 23, 2004. Ser. C No. 118, para. 135.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> As previously indicated by the Petitioners, the second petition for leave to appeal was substantially for the same relief, but included corrected information that was missing from the first application for leave to appeal.

requirement. 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. Further, this petition does not 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 Petitioners have alleged that the State has violated Mr. Cash's rights under the following Articles of the American Declaration: Article I (the right to life, liberty and personal security), Article II, (right to equality before the law), Article XI (right to the preservation of health and to well being), Article XVIII (right to a fair trial), Article XXV (right of protection from arbitrary arrest) and, Article XXVI (right to due process of law).. In addition, the Petitioners have provided factual allegations that, if proven, would tend to establish that the alleged violations might be well founded. The Commission therefore concludes, without prejudging the merits of the case, that the petition is not barred from consideration under Article 34 of its Rules of Procedure.<sup>11</sup>

37. In accordance with the foregoing analysis, and without prejudging the merits of this petition, the Commission decides to declare that the petition is admissible pursuant to Articles 31, 32, 33, 34, and 37 of the Commission's Rules of Procedure.

#### **C. Petitioners' Position on the Merits**

##### **1. Articles I, II, and XXVI of the Declaration - The Mandatory Death Penalty**

38. The Petitioners allege that The State has violated the human rights of Mr. Cash as established by Article I (the right to life, liberty and personal security), Article II, (right to equality before the law), and Article XXVI (right to due process of law) of the American Declaration.

39. The Petitioners argue that the mandatory death penalty for murder in The Bahamas violates Articles I, II, and XXVI of the Declaration. The Petitioners contend that because Mr. Cash was sentenced to death without having an opportunity to present evidence in mitigation and/or argue that he should not be executed, his right to life under Article I, his right to equality before the law as established by Article II, and his right to be free from cruel, infamous or unusual punishment under Article XXVI of the Declaration were violated.

##### **2. Articles XXVI, II, and XVIII - The Prerogative of Mercy**

40. The Petitioners argue that Mr. Cash's rights were violated under Articles XXVI, II, and XVIII of the American Declaration "by reason of the procedures established under the Bahamian Constitution for pardon and mercy".<sup>12</sup> In particular, the Petitioners contend that:

- a. the pardon/commutation is extra-legal in nature,

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<sup>11</sup> Article 34 of the Commission's Rules of Procedure provide that the Commission shall declare a petition inadmissible when the petition (a) does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure; (b) the statements of the petitioner or the State indicate that it is manifestly groundless or out of order' or, (c) supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order.

Article 27 of the Commission's Rules of Procedure provides that: "The Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments, with respect to the Member States of the OAS, only when the petitions fulfill the requirements set forth in those instruments, in the Statute, and in these Rules of Procedure.

<sup>12</sup> See Petitioner's submission to the Commission of October 06, 2003.

- b. there exists no criteria for the exercise of discretion of whether to pardon or execute,
- c. no information is available as to whether such discretion is exercised on the basis of legally admissible evidence,
- d. there is no right to make either written or oral representations, and no opportunity is provided to respond to any remarks of the trial judge (or anybody else) as to whether the sentence of death should be carried out.

41. In relation to Article XXVI, the Petitioners contend that the nature of the pardon/commutation procedure is capricious and arbitrary, and amounts to a violation of Mr. Cash's due process right not to be subjected to cruel, infamous or unusual punishment.

42. In relation to Article II, the Petitioners submit that Mr. Cash's right to equal protection is violated by the arbitrary nature of the pardon/commutation process in that there is no right to a hearing when the question of mercy or clemency is considered and that the commutation discretion is so broad and unaccountable that it must be assumed to operate with arbitrary effect.

43. As regards Article XVIII, the Petitioners contend that Mr. Cash's right to resort to the courts to protect his fundamental rights is violated by: (a) the absence of any means of judicially challenging the basis on which an adverse decision may be made against him by the Mercy Committee and, (b) the overall exclusion of Mr. Cash's participation in the entire pardon/commutation process.

### **3. Articles I, XXV, and XXVI - Alleged Involuntary Confessions; Right to Humane Treatment/Not to Be Tortured**

44. The Petitioners allege that the State violated Mr. Cash's rights under Articles I, XXV, and XXVI of the Declaration and claim that Mr. Cash was assaulted by the police after he was arrested for the deceased's death for the purpose of extracting a confession. In particular, the Petitioners state that Mr. Cash was punched, kicked, hit with a cutlass and had his testicles squeezed. The Petitioners further claim that these actions by the police constitute torture. The Petitioners maintain that there was clear evidence of injury to Mr. Cash when he appeared before the Court four days after his arrest. The Petitioners contend that Mr. Cash complained to his attorney and the judge that he had been beaten by the police while he was in their custody and that the evidence of Mr. Cash's injuries led the Court of Appeal of The Bahamas to conclude that he was assaulted whilst in police custody. According to the Petitioners, the Court of Appeal held that his two confessions should not have been admitted into evidence (in his third trial) because they were obtained involuntarily. However, the Court upheld Mr. Cash's murder conviction and death sentence. The Petitioners further allege that the treatment of Mr. Cash at the hands of the Bahamian police amounted to torture in violation of Articles I, XXV and XXVI of the American Declaration.

### **4. Articles XVIII and XXVI - Right to a Fair and Impartial Trial**

45. The Petitioners claim that the treatment of Mr. Cash by the police and the extraction of a confession violated his right to a fair trial as established by Articles XVIII and XXVI of the Declaration. Additionally, the Petitioners assert that the manner in which the trial judge conducted Mr. Cash's (third) trial violated his right to a fair and impartial trial, and judicial protection as provided by Articles XVIII and XXVI of the Declaration, as it relates to the admission of the confession into evidence in the trial.

46. The Petitioners contend that the use of involuntary confession evidence at trial is fundamentally unfair. The Petitioners assert that the right to be free from self-incrimination is a fundamental part of every civilized system of justice and that Mr. Cash's right to a fair trial was violated. The Petitioners argue that the failure of the courts in The Bahamas to quash Mr. Cash's conviction, notwithstanding their conclusion that he had been tortured to confess, deprived him of his right under Article XVIII to a procedure which would protect his fundamental constitutional rights. According to the Petitioners, quashing Mr. Cash's conviction was the only meaningful protection available to him.

## **5. Article XXV - Right to Be Tried Without Undue Delay**

47. The Petitioners claim that the State is responsible for violating Mr. Cash's right to be tried without undue delay, given that (a) Mr. Cash's first trial did not occur until August 06, 1996 - August 19, 1996, almost two years after his arrest on September 01, 1994; and (b) that Mr. Cash was subsequently re-tried twice by the State between 1996 and 1997. The Petitioners argue that the State is wholly responsible for this delay, and therefore in violation of Mr. Cash's right to be tried without delay.

## **6. Article XVIII - Right to a Fair Trial; Access to the Courts**

48. The Petitioners claim that Article XVIII of the Declaration guarantees all citizens of The Bahamas the right of access to the courts in cases where they claim that their fundamental constitutional rights have been violated. The Petitioners argue that the failure of the State Party to provide legal aid for Constitutional Motions in The Bahamas denies Mr. Cash access to the courts and hence and to an effective remedy for violations of the Constitution, which also constitutes a violation of Article XVIII of the Declaration.

## **7. Articles XI, XXV, XXVI - Inhumane Conditions of Detention**

49. The Petitioners contend that since Mr. Cash's conviction and mandatory death sentence, he has been detained on death row at the Fox Hill Prison in conditions that constitute inhuman and degrading treatment. According to the Petitioners, in 1991 a Review Committee examined complaints at the Fox Hill Prison and found that inmates suffered conditions of near unbearable heat, that inmates were confined to their cells for 23 hours of the day, and that there was a lack of proper medical care. The Petitioners assert that these conditions continue and that Mr. Cash is subject to them in violation of his right to health and well-being under Article XI of the Declaration; his right to humane treatment while in custody under Article XXV of the Declaration; and his right to be free from cruel, infamous or unusual punishment under Article XXVI of the Declaration.

## **D. State's Position**

50. Apart from acknowledging receipt of the Commission's communications referred to in Chapter II (Proceedings Before the Commission), the State has not addressed the admissibility and merits of the petition, nor has it accepted the Commission's offer to facilitate a friendly settlement of the case.

## **V. ANALYSIS**

### **A. The Merits**

#### **1. Standard of Review**

51. 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 perpetrate through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This heightened scrutiny test is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty and has been articulated and applied by the Commission in previous capital cases before it.

52. 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.

53. The Commission will therefore review the Petitioners' 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. Presumption of Facts**

54. The Commission notes that the State has not disputed the Petitioners' allegations regarding the judicial proceedings culminating in the dismissal of Mr. Cash's special leave to appeal to the Privy Council in March 2001. In this respect, the Commission has received no information or observations from the State with respect to the Petitioners' petition, despite repeated requests. Accordingly the Commission invokes Article 39 of its Rules of Procedure, which provides that:

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

55. 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".

56. The Commission also considers that the information requested by the Commission 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.<sup>13</sup>

57. 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".<sup>14</sup> 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 its functions to protect human rights.

## **B. Application and Interpretation of the American Declaration of the Rights and Duties of Man**

58. The Petitioners in the present case have alleged that the State of The Bahamas is responsible for violations of the rights of Peter Cash 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

<sup>13</sup> Inter-American Court of Human Rights, Velásquez Rodríguez case, Judgment of July 29, 1988, para. 135 and 136.

<sup>14</sup> 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.

Bahamas.<sup>15</sup> 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.<sup>16</sup>

59. 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 the context of developments in the field of international human rights law occurring since those instruments were first composed, and with due regard to other relevant rules of international law applicable to Member States against which complaints of human rights violations are properly lodged.<sup>17</sup>

60. 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.<sup>18</sup> 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.<sup>19</sup> Pertinent developments have also been drawn from the provisions of other international instruments adopted inside and outside of the framework of the inter-American system, including the Inter-American Convention To Prevent and Punish Torture and the UN Standard Minimum Rules for the Treatment of Prisoners.<sup>20</sup>

61. 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.

## 1. Alleged Violations of the American Declaration

62. The Petitioners allege: (i) violations of Articles I, II, XVIII, and XXVI of the Declaration relating to the mandatory nature of the death penalty and the process for granting amnesty, pardon or commutation of sentence in The Bahamas; (ii) violations of Articles XI, and XXVI of the Declaration pertaining to conditions of detention; (iii) violations of Article XVIII, and XXVI of the Declaration relating to the unavailability of legal aid for Constitutional Motions in The Bahamas and the right to an impartial trial, and (iv) violations of Articles XXV, and XXVI relating to being tried without undue delay. For simplicity, the Commission will categorize these alleged violations as follows: (a) mandatory death penalty &

<sup>15</sup> The Bahamas deposited its instrument of ratification of the OAS Charter on March 03, 1982.

<sup>16</sup> 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.

<sup>17</sup> See 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.

<sup>18</sup> 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.

<sup>19</sup> 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).

<sup>20</sup> 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).

pardon/commutation process (b) defects in due process/torture and (c) post trial conditions of detention. The Petitioners have not expressly invoked Articles XXIV<sup>21</sup> and XXV<sup>22</sup> of the Declaration with respect to the mandatory death penalty or the concomitant pardon/commutation process. Based on the analysis set out hereafter and upon the principle of *iura novit curia*,<sup>23</sup> the Commission also recognizes colorable violations of Article XXIV and XXV of the Declaration.

**2. Articles I, II, XVIII, XXIV, XXVI - The Mandatory Death Penalty and Pardon/Commutation Process**

63. Article I of the American Declaration provides:

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

64. Article II provides:

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

65. Article XVIII states:

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

66. Article XXIV provides:

Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, or the right to obtain a prompt decision thereon.

67. Article XXV states:

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 non-fulfillment 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.

68. Article XXVI provides:

Every accused person is presumed to be innocent until proved guilty.

<sup>21</sup> Article XXIV. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

<sup>22</sup> Article XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. Right of protection from arbitrary arrest.

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.

<sup>23</sup> I/A Court H.R., *Case of Hilaire, Constantine, and Benjamin et al.* Judgment of June 21, 2002, Series C N° 94, para. 107, where the Court noted that international jurisprudence recognizes the power and the duty of an international tribunal "to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them". See also IACHR, Report N° 7/03 (admissibility) *Whitley Myrie*, Jamaica para. 65.

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.

**(a) Mandatory death penalty**

69. The Commission recalls that in the cases of Michael Edwards, Omar Hall, Jeronimo Bowleg, and Brian Schroeter<sup>24</sup> (hereinafter “Michael Edwards et al case” (from The Bahamas) mandatory death sentences were imposed upon conviction for murder pursuant to Section 312 of the Penal Code of The Bahamas. This is the same provision under which Mr. Cash was sentenced to a mandatory death penalty. The Commission concluded that the State’s domestic law did not have a procedure for individualized sentencing, nor did it allow persons under conviction to present evidence of mitigating circumstances prior to being sentenced by the Court. In those cases, the Commission found that the imposition of mandatory death sentences violated Articles I, XXIV, XXV, and XXVI of the American Declaration.

70. As the Commission observed at paragraph 136 of its Report in the Edwards et al case:

several aspects of imposing mandatory death penalties for the crime of murder are problematic in the context of a proper interpretation and application of the Declaration. First, it is well-recognized that the crime of murder can be perpetrated in the context of a wide variety of mitigating and aggravating circumstances, with varying degrees of gravity and culpability. This conclusion is illustrated by the broad definition of murder under law of The Bahamas, as the unlawful killing of another person with the intent to kill or to cause unlawful harm or injury. It is also illustrated by the circumstances of the condemned men’s cases. Notwithstanding the existence of such disparities, however, the mandatory death penalty, seeks to impose capital punishment in all cases of murder, without distinction. It subjects an individual who, for example, commits a murder in a spontaneous act of passion or anger, to the equivalent and exceptional punishment as an individual who executes a murder after carefully planning and premeditation”.

71. As the Commission also noted in the *Edwards et al* case, mandatory sentencing by its very nature precludes consideration by a court of whether the death penalty is an appropriate, or indeed permissible, form of punishment in the circumstances of a particular offender or offense. Moreover, by reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of a crime for which the sentence was mandated. In the Commission’s view, these aspects of mandatory death sentences cannot be reconciled with Article I of the Declaration, in several respects. As noted above, the mandatory death penalty in The Bahamas imposes the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability. Not only does this practice fail to reflect the exceptional nature of the death penalty as a form of punishment, but, in the view of the Commission, it results in the arbitrary deprivation of life, contrary to Article I of the Declaration.”

72. The Commission reaffirms that imposing a mandatory penalty of death for all crimes of murder prohibits a reasoned consideration of each individual case to determine the propriety of the punishment in the circumstances, despite the fact that murder can be committed under widely-differing circumstances. By its nature, then, this process eliminates any reasoned basis, for sentencing a particular individual to death and fails to allow for a rational and proportionate connection between individual offenders, their offenses, and the punishment imposed on them. Implementing the death penalty in this manner therefore results in the arbitrary deprivation of life, within the ordinary meaning of that term and in the context of the object and purpose of Article I of the Declaration.

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<sup>24</sup> IACHR, Report N° 48/01 Case 12.067, Michael Edwards, Case 12.068, Omar Hall, Case 12.086, Brian Schroeter & Jeronimo Bowleg, The Bahamas, April 4, 2001.

73. The mandatory death penalty cannot be reconciled with Article I of the Declaration in another significant respect. As noted previously, the Inter-American Court has emphasized several restrictions upon the implementation of the death penalty that flow directly from the terms of Article 4 of the Convention, restrictions which, in the Commission's view, also provide guidance in defining limitations under Article I of the Declaration on the imposition of capital punishment. These include considerations relating to the nature of a particular offense, for example whether it can be considered a political or related common offense, as well as factors relating to the circumstances of an individual offender, for example whether the offender was pregnant at the time he or she committed the crime for which the death penalty may be imposed. By its very nature, however, mandatory sentencing imposes the death penalty for all crimes of murder and thereby precludes consideration of these or any other circumstances of a particular offender or offense in sentencing the individual to death.

74. Similarly, by reason of its compulsory nature, the imposition of a mandatory death sentence precludes any effective review by a higher court as to the propriety of a sentence of death in the circumstances of a particular case. As indicated previously, once a mandatory death sentence is imposed, all that remains for a higher court to review is whether the defendant was properly found guilty of a crime for which the sentence of death was mandated. There is no opportunity for a reviewing tribunal to consider whether the death penalty was an appropriate punishment in the circumstances of the particular offense or offender. This consequence cannot be reconciled with the fundamental principles of due process under Articles, XVIII, XXIV, XXV, and XXVI of the Declaration that govern the imposition of the death penalty.

75. With reference to Mr. Cash, the Commission finds that he was sentenced to a mandatory death penalty based solely upon the category of crime for which he was convicted. Therefore, for the foregoing reasons the Commission concludes violated Mr. Cash's rights under Articles I, XVIII, XXIV, and XXVI of the American Declaration because it imposed a mandatory death sentence on Mr. Cash upon his conviction for murder, without providing him with individualized sentencing and the opportunity to present mitigating evidence prior to that sentence being imposed.

**(b) Pardon/Commutation Process**

76. The authority of the Executive in The Bahamas to exercise the Prerogative of Mercy is prescribed in Sections 90, 91, and 92 of the Constitution of The Bahamas<sup>25</sup> which provide as follows:

90. (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf-

Grant to any person convicted of any offense against the law of The Bahamas a pardon, either free or subject to lawful conditions;

Grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

Substitute a less severe form of punishment for that imposed by any sentence for such an offence; or

Remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to Her Majesty on account of such an offence.

(2) The powers of the Governor-General under paragraph (1) of this Article shall be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister.

91. There shall be an Advisory Committee on the Prerogative of Mercy, which shall consist of –  
The Minister referred to in paragraph (2) of Article 90 of this Constitution who shall be the Chairman;  
The Attorney General; and  
Not less than three or more than five other members appointed by the Governor-General.

<sup>25</sup> Statutory Instruments, 1973 N<sup>o</sup> 1080, Caribbean and North Atlantic Territories, The Bahamas Independence Order 1973, at 58.

92. (1) Where an offender has been sentenced to death by any court for an offence, against the law of The Bahamas, the Minister shall cause a written report of the case from the trial Justice of the Supreme Court, together with such other information derived from the record of the case or elsewhere as the Minister may require, to be taken into consideration at a meeting of the Advisory Committee.

(2) The Minister may consult with the Advisory Committee on the Prerogative of Mercy before tendering any advice to the Governor-General under paragraph (2) of Article 90 of this Constitution in any case not falling within paragraph (1) of this Article.

(3) The Minister shall not be obliged in any case to act in accordance with the advice of the Advisory Committee.

(4) The Advisory Committee may regulate its own procedure.

(5) .....

77. As the Commission observed in the case of Michael Edwards, et al case<sup>26</sup> the Commission does not consider that the State's Advisory Committee on the Prerogative of Mercy ("the Advisory Committee"), that was established pursuant to Articles 91 and 92 of the Constitution of The Bahamas, can provide an adequate opportunity consistent with the requirements of the Articles I, XVIII, XXIV, XXV, and XXVI of the American Declaration for the proper implementation of the death penalty through individualized sentencing.

78. The law in The Bahamas therefore provides for a process by which the Executive may exercise the authority to grant amnesties, pardons, or commutations of sentences. The Commission is not, however, aware of any prescribed criteria that are applied in the exercise of the functions or discretion of the Advisory Committee, save for the requirement in death penalty cases that the Minister cause a written report of the case from the trial judge, and possibly other information in the Minister's discretion, to be taken into consideration at the meeting of the Advisory Committee. Nor is the Commission aware of any right on the part of an offender to apply to the Advisory Committee, to be informed of the time when the Advisory Committee will meet to discuss the offender's case, to make oral or written submissions to the Advisory Committee or to present, receive or challenge evidence considered by the Advisory Committee.

79. This process is not consistent with the standards prescribed under Articles I, XVIII, XXIV, XXV, and XXVI of the Declaration that are applicable to the imposition of mandatory death sentences. As outlined previously, these standards include legislative or judicially prescribed principles and standards to guide courts in determining the propriety of death penalties in individual cases, and an effective right of appeal or judicial review in respect of the sentence imposed. The Prerogative of Mercy process in The Bahamas clearly does not satisfy these standards, and therefore cannot serve as a substitute for individualized sentencing in death penalty prosecutions.

80. Moreover, based upon the information before it, the Commission finds that the procedure for granting mercy in The Bahamas does not guarantee condemned prisoners with an effective or adequate opportunity to participate in the mercy process, and therefore does not properly ensure the Mr. Cash's rights under Article XXIV of the Declaration to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

81. In the Commission's view, the right to petition under Article XXIV of the Declaration, when read together with the State's obligations under the Declaration, must be read to encompass certain minimum procedural protections for condemned prisoners if the right is to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners to apply for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case,

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<sup>26</sup> IACHR, Report No 48/01 Case 12.067, Michael Edwards, Case 12.068, Omar Hall, Case 12.086, Brian Schroeter & Jeronimo Bowleg, The Bahamas, April 4, 2001, at para.166.

to make representations in person or by counsel to the competent authority and, to receive a decision from that authority within a reasonable period of time prior to his or her execution. It also entails the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. In order to provide condemned persons with an effective opportunity to exercise this right, a procedure should be prescribed and made available by the State through which prisoners may file an application for amnesty, pardon or commutation of sentence, and submit representations in support of his or her application. In the absence of minimal protections and procedures of this nature, Article XXIV of the American Declaration is rendered meaningless, a right without a remedy. Such an interpretation cannot be sustained in light of the object and purpose of the American Declaration.

82. The Commission finds that the State has failed to respect the Mr. Cash's right under Article XXIV of the American Declaration to petition for amnesty, pardon or commutation of sentence, and to obtain a prompt decision thereon.

**(c) Conclusion on Mandatory Death Penalty and Pardon/Commutation Process**

83. Based upon the foregoing facts and in light of its prior jurisprudence and that of the Inter-American Court of Human Rights outlined above, the Commission finds that by imposing mandatory death sentence on Mr. Cash, without individualized sentencing and the opportunity to present mitigating evidence, the State violated Mr. Cash's right not to be arbitrarily deprived of his life and his right not to be subjected to cruel, inhuman or degrading treatment pursuant to Articles I, XVIII, XXIV, XXV, and XXVI, of the Declaration. Given its conclusions that the mandatory death sentence imposed on Mr. Cash contravenes Articles I, XVII, XXV, and XXVI of the Declaration and is therefore unlawful, the Commission does not consider it necessary to determine whether Mr. Cash's right to equality before the law pursuant to Article II of the Declaration was violated by the State.

84. The Commission also concludes that the State has violated Mr. Cash's rights pursuant to Article XXIV of the American Convention by failing to guarantee him an effective right to petition and to apply for amnesty, pardon or commutation of sentence, to make representations, in person or by counsel, to the Advisory Committee on the Prerogative of Mercy and, to receive a prompt decision from the Advisory Committee within a reasonable time prior to his execution.

85. Finally, the Commission concludes that the State has violated Mr. Cash's rights to a hearing with due guarantees by a competent, independent and impartial tribunal as established under Articles XVIII, XXV, and XXVI, of the American Declaration. Mr. Cash was not provided with an opportunity to make representations and present evidence to the trial judge as to whether his crime warranted the ultimate penalty of death, and was therefore denied the right to fully answer and defend the criminal accusation against him.

86. It follows from the Commission's findings that, should the State execute Mr. Cash pursuant to his mandatory death sentence, this would constitute further and irreparable violations of Articles I, XVIII, XXV, XXVI and of the Declaration.

**VI. ALLEGED VIOLATIONS OF DUE PROCESS**

**A. Alleged violations of Due Process: Alleged Involuntary Confession; Treatment of Confession by Trial Judge (in third trial) and Court of Appeal of The Bahamas; Undue Delay in Trying Cash**

**1. Articles XVIII, XXVI - Right to a Fair and Impartial Trial/right to physical integrity**

87. The Petitioners claim that the State has violated Mr. Cash's right to a fair and impartial trial as established by Articles XVIII and XXVI of the Declaration. The Petitioners contend Mr. Cash was physically abused by the police upon arrest in September 1994. The Petitioners further contend that while in police custody Mr. Cash was forced to make involuntary confessions (orally and in writing) implicating him in the

murder of Joyce Adderley. The Petitioners state that upon hearing Mr. Cash's appeal against his conviction and sentence (arising out of the third trial) the Court of Appeal of The Bahamas found that the trial judge erred in allowing two of Mr. Cash's statements into evidence because they were involuntarily made. However, the Court upheld Mr. Cash's conviction based on the proviso to section 12 of the Court of Appeal Act of the Bahamas. The relevant provisions (sections 12 and 13) are as follows:

12. (1) A person convicted on information in the Supreme Court after the coming into operation of this subsection, may appeal under the provisions of this Act to the Court on any of the following grounds-

- that evidence was wrongly rejected or inadmissible evidence was wrongly admitted;
- that the verdict was unreasonable or could not be supported having regard to the evidence;
- that under all the circumstances of the case, the verdict is unsafe or unsatisfactory;
- that the conviction was erroneous in point of law;
- that some specific illegality or irregularity, other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the trial;
- that the sentence passed was based on a wrong principle of law; or
- that the sentence passed was unduly severe.

A person sentenced by the Supreme Court under subsection (2) of section 218 of the Criminal Procedure Code Act may appeal to the court under the provisions of this Act against that sentence.

(3) ...

(4) ...

13. (1) After the coming into operation of this section, the court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict should be set aside on the grounds that-

- (a) under all the circumstances of the case it is unsafe or unsatisfactory;
  - (b) it is unreasonable or cannot be supported having regard to the evidence;
  - (c) there was a wrong decision or misdirection on any question of law or fact;
  - (d) in the course of the trial, there was a material illegality or irregularity substantially affecting the merits of the case; or
  - (e) the appellant did not receive a fair trial,
- and in any other case shall dismiss the appeal:

*Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred. (emphasis added)*

(2) Subject to the provisions of this Part of this Act the court shall, if it allows the appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the court may think fit.

(3) On an appeal against sentence the court shall, if it thinks that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as the court thinks ought to have been passed, and in any other case shall dismiss the appeal.

88. The Petitioners contend that the failure of the Court of Appeal of The Bahamas to quash Mr. Cash's conviction, notwithstanding its conclusion that there was evidence of forced confessions, deprived Mr. Cash of his right under Article XVIII to a procedure which would protect his fundamental constitutional rights. According to the Petitioners, the only meaningful protection available to Mr. Cash was the quashing of his conviction.

89. Articles XVIII and XXVI of the Declaration address the right to a fair and impartial trial and judicial protection.

90. Article XVIII of the Declaration states:

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

91. Article XXVI of the Declaration states:

Every accused person is presumed to be innocent until proved guilty.

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

92. According to the Petitioners, during his third trial, Mr. Cash contested the voluntariness of a written statement and an oral statement made some 36 hours later, implicating him in the murder of Joyce Adderley. The Petitioners claim that these confessions were made involuntarily, after Mr. Cash was assaulted by the police. According to the Court of Appeal judgment supplied by the Petitioners, Mr. Cash testified during his trial that he had been “punched several times in the stomach” and that he had fallen out of his chair while being beaten. Mr. Cash had also testified of an attempt “to interfere with his private parts”. As a result of the beating, the defendant said his head was swollen and that he felt pain in the stomach, his chest, and lower back.

93. In addressing the evidence of injury adduced during the third trial, the trial judge noted that “The doctor’s report tendered by the defense showed that the doctor found only a small swelling behind the left ear in (sic) parietal bone”, with no evidence of bruises or lacerations. The trial judge took the view that “considering the evidence of the defendant and having regard to the manner of the beating as alleged by the defendant it seemed curious that the doctor found no lacerations or bruises on his head, chest, stomach and back”, and that “From the evidence of the defendant as to the manner of the beating alleged to have been inflicted by the police it seemed unlikely that whatever was found by the doctor at the rear of his left ear could have come from the beating alleged by him.

94. However, the Court of Appeal of the Bahamas found that there was clear evidence that Mr. Cash had sustained injuries while in the custody of the police, and the trial judge should have exercised his discretion to exclude the written statement and subsequent oral statement. In reference to the trial judge’s assessment, the Court of Appeal opined:

.... Firstly, the learned judge concluded that having regard to the extent of the beatings that the appellant said were administered to him one would have expected the doctor to find at least some evidence of bruises or contusions about his body, even as long as four days after it was alleged that those beatings and assaults had occurred. Instead, all the doctor recorded in the report form was pain in the abdomen and lower back and pain in the absence of injury could be subjective. Therefore the learned judge concluded the appellant was lying when he complained of being beaten and otherwise ill-treated by the police. Secondly because there was no evidence that the wound to his head that the doctor found was “fresh” he could not act on it to conclude that it was as a result of any assault to the appellant’s person.

With due respect, I think that on both scores the learned judge’s conclusions were mistaken. Even assuming that the “pains recorded in the doctors report were as a result of information supplied by the appellant and not proof of the extent of the assaults, the learned judge failed fully to appreciate the effect of the finding that there was a swelling in the region of the left parietal bone. Even if this was the only reliable evidence of injury to the appellant, it would simply mean that he would have been exaggerating the extent of his injuries. But the fact that an injury was received by him whilst in police custody still had to be satisfactorily explained. This the learned judge attempted to do by his second conclusion, viz., that there was no evidence that the wound was fresh.

However, the crucial question was not whether the injury was fresh but on whom lay the burden of proving that it was otherwise. Clearly, the answer is - on the prosecution, which had the burden of proving beyond reasonable doubt that the confession was free and voluntary. But the trial judge seems

to have been placing the burden of proving that the injury was "fresh" on the accused, when it was quite easy for the prosecution to have adduced evidence to disprove that fact. The prosecution knew that the accused had been examined by a doctor at the instance of the magistrate, and must have been aware of the contents of the report issued by her. All that was needed was to request of the doctor some clarification of the nature of the injury. This they failed to do. They cannot therefore be heard to say that there was no proof that the wound or injury to his head was "fresh." As this court held in the recent case of *Mckenzie v R* and *Mott v R* (Cr Apps Nos. 45 and 47 of 1995 dated 18<sup>th</sup> October 1966) any injury suffered by an accused person whilst in custody must be satisfactorily explained if a confession statement is to conform to the required standard of voluntariness. (see also unreported case of *R v. Moss*). In sum therefore, the prosecution had failed to discharge the burden of proof that the injury to the back of the appellant's head was not consistent with blows that had been inflicted on that part of his body. Therefore, in our opinion the learned judge ought to have excluded the written statement; and having regard to the proximity in time between that statement and the last oral statement, some thirty-six hours, he ought to have exercised his discretion to exclude the later statement also.<sup>27</sup>

95. Nevertheless, the Court of Appeal declined to quash the conviction of Mr. Cash, holding that:

"In ordinary circumstances either of these omissions on the part of a trial judge may well have resulted in the appeal being allowed. But in this case, it is our opinion that the remainder of the evidence was too compelling to warrant any such result[...]"<sup>28</sup> and that "[...] this is a fit case in which the proviso to section 12 of the Court of Appeal Act, Chapter 40 should apply."<sup>29</sup>

96. Generally, in respect of the manner in which trials are conducted, the Commission is of the view that this is a matter more appropriately left to the domestic courts of States. The Commission considers that it is generally for the courts of States to review the factual evidence in a given case and give directions as to the applicable domestic law. Similarly, it is for the appellate courts of States, and not the Commission, to review the manner in which a trial was conducted, unless it is clear that the judge's conduct was arbitrary, amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality.

97. The judgment of the Court of Appeal of the Bahamas clearly established that the prosecution failed to establish that Mr. Cash's statements were voluntary, based on the finding that Mr. Cash had sustained injury while in custody, which *ipso facto* had a potentially serious impact upon the fairness of the trial of Mr. Cash, in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration. Instead of remedying the violations of Mr. Cash's rights under these provisions, the Court of Appeal opted to affirm his sentence, on the premise that "no miscarriage of justice has actually occurred"<sup>30</sup>.

98. With the greatest of respect to the Court of Appeal of The Bahamas and having regard for the Commission's observations on the doctrine of heightened scrutiny, the Commission considers that the Court's conclusion falls short of the State's international obligation to protect the due process rights of the Petitioners, particularly with respect to the treatment of the confession evidence. In the cases of *Lopez Aurelli (Argentina)*<sup>31</sup> and *Aguado Montealegre (Nicaragua)*<sup>32</sup>, the Commission found violations of due process where petitioners were convicted of criminal offences on the basis of forced confessions<sup>33</sup>. Similarly, in the case of

<sup>27</sup> Court of Appeal of The Bahamas judgment of October 23, 1998, pages 7-8.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* page 9.

<sup>30</sup> See proviso to section 12 of Court of Appeal Act (*supra*) and page 9 of the Court of Appeal judgment (*supra*).

<sup>31</sup> IACHR Report N° 74/90, Case 9850, Hector Geronimo Lopez Aurelli, Argentina, October 4, 1990.

<sup>32</sup> IACHR Resolution No. 29/89, Case 10.198, Reynaldo Tadeo Aguado Montealegre, Nicaragua, September 29, 1989.

<sup>33</sup> In the Lopez Aurelli case, the complainant, Hector Geronimo Lopez Aurelli, was convicted of acts of subversion, based on confessions obtained under torture. The Commission found (*inter alia*) that this violated his rights to personal safety and due process under Articles I, XVIII, and XXVI of the American Declaration. In the Aguado Montealegre case, a former soldier in the Ministry of the Interior of Nicaragua was sentenced to 30 years imprisonment for espionage. While being held incommunicado, he was forced to make incriminating statements under duress. These statements constituted the only evidence against him. The Commission found violations of Article

[continues ...]

*Cariboni v Uruguay*<sup>34</sup>, the United Nations Human Rights Committee (UNHRC) found a violation of Article 14 (right to due process) of the International Covenant on Civil and Political Rights (ICCPR) where an individual accused of subversive activities was forced to make confessions under torture that were later used against him in criminal proceedings. In the case of Peter Cash, although the Court of Appeal recognized the deficiency of the confession evidence adduced, it nevertheless failed to take any remedial measures, either in terms of a new trial or some redress for the treatment meted out to him. Accordingly, the Commission considers that this approach of the Court of Appeal failed to conform to the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration. In the Commission's view, the Court of Appeal's recognition that Mr. Cash suffered injuries while in custody, evidences the State's failure to protect Mr. Cash's right to personal security, contrary to Article I of the American Declaration; his right to humane treatment while in custody, contrary to Article XXV of the American Declaration; and to protection from cruel, infamous or unusual punishment, contrary to Article XXVI of the American Declaration.

99. In a case such as the present one, where the defendant's conviction has 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 The Bahamas, but which it declined to exercise.

100. 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 Mr. Cash's confessions. In the Commission's view, the absence of any remedial action by the State reinforces its view that the State violated Mr. Cash's right to physical integrity, contrary to Articles I, XXV and XXVI of the American Declaration.

## VII. TORTURE

101. The Petitioners also contend that violence inflicted on Mr. Cash by the Bahamian police amounted to torture in violation of Articles I, XXV, and XXVI. The Commission acknowledges that The Bahamas is not a signatory to either the American Convention of Human Rights or the Inter-American Torture Convention. However, at paragraph 154 of its 2000 Report on Terrorism and Human Rights,<sup>35</sup> the Commission noted that:

Under the Inter-American Torture Convention regime, torture refers to acts committed by state agents or persons acting under the orders or instigation of state agents. While analyzing the concept of torture for the purposes of Article 5 of the American Convention on Human Rights, the Commission has frequently referred to the definition provided for in the Inter-American Torture Convention, and has also found violations of the Inter-American Torture Convention itself as against states parties to that instrument. The Commission has considered that for torture to exist three elements have to be combined: 1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; 2. it must be committed with a purpose (*inter alia* personal punishment or intimidation) or intentionally (i.e. to produce a certain result in the victim); 3. it must be committed by a public official or by a private person acting at the instigation of the former. As discussed below, torture and inhumane treatment are distinct types of violations.

102. At paragraph 155 of the same Report, the Commission noted

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[... continuation]

8 (2) (g), ( the right not to be compelled to be a witness against himself or to plead guilty) and Article 8 (3), (A confession of guilt by the accused shall be valid only if it is made without coercion of any kind).

<sup>34</sup> UNCHR, Raúl Cariboni v. Uruguay, Communication No. 159/1983, U.N. Doc. CCPR/C/OP/2 at 189 (1990).

<sup>35</sup> Report On Terrorism And Human Rights, OEA/Ser.L/V/II.116, 22 October 2002.

“The American Convention prohibits the imposition of torture or cruel, inhuman or degrading treatment or punishment on persons under any circumstances<sup>36</sup>. While the American Declaration does not contain a general provision on the right to humane treatment, the Commission has interpreted Article I of the American Declaration as containing a prohibition similar to that under the American Convention.<sup>37</sup> In fact it has specified that “[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations erga omnes.<sup>38</sup>” It has also qualified the prohibition of torture as a norm of jus cogens.<sup>39</sup>

103. At paragraph 158, the Commission further noted that

“... with regard to the conceptual difference between the term “torture” and “inhuman or degrading treatment”, the Inter-American Commission has shared the view of the European Commission on Human Rights that the concept of “inhuman treatment” includes that of “degrading treatment”, and that torture is an aggravated form of inhuman treatment perpetrated with a purpose, namely to obtain information or confessions or to inflict punishment. The Inter-American Commission has also relied upon the European Court of Human Rights’ view that the essential criterion to distinguish between torture and other cruel, inhuman or degrading treatment or punishment “primarily results from the intensity of the suffering inflicted.”

104. The State has not controverted the Petitioners’ allegation that Mr. Cash was beaten by the police while in custody for the purpose of extracting a written confession, followed by an oral confession. As noted previously, the findings of the Bahamian courts corroborate that he did suffer from injuries while in the custody of the police in these circumstances. In the premises the Commission is satisfied that this treatment of Mr. Cash by the police constituted an aggravated form of inhuman treatment perpetrated to obtain confessions from Mr. Cash, and therefore torture. Accordingly, the Commission finds that this violated the rights of Mr. Cash under Articles I, XXV, and XXVI of the American Declaration.

#### **A. Article XXV of the Declaration - Right to be Tried Without Undue Delay**

105. The Petitioners claim that the chronology of the criminal proceedings against Mr. Cash demonstrates that he was deprived of his right to be tried without undue delay. Mr. Cash was first arrested in September 1994, tried for the first time in 1996 and, subsequently retried twice between 1996 and 1997.

106. The State has not responded to the merits of Mr. Cash’s petition relating to a violation of Article XXV of the Declaration. Article XXV of the Declaration provides:

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 non-fulfillment 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.

107. The Commission had the opportunity to address this issue in the cases of Michael Edwards et al case.<sup>40</sup> After being arrested for murder, Messrs. Schroeter and Bowleg claimed that their right to be tried without undue delay and the length of time spent in detention pursuant to Article XXV of the Declaration were violated by the State. They were not brought to trial until approximately 26 months after they were

<sup>36</sup> Article 5 of the American Convention.

<sup>37</sup> See, e.g., Case 9437, Report N° 5/85, Juan Antonio Aguirre Ballesteros (Chile), Annual Report of the IACHR 1984-1985.

<sup>38</sup> IACHR, Report on Canada (2000), para. 118.

<sup>39</sup> IACHR, Report on Canada (2000), para. 154.

<sup>40</sup> IACHR, Report N° 48/01 Case 12.067, Michael Edwards, Case 12.068, Omar Hall, Case 12.086, Brian Schroeter & Jeronimo Bowleg, The Bahamas, April 4, 2001.

arrested. As in the present case, the State did not respond to the merits of the condemned men's petition including their claims relating to a violation of Article XXV of the Declaration. The Commission ultimately found that the State had violated the right of Messrs. Schroeter and Bowleg to be tried without undue delay.

108. Relying on jurisprudence from the Inter-American Court, the Commission indicated at paragraph 218 of its Report<sup>41</sup> that:

In addressing the issue of a "reasonable time" under Articles 7(5) and 8(1) of the Convention, the Inter-American Court has confirmed that the purpose of the reasonable time requirement is to prevent accused persons from remaining in that situation for a protracted period and to ensure that a charge is disposed of promptly.<sup>42</sup> The Inter-American Court has also considered that the point from which a reasonable time is to be calculated is the first act of the criminal proceedings, such as the arrest of the defendant, and that the proceeding is at an end when a final and firm judgment is delivered and the jurisdiction thereby ceases. According to the Inter-American Court, the calculation of a reasonable time must, particularly in criminal matters, encompass the entire proceeding, including any appeals that may be filed.<sup>43</sup>

109. The Commission further observed at paragraph 219 that:

In determining the reasonableness of the time in which a proceeding must take place, the Inter-American Court has shared the view of the European Court of Human Rights that three points must be taken into account: (a) the complexity of the case; (b) the procedural activity of the Interested party; and (c) the conduct of the judicial authorities.<sup>44</sup> This Commission has likewise suggested that the reasonableness of a pre-trial delay should not be viewed exclusively from a theoretical point of view, but must be evaluated on a case by case basis.<sup>45</sup>

110. Finally, the Commission concluded at paragraph 220 that:

In addition to its case by case analysis of the reasonableness of the pre-trial delay, the Inter-American Commission has established that the burden of proof is on the State to present evidence justifying any prolongation of a delay in trying a defendant. In assessing what is a reasonable time period, the Commission, in cases of *prima facie* unacceptable duration, has placed the burden of proof on the state to adduce specific reasons for the delay. In such cases, the Commission will subject these reasons to the Commission's "closest scrutiny."<sup>46</sup>

111. In Mr. Cash's case, he was subjected to a pre-trial delay of almost two years from the date of his arrest September 1, 1994, to the date of his first trial August 16 - August 19, 1996. Ultimately it took the State more than three years after Mr. Cash's arrest to record a final conviction.

112. Based on the record before it, the Commission finds that Mr. Cash's prosecution was not particularly complex, nor is there information before the Commission concerning the procedural activity relating to, or of the conduct of, the judicial authorities that explains or justifies a delay of almost two years between Mr. Cash's arrest and his first trial.

<sup>41</sup> *Ibid.*

<sup>42</sup> I/A Court H.R., *Suarez Rosero Case*, Judgment, 12 November 1997, ANNUAL REPORT 1997, p. 283, para. 70.

<sup>43</sup> *Id.*, para. 71.

<sup>44</sup> *Id.*, para. 72. See also I/A Court H.R., *Genie Lacayo Case*, Judgment of January 29, 1997, ANNUAL REPORT 1997, para. 77. See also Report 2/97, Cases Nos. 11.205, 11.236, et al. (Argentina) March 11, 1997, ANNUAL REPORT 1997 at 241, 245-6. This reasoning was set forth in the leading European Court case on this issue, the *Stogmuller v. Austria* judgment of 10 November 1969, Series A N° 9, p. 40.

<sup>45</sup> See Report 2/97, Cases Nos. 11.205, 11.236, et al. (Argentina), *supra*.

<sup>46</sup> Report N° 12/96, Case N° 11.245 (Argentina), March 1, 1996, ANNUAL REPORT 1995, at 33, See similarly U.N.H.R.C., *Desmond Williams v. Jamaica*, Communication N° 561/1993, U.N. Doc. CCPR/C/59/D/561/1993 (1997) (holding that by "rejecting the author's allegation in general terms, the State party has failed to discharge the burden of proof that the delays between arrest and trial in the instant case was compatible with article 14, paragraph 3(c); it would have been incumbent upon the State party to demonstrate that the particular circumstances of the case justified prolonged pre-trial detention.").

113. In light of the Commission's prior jurisprudence,<sup>47</sup> and that of the Inter-American Court of Human rights<sup>48</sup> and, other international authorities, the Commission is of the view that the delay in Mr. Cash's case from the date of his arrest in 1994 to the date of his first trial in 1996, is *prima facie* unreasonable and calls for justification by the State.<sup>49</sup> In addition, the State has failed to respond to the issue of "delay" and has failed to provide any proper justification for the delay in bringing Mr. Cash to trial.

114. The Commission concludes that the State failed to try the Mr. Cash without undue delay and within a reasonable time contrary to Article XXV of the American Declaration. Therefore, the Commission finds that the State has violated Mr. Cash's right to be tried without undue delay and within a reasonable time pursuant to Article XXV of the Declaration in relation to his first trial.

115. Given that the Commission has found that Mr. Cash's right to be tried without undue delay and within a reasonable time was violated by the State, the Commission will not consider whether the length of the delay in trying Mr. Cash or his prolonged period of post-conviction detention, as outlined above, constitute cruel, unusual or degrading punishment or treatment contrary to Article XXVI of the Declaration and therefore may also render Mr. Cash's execution unlawful.

#### **B. Articles XI, XXV, and XXVI - Conditions of Detention**

116. The Petitioners allege that the State has violated Mr. Cash's right to the preservation of his health and well-being, and not to be subjected to cruel, unusual or degrading punishment or treatment pursuant to Articles XI, XXV and XXVI of the American Declaration because of the conditions of post-trial detention to which he has been subjected.

117. The Petitioners contend that since Mr. Cash's conviction and mandatory death sentence, he has been detained on death row in conditions which constitute inhuman and degrading treatment. The Petitioners claim that a 1991 Review Committee examined complaints about conditions at Fox Hill Prison, and concluded that the prison was overcrowded and understaffed. According to the Petitioners, the 1991 Prison Review Committee found that inmates suffered conditions of near unbearable heat, that inmates were confined to their cells for 23 hours of the day, and that there was a lack of proper medical care. The Petitioners assert that Mr. Cash is subject to these continuing conditions which violate his right to health and well being pursuant to Article XI, his right to humane treatment under Article XXV, and his right to be free from cruel punishment in Article XXVI. Apart from this general information about prison conditions, the Petitioners have not supplied the Commission with any particulars of how these conditions affect Mr. Cash in particular. In the circumstances, the Commission finds that there is insufficient information upon which to make a finding about Mr. Cash's claims in this regard. Accordingly, the Commission dismisses Mr. Cash's claims relating to his post conviction conditions of detention.

#### **C. Articles XVII, XVIII, and XXVI of the Declaration - Unavailability of Legal Aid for Constitutional Motions**

118. The Petitioners have indicated that Mr. Cash is indigent, and they argue that legal aid is not available to him to pursue a Constitutional Motion in the courts of The Bahamas. Consequently, the

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<sup>47</sup> Id. See Report No 41/00, Case N° 12.023, Desmond McKenzie, Case N° 12.044, Andrew Downer and Alphonso Tracey, Case N° 12.027, Carl Baker, Case 12.126, Dwight Fletcher. Inter-American Commission's Report at 918.

<sup>48</sup> Id. June of June 21, 2002, p, 50-55, paras. 132-152, p71, para. 3.

<sup>49</sup> See e.g. *Suarez Romero Case*, *supra*, p. 300, para. 73 (finding that a period of delay 4 years and 2 months between the victim's arrest and disposition of his final appeal to "far exceed" the reasonable time contemplated in the Convention and therefore to violate Articles 7(5) and 8(1) of the Convention.); I/A Comm. H.R., Report on Panama, ANNUAL REPORT 1991, at p. 485 (finding an average pre-trial delay of 2 years and 4 months to be unreasonable contrary to Article 7(5) of the Convention); *Desmond Williams v. Jamaica*, *supra*, para. 9.4 (finding a delay of two years between arrest and trial to be prolonged and unreasonable); U.N.H.R.C., *Patrick Taylor v. Jamaica*, Communication N° 707/1996, U.N. Doc. CCPR/C/60/D/707/1996 (1997) (finding a delay of 28 months between arrest and trial to be a violation of the petitioner's right to be tried without undue delay).

Petitioners argue that the State is in violation of his right to a fair trial under Articles XVIII and XXVI of the Declaration. The Petitioners contend that the failure of the State to provide legal aid denies Mr. Cash access to the Courts in The Bahamas in fact as well as in law. The Petitioners argue that to bring a Constitutional Motion before the domestic courts often involves sophisticated and complex questions of law that require the assistance of counsel. As previously indicated, the State has offered no observations on this issue.

119. The Commission has previously addressed this issue comprehensively in the Michael Edwards et al case, from The Bahamas<sup>50</sup>. The Commission's analysis in that Report is equally applicable to Mr. Cash's petition. Accordingly, based on the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by the Petitioners, such as the right to due process of law, the right to humane treatment, and the adequacy of their prison conditions, are procedurally and substantively complex and cannot be effectively raised or presented by a prisoner in the absence of legal representation. The Commission also finds that the State does not provide legal aid to individuals in The Bahamas to bring Constitutional Motions, and that Mr. Cash is indigent and is therefore not otherwise able to secure legal representation to bring Constitutional Motions.

120. The Commission further finds that by failing to make legal aid available for Mr. Cash to pursue a Constitutional Motion in relation to his criminal proceedings, the State has effectively barred recourse for him to a simple and brief procedure whereby the courts in The Bahamas would protect him from acts of authority that, to his prejudice, violate his fundamental rights under the Constitution of The Bahamas and under the American Declaration. Moreover, in capital cases, where Constitutional Motions relate to the procedures and conditions through which the death penalty has been imposed and therefore relate directly to the right to life and to humane treatment of a defendant, it is the Commission's view that the effective protection of those rights cannot properly be left to the random prospect as to whether an attorney may be willing or available to represent the defendant without charge. The right to judicial protection of these most fundamental rights must be guaranteed through the effective provision of legal aid for Constitutional Motions.<sup>51</sup> The State cannot be said to have afforded such protection to Mr. Cash. As a consequence, the State has failed to fulfill its obligations under Article XVIII of the American Declaration in respect of Mr. Cash.

121. Accordingly, the Commission concludes that the State has failed to respect Mr. Cash's right under Article XXVI of the Declaration by denying him an opportunity to challenge the circumstances of his conviction under the Constitution of The Bahamas in an impartial and public hearing. The Commission also concludes that the State has failed to provide Mr. Cash with a simple and brief procedure whereby the courts in The Bahamas would protect him from acts of authority that, to his prejudice, violate his fundamental constitutional rights under the Constitution of The Bahamas and under the American Declaration, and has therefore violated Mr. Cash's right to judicial protection under Articles XVIII, and XXVI of the Declaration.

### VIII. ACTIONS SUBSEQUENT TO REPORT N° 70/06

122. On October 16, 2006, the Inter-American Commission approved Report N° 70/06 on the admissibility and merits of this matter, which comprises paragraphs 4 to 121 *supra*, with the following recommendations to the State:

1. Grant an effective remedy, which includes a re-trial of Mr. Cash in accordance with the fair trial protections under the American Declaration, or failing that, an appropriate remission or commutation of sentence.
2. Undertake an investigation to identify the police officers involved in assaulting Mr. Cash to extract confessions and apply the proper punishment under law.

<sup>50</sup> Edwards, Hall, Schoeter, *et al.*

<sup>51</sup> See similarly U.N.H.R.C., William Collins v. Jamaica, Communication N° 240/1987, U.N. Doc. N° CCPR/C/43/D/240/1987 (1991), para. 7.6 (finding that in capital punishment cases, legal aid should not only be made available, it should enable counsel to prepare his client's defense in circumstances that can ensure justice).

3. Adopt measures to compensate Mr. Cash for the suffering occasioned by the violation of Mr. Cash's rights, particularly his right to personal security, his right to humane treatment while in custody and his right to be protected from cruel, infamous or unusual punishment.

4. Adopt such legislative or other measures as may be necessary to ensure that the rights under Articles I, XXV and XXVI of the American Declaration to personal security, to humane treatment and the right not to receive cruel, infamous, or unusual punishment in custodial detention are given effect in The Bahamas.

5. Adopt such legislative or other measures as may be necessary to ensure that the death penalty is imposed in compliance with the rights and freedoms guaranteed under the American Declaration including, and in particular, Articles I, XXV, and XXVI and to ensure that no person is sentenced to death pursuant to a mandatory sentencing law in The Bahamas.

6. Adopt such legislative or other measures as may be necessary to ensure that the right under Article XXIV of the American Declaration to petition for amnesty, pardon or commutation of sentence is given effect in The Bahamas.

7. Adopt such legislative or other measures as may be necessary to ensure that the right to an impartial hearing under Article XXVI of the American Declaration and the right to judicial protection under Article XVIII of American Convention are given effect in The Bahamas in relation to recourse to Constitutional Motions.

8. Adopt such legislative or other measures as may be necessary to ensure that the right to a fair and impartial hearing under Articles XVIII and XXVI of the American Declaration is given effect in The Bahamas.

9. Adopt such legislative or other measures as may be necessary to ensure that the right under Article XXV of the American Declaration to be tried without undue delay is given effect in The Bahamas.

123. On November 17, 2006, the report was transmitted to the State with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date, the IACHR notified the petitioners of the adoption of the report and its transmittal to the State. On January 16, 2007, the State acknowledged receipt of the communication and informed that the matter was being reviewed. To date the State has not responded.

124. On July 26, 2007, and June 25, 2013, the IACHR requested information to both parties on the compliance with the recommendations set forth in Report N<sup>o</sup> 70/06. No response was received.

125. On November 4, 2013, the Inter-American Commission approved Report N<sup>o</sup> 87/13 containing the final conclusions and recommendations indicated *infra*. As set forth in Article 47(2) of its Rules of Procedure, on November 13, 2013, the IACHR transmitted the report to the parties with a time period of two months to present information on compliance with the final recommendations. No response was received within the stipulated period.

## **IX. FINAL CONCLUSIONS AND RECOMMENDATIONS**

126. In accordance with the legal and factual considerations set out in this report, the Inter-American Commission concludes that The Commonwealth of The Bahamas is responsible for the violation of the following provisions of the American Declaration:

- Articles II, XVIII and XXVI by failing to provide Mr. Cash with an effective right to petition for amnesty, pardon or commutation of sentence;
- Articles XVIII and XXVI by failing to exclude or remedy the use of coerced confessions in the criminal proceedings against him;
- Articles I, XXV, and XXVI by subjecting or permitting the victim to be subjected to torture;

- Articles XVIII and XXVI by failing to make legal aid available to Mr. Cash to pursue a Constitutional Motion; and
- Article XXV by violating Mr. Cash's right to be tried without undue delay.

127. In its preliminary report the IACHR recommended to the State to ensure that no person is sentenced to death pursuant to a mandatory sentencing law. According to publicly available information, the mandatory death penalty in The Bahamas was ruled unconstitutional in 2006 by the Judicial Committee of the Privy Council in the case of *Bowe and Davis*.<sup>52</sup> In light of this ruling The Bahamas amended the Penal Code in October 2011 by removing the mandatory sentence of death.<sup>53</sup> Based on this information, the Commission concludes that the State has complied with the second part of the fifth recommendation set forth in Report No. 70/06.

128. The Inter-American Commission finds that the State has not taken measures toward compliance with the rest of the recommendations in the merits report in this case. Accordingly,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES ITS RECOMMENDATIONS THAT THE COMMONWEALTH OF THE BAHAMAS:**

1. Grant an effective remedy, which includes a re-trial of Mr. Cash in accordance with the fair trial protections under the American Declaration, or failing that, an appropriate remission or commutation of sentence;
2. Undertake an investigation to identify the police officers involved in assaulting Mr. Cash to extract confessions and apply the proper punishment under law;
3. Adopt measures to compensate Mr. Cash for the suffering occasioned by the violation of Mr. Cash's rights, particularly his right to personal security, his right to humane treatment while in custody and his right to be protected from cruel, infamous or unusual punishment;
4. Adopt such legislative or other measures as may be necessary to ensure that the rights under Articles I, XXV and XXVI of the American Declaration to personal security, to humane treatment and the right not to receive cruel, infamous, or unusual punishment in custodial detention are given effect in The Bahamas;
5. Adopt such legislative or other measures as may be necessary to ensure that the death penalty is imposed in compliance with the rights and freedoms guaranteed under the American Declaration including, and in particular, Articles I, XXV, and XXVI;
6. Adopt such legislative or other measures as may be necessary to ensure that the right under Article XXIV of the American Declaration to petition for amnesty, pardon or commutation of sentence is given effect in The Bahamas;
7. Adopt such legislative or other measures as may be necessary to ensure that the right to an impartial hearing under Article XXVI of the American Declaration and the right to judicial protection under Article XVIII of American Convention are given effect in The Bahamas in relation to recourse to Constitutional Motions;

<sup>52</sup> *Bowe (Junior) & Anor v. R.* Rev 1 (Bahamas) [2006] UKPC 10 (8 March 2006). Available at: <http://www.bailii.org/uk/cases/UKPC/2006/10.html>.

<sup>53</sup> The Death Penalty Project – Bahamas; available at: <http://www.deathpenaltyproject.org/where-we-operate/caribbean/bahamas/>. See also, Alfred Sears, Constitutional reform, pt. 10, October 25, 2012; available at: [http://www.thenassaeguardian.com/index.php?option=com\\_content&view=article&id=34945&Itemid=86](http://www.thenassaeguardian.com/index.php?option=com_content&view=article&id=34945&Itemid=86).

8. Adopt such legislative or other measures as may be necessary to ensure that the right to a fair and impartial hearing under Articles XVIII and XXVI of the American Declaration is given effect in The Bahamas; and

9. Adopt such legislative or other measures as may be necessary to ensure that the right under Article XXV of the American Declaration to be tried without undue delay is given effect in The Bahamas.

#### **X. PUBLICATION**

129. In view of the foregoing considerations, and in accordance with Article 47 of its Rules of Procedure, the Commission decides to publish this report and include it in its Annual Report to the OAS General Assembly. In carrying out its mandate, the Commission will continue to evaluate compliance with the recommendations reiterated in this report until they are fully implemented.

Done and signed in the city of Washington, D.C., on the 2<sup>nd</sup> day of the month of April, 2014. (Signed): Tracy Robinson, President; Rose-Marie Antoine, First Vice-President; Felipe González, Second Vice-President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and James L. Cavallaro Commissioners.

The undersigned, Elizabeth Abi-Mershed, Assistant Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 47 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.

Elizabeth Abi-Mershed  
Assistant Executive Secretary