AFFIDAVIT OF MICHAEL E. TIGAR

BEFORE ME, the undersigned authority, personally appeared MICHAEL E. TIGAR, who, upon his oath, deposes and states as follows:

1. My name is Michael E. Tigar. My *curriculum vitae* is already before the Commission. Across more than four decades, I have been a practicing lawyer, a law professor who has worked on four continents, author of more than a dozen books and scores of other publications, and a student of the role and responsibility of lawyers in society.
2. As I understand it, one issue before the Commission is whether Mr. Hall received minimally adequate legal representation in his capital trial under generally accepted standards of international law, and under conditions that engage state responsibility for that error. The precise expression of this issue in terms of the American Declaration is the subject of counsel's written and oral arguments, and I will not repeat it.
3. At the hearing before the Commission on October 29, 2010, the State's representative directed some of his remarks to my personal experience, suggesting that while Mr. Hall's attorneys "may not have provided the same expertise as Professor Tigar," that level of performance "is not what the Constitution mandates." This reference reflects a misunderstanding of Mr. Hall's situation. The standards to which I refer – the American Bar Association (ABA) Guidelines, in themselves and as their elements are reflected in state practice, custom, *opinio juris*, and relevant treaties – are minimum standards, and the performance of Mr. Hall's trial counsel fell well below them. It is therefore irrelevant whether I, or some other lawyer, might have done more than these standards require in the same situation. I confess that I have not always been able to prevent the conviction – or even the execution – of clients for whom I have acted.
4. The standards to which I refer may be analogized to a recipe. Following a recipe carefully, one can make an adequate cake. A cake recipe calls for using the right ingredients, in the proper proportions, adding ingredients at the proper time, and mixing them in the proper way. If you try to make a cake and leave out the sugar, that is a basic error and you will not have a cake. Nor will you have a cake if, having realized halfway through the baking that you forgot the sugar, you pull the half-baked dough from the oven and frantically pour sugar over it. That, in effect, is what Mr. Hall's trial counsel did, in undertaking at the very last minute an attempt to conduct an adequate mitigation investigation.
5. The State representative's remarks reflect a lamentable failure to grasp the problem before the Commission. The problem of ineffective assistance of counsel arises in many settings. Just recently, I was asked to assist United States military defense counsel to learn and apply basic skills in representing capital defendants. This case presents the Commission, and through it the international community, an opportunity to reinforce the state practice that is reflected in that invitation by a group of able military lawyers. As a further example, in the state of North Carolina where I now live, increased funding for death penalty representation training and assistance in recent years has substantially reduced the number of death verdicts – by about 2/3, according to advocates to whom I have spoken.
6. The factual basis for Mr. Hall's claim is also the subject of counsel's written and oral submissions. However, in light of the comments made by the State's representative at the

hearing before the Commission on October 29, 2010, I make the following observations.

7. In my presentation, I asserted that Mr. Hall's trial counsel spent only two and one-half weeks doing a mitigation investigation. The State claims that the proper time frame is six weeks because the penalty phase of trial began some weeks after the trial began. The record reflects that jury selection began on October 2, 1995, and the penalty hearing began on November 1, 1995, but the State's assertion is nonsense in any event. Jury selection is a critical phase of a capital trial. Counsel cannot know what questions to pose to prospective jurors on *voir dire* unless she has completed the pretrial investigation and identified the witnesses and issues she intends to present. Effective jury selection in a capital trial involves trying to understand how particular jurors will respond to the particular circumstances of this defendant. When the trial begins, with counsel's opening statement to the jury in the "trial" or "guilt-innocence" phase, counsel must introduce the client to the jury. He must already have in mind the elements of the case for life that he may later need to present, if the jury finds the client committed the offense. Counsel's investigative work must therefore be concluded by that time. In this very case, one of the two lawyers (to which the State concedes Mr. Hall was entitled) left town during jury selection in order to gather facts for the penalty phase, rather than assisting in that crucial stage.
8. I am also aware that trial counsel filed a motion before Mr. Hall's trial admitting that they had not done a complete mitigation investigation and seeking to continue the trial date. The trial judge denied that motion, thus further implicating State responsibility in the denial of Mr. Hall's right to a fair proceeding.
9. During post-conviction proceedings, the trial judge also failed to grant a hearing on Mr. Hall's constitutional claim of ineffective assistance of trial counsel. Under U.S. law, such a challenge to trial counsel's performance is timely if raised in the post-conviction process. This failure to provide a fair hearing in the post-conviction phase undermines the State's reliance on *ex parte* affidavits that were never subject to the testing that would have occurred if an evidentiary hearing had been allowed. Moreover, the State's assertions based on these ex parte filings are contradicted by other evidence in the record, as counsel for Mr. Hall have shown. For reasons more amply discussed in counsel's filings, I maintain the view of relevant facts set out in my initial presentation.
10. It undermines, rather than supports, the State's position that the trial judge asserted during the domestic post-trial proceedings –without having held a hearing – that trial counsel were "eloquent." Eloquence without factual substance is simply the noise made by an empty vessel.
11. As I stated at the hearing before the Commission on October 29th, a federal prosecutor seeking a death sentence must convince all twelve jurors to sign a paper authorizing the State to kill a human being. If even one juror refuses to sign, that means a life sentence. Under the federal law, defense counsel has the right and the duty to ask that the jury's attention be directed to any mitigating consideration that is potentially relevant, regardless of whether the federal statute specifically identifies that consideration. Thus, in assessing trial counsel's failure, one must recognize the very wide degree of opportunity to present mitigation narratives, and therefore the equally wide responsibility to develop evidence that would support such narratives.
12. With respect to the breadth of mitigation contemplated by the federal death penalty statute, that scheme was utterly unlike the one that governed capital sentencing hearings

in Texas state courts from 1976 to 1991, under which Mr. Hall's trial counsel had obtained their only capital trial experience. Because defense counsel in cases like Mr. Hall's were appointed from the group of lawyers who had been handling capital cases in Texas state court, the federal system in Texas in 1994-1995 reflected many of the faults that existed in the Texas state system, about which the Commission has previously expressed grave concern.

13. The prosecutor, as I noted, is trying to convince the jury that this defendant is the "other," unfit to live in human society. Defense counsel must present evidence and argument that makes the human connection between the jurors and the accused. The lawyer representing Orlando Hall – or any "Orlando Hall" – must convey both the universal message that the jury and the defendant share a common humanity, while painting the particular struggle of this black American who grew up in this particular way, in this particular place, under these specific conditions. Only thus can counsel help the jury avoid what Du Bois described a century ago: the majority society's reflexive tendency to measure the African-American soul "by the tape of a world that looks on in amused contempt and pity." W.E.B. Du Bois, THE SOULS OF BLACK FOLK (1903).
14. For millennia, lawyers have understood how different cultures and experiences shape expectations and conduct. One important thread of legal development in the West is how to accommodate the strands of continuity, diversity, and change. The Roman legal tradition, and later the canon law, sought such accommodation through restatements, "institutes" and collections of commentary. Indeed, Roman law in the classical period sought to accommodate the differing legal traditions of the various peoples within the Empire as part of a *ius gentium*, or law of all peoples, administered by a *praetor peregrinus* appointed to that task. The common law tradition moved differently, but faced the same challenges. Such institutions as the "personality of laws," which prevailed in Europe for centuries, reflected this aspect of lawyers' work. The competing secular, religious, feudal and royal jurisdictions also showed us how social, cultural and political differences may operate in civil society. This historic role of lawyers forms an important shared tradition. I have discussed this at some length in my book LAW AND THE RISE OF CAPITALISM (1977).
15. With specific reference to advocacy on behalf of the accused, in the earliest records we have, we see a developing idea of presenting a "stranger" to the deciders. The stranger may be someone who lives in the same community as the jurors, but whose profession, race or other characteristics set him apart from them. See my discussion of Cicero's *Pro Murena* in my book PERSUASION: THE LITIGATOR'S ART (1999) at 21. This issue has been brilliantly captured in Roland Barthes' essay *Dominici ou la Triomphe de la Litterature*, discussed in PERSUASION at 4-5, and contained in Roland Barthes, MYTHOLOGIES (Editions de Seuil 1957) at 50. I do not dwell at length on this history, for modern developments shed more light on the topic. It is worth noting that Philippe de Beaumanoir, in 1283, remarked in his treatise *Coutumes de Beauvaisis*, of the gap between the life experiences and modes of expression of the common man versus the lawyer, and the latter's need to seek to understand his client's situation. The Church canonized Ivo of Brittany – St. Ives (1253-1303) – in 1347 because he was a relentless advocate for the poor.
16. Let me turn, however, to the developments since World War II, which show an international consensus that is reflected in *opinio juris*, state practice, international

custom, and relevant treaties. To save time, I refer to my colleague Richard J. Wilson's magnificent book DEFENSE IN INTERNATIONAL CRIMINAL PROCEEDINGS: CASES, MATERIALS AND COMMENTARY (2006) (Michael Bohlander and Roman Boed, co-editors), particularly Chapter 2, "Procedural Safeguards for the Defense in International Human Rights Law." Professor Wilson traces relevant history and notes the role and responsibilities of counsel from the Nuremburg tribunals, through the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. He also discusses the American Declaration, and reminds us of the issues that Petitioner confronts in this hearing. One should also review the sentiments in Chapter 1 of the book, by Michael Bohlander, reminding us of the special dangers when a person on trial is regarded as a "stranger," the "other." See also my discussion in PERSUASION at 25-27.

17. To the scholarly works and the authorities they cite, I would add some observations based on my own work. I do this because, as Jerome Frank trenchantly commented, "The law is not what it says, but what it does."

- In 1991, I was facilitator at a conference at the International Institute for Criminal Sciences (ISISC) in Siracusa, Italy, hosted by Professor Cherif Bassiouni. The group for which I was responsible consisted of lawyers from every Eastern European country and several parts of the former Soviet Union. In a single day, working in English and French as shared languages, we developed a unified statement of the right to a defense including the right to effective counsel. The American Bar Association, whose standards we have been discussing in Petitioner's case, has continued to consult on these issues.
- Over the years I have been *professeur invité* at the *Faculté de droit* in Aix-en-Provence, I have found in discussions with my French colleagues and my students a consensus on the responsibilities of advocates in cases involving cultural and racial minorities, and an understanding of state responsibility to defend the rights of such groups. Some of this understanding arises from study of the lapses of professional responsibility of lawyers during the Vichy period and in later years around the issues raised by ethnic conflict in France.
- Now that jury trials are being introduced in Japanese criminal procedure, legal scholars in that country are confronting the same questions that face trial lawyers in the United States of America. In my recent visit to Ritsumeikan Law School, we discussed these issues.
- During the apartheid period, I went to South Africa under the auspices of the 60,000 member American Bar Association Section of Litigation, in which I was Vice-Chair, Chair-Elect, and later Chair. Our group helped to train non-white lawyers, with particular emphasis on capital cases. The responsibilities of counsel were seen to be the same as in the United States of America. In addition to our training sessions, I had the opportunity to discuss these issues with Abdullah Omar, at that time counsel to Nelson Mandela and later Minister of Justice when Mandela was released from prison and formed a government. In our discussions, I learned that South African lawyers

faced the same problems as American ones – to portray clients who are strangers to the dominant culture to an audience that is at least doubtful and often openly hostile. After all, there were no juries in South Africa, and 99 of 100 judges were white males. Mr. Omar and I talked about the Rivonia trial of ANC leaders, and how counsel there had managed to avoid a death sentence for their clients. After apartheid ended, Mr. Omar (by now Justice Minister) invited me to confer with the ANC about legal mechanisms for protecting rights, and once again I could easily draw upon the shared tradition of which I have spoken here. Richard Goldstone was one of the very few South African judges at that time who would help in training non-white advocates, and he helped us all see the basic importance of these principles. His work on these issues, as we all know, has continued.

- In 2007, I taught at the Asser Institute in The Hague and again observed the consensus to which I have referred, and which is discussed also in Professor Wilson's work.
- In 2009, I devised and taught a course at the University of Geneva, with students from the United States, Georgia, Azerbaijan, England, Italy, Japan and Argentina. I set the students the task of devising a system for fair trial of terrorism cases – the quintessential cases of the "other" in the contemporary setting. Each of them drew upon the legal structure of her own country. Each then examined the issues in terms of the developing transnational consensus. Their imagined structures differed in detail, but every proposal embraced the principles to which I have referred.
- During my work in Geneva, I met the founders and directors of International Bridges to Justice (IBJ), two former public defenders from the United States. IBJ works with States to set up lawyer training sessions. Its work, like that discussed in every one of the examples I have given, is based on the ideals and principles embodied in the ABA guidelines. As its statement reflects, "IBJ's main method of engaging in criminal justice reform is through training public defenders, or legal aid lawyers, in countries throughout Africa and Asia where there are few lawyers to advocate on behalf of thousands of prisoners. IBJ creates interactive criminal defense trainings with best practices, specific hypothetical situations and country-specific legal informational and case studies." That is, IBJ adopts and teaches the things to which I have referred. So far, it has done so in Cambodia, China, India, Nepal, Pakistan, the Philippines, Vietnam, Burundi, Democratic Republic of Congo, Kenya, Malawi, Nigeria, Rwanda, Swaziland, Uganda, Zimbabwe, and Brazil. From this list, one can see that the challenges in some of the countries are considerable. But the important thing is that in each case, the officials of the country involved have acknowledged and supported IBJ's presence and work. IBJ is just one NGO concerned with this issue. I mention it because one of my students at Duke University interned there, and because I

had the opportunity to discuss its work with the founders at some length.

■ To illustrate the breadth of mitigation available under the federal statute, and also the obligations of counsel, I refer to the case of *Mohamed and Another v. President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (28 May 2001). Mohamed was arrested in South Africa and then rendered to the United States to stand trial in the embassy bombings case. He claimed that his rendition was unlawful under South African and international law. The South African Constitutional Court held that the rendition was unlawful, but had to consider whether any judgment it issued would be moot because Mohamed was already in the U.S. and would be tried in a federal capital case. As it happened, Justice Richard Goldstone consulted me (I was in South Africa at the time). The Court's judgment noted that the U.S. judge had authorized Mohamed's U.S. counsel to participate in the South African proceedings, and that the South African judgment might well have some influence on the U.S. proceedings. The Constitutional Court was correct. Judge Leonard Sand, who presided over the New York trial, used the South African judgment to instruct the jury that it could consider in mitigation the fact that Mr. Mohamed was brought to the United States involuntarily and possibly unlawfully, and that but for this possible violation of his rights, he would not be facing a death sentence. Defense counsel in that case did a great deal of work, traveling to Africa and seeking expert assistance, to explain their client's situation to the jury. The jury did not unanimously vote for death, and the client's life was spared. The point is that it may be very hard to explain to jurors that a horrible crime does not automatically mean a death penalty, but counsel who simply follow the ABA Guidelines may well be able to achieve this result, as did the lawyers in Mohamed's case.

18. In sum, the principles enumerated in the ABA guidelines – the list of tasks, if you will – have become part of the *lingua franca* of defense lawyers all over the world. I can trace this development to the 1970s. When the United States Supreme Court upheld the death penalty as consistent with the constitution under certain circumstances and with appropriate procedural safeguards, lawyers who had been involved in death penalty litigation faced a daunting set of tasks. The Supreme Court had taught us that no matter how serious or heinous the defendant's crime, the nature of his participation in that crime, and – most significantly for the present case – his own personal characteristics were decisively relevant to the jury's decision to vote for life. At the same time, a new generation of leaders emerged within the American Bar Association. This new generation did not come from the traditional state and local bar political apparatus. Many of them were founders of new and influential groupings in the ABA, including the Section of Litigation. The Section of Litigation was established in the early 1970s and by 1989-90 had become the largest ABA Section, with more than 60,000 lawyer-members. Its chairpersons had gone on to become President of the entire ABA, and to hold other ABA-

wide positions. Litigation, together with the Section on Individual Rights and Liberties and the Section on Criminal Justice, formed a powerful grouping within the ABA, and the leadership used this power to involve the ABA in recruiting, training and supporting lawyers involved in capital defense. The ABA Guidelines did not appear overnight. They reflected standards distilled from experience and fashioned by consensus. As it happened, I was Chair of the Section of Litigation in 1989-90, and in the years leading up that responsibility and thereafter had a front-row seat in the process of developing relevant standards of practice and in seeing that these were carried out. My own participation in the process from which the Guidelines emerged reinforces my view that they reflect a relevant standard and that trial counsel in this case did not meet that standard.

19. The consensus to which I refer is also reflected in U.S. practice, based on which the Commission may reasonably conclude that the State is both responsible for Mr. Hall's present situation and has effectively acquiesced in his position with respect to the duties and obligations of capital defense counsel. Federal death penalty counsel are appointed under a special statutory scheme that imposes additional requirements in addition to those of the regular system for appointing counsel in criminal cases. At the time of Mr. Hall's trial, federal resource counsel Kevin McNally did seek to improve the performance of Mr. Hall's counsel, but (as his affidavit in the record tells us) without success. In the years since Mr. Hall's trial, the federal government and allied individuals and groups have taken steps to enforce compliance with the ABA Guidelines. Resource counsel are more active, and they reach out to judges to whom capital cases are assigned to recommend the appointment of qualified counsel. I have participated with federal resource counsel in training sessions for capital trial lawyers. The ABA has supported the creation and maintenance of the resource counsel system. Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit has been instrumental in obtaining funding for such programs in Texas for state and federal capital counsel, and I have responded to his invitations to address those sessions. And, while few of us believe that conducting capital trials before military commissions at remote bases like Guantanamo Bay, Cuba is an acceptable practice, the Office of Military Commissions in the U.S. Department of Defense has set up an Office of the Chief Defense Counsel. At the invitation of that officer, I recently participated in helping to train two dozen military lawyers in the techniques applicable to defense of capital cases, with special reference to cases pending before the military commissions. Again, the ABA Guidelines provide the matrix within which the United States will train its own military defense counsel.

Further Affiant sayeth not.
The foregoing statement is true and correct to the best of my knowledge and belief, and I so state under the pains and penalties of perjury.

_____
Michael E. Tigar

Signed and sworn before me, the undersigned authority,
on this ____ day of _____, 20__.

_____
Notary Public, State of _____

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