

REPORT N° 56/02  
MERITS  
CASE 12.158  
BENEDICT JACOB  
GRENADA  
October 21, 2002

SUMMARY

1. This Report concerns a petition which was presented to the Inter-American Commission on Human Rights (hereinafter referred to as "the Commission") by Saul Lehfreund Esq., Solicitor, of Messrs. Simons, Muirhead & Burton, Solicitors, in London, United Kingdom, (hereinafter referred to as "the Petitioners") by letter dated May 21, 1999, on behalf of Benedict Jacob (hereinafter referred to as "Mr. Jacob"). The petition alleges that the State of Grenada (hereinafter referred to as "the State") violated Mr. Jacob's rights under the American Convention on Human Rights (hereinafter referred to as "the Convention").
2. The Petitioners state that in this case, Mr. Jacob, a national of Grenada, was tried, and convicted of murder by the State pursuant to the Criminal Code of Grenada, on June 30, 1997, and a mandatory death sentence by hanging was imposed on him in accordance with the domestic law of Grenada. [1] According to the Petitioners, Mr. Jacob appealed his conviction and sentence to the Eastern Caribbean Court of Appeal in Grenada and his appeal was dismissed by the Court on December 8, 1997. The Petitioners inform that Mr. Jacob petitioned the Judicial Committee of the Privy Council for Special Leave to Appeal as a Poor Person, and the Privy Council dismissed his petition on December 16, 1998.
3. The Petitioners argue that the petition is admissible because Mr. Jacob's petition has satisfied the requirements of Article 46 of the Convention. The Petitioners also allege that the State has violated Mr. Jacob's rights under Articles 4(1), 4(6), 5(1), 5(2), 5(6), 8 and 24 of the Convention.
4. In their petition, the Petitioners requested that the Commission issue Precautionary Measures pursuant to Article 29(2) of its former Regulations against the State and ask that the State suspend Mr. Jacob's execution to avoid irreparable damage to him while his case was pending determination before the Commission. The Petitioners also requested that the Commission recommend that the State quash Mr. Jacob's death sentence and release him from prison.
5. In this Report, the Commission concludes that the Petitioners' claims relating to violations of the Convention on behalf of Mr. Jacob satisfy the requirements of Article 46 of the Convention and are therefore admissible.

6. Consequently, the Commission, on the basis of the information presented, and the due analysis under the American Convention, concludes that the State of Grenada is liable as follows:

1. The State is responsible for violating Mr. Jacob's rights under Articles 4(1), 5(1), 5(2) and 8(1), in conjunction with a violation of Article 1(1) of the American Convention, by sentencing Mr. Jacob to a mandatory death penalty.

2. The State is responsible for violating Mr. Jacob's rights under Article 4(6) of the Convention, in conjunction with a violation of Article 1(1) of the American Convention, by failing to provide Mr. Jacob with an effective remedy to apply for amnesty, pardon or commutation of sentence.

3. The State is responsible for violating Mr. Jacob's rights under Article 5(1) of the American Convention, in conjunction with a violation of Article 1(1) of the American Convention, because of its failure to respect Mr. Jacob's rights to physical, mental, and moral integrity by detaining him in inhumane conditions of detention.

4. The State is responsible for violating Mr. Jacob's rights under Articles 8 and 25 of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by failing to make legal aid available to him to pursue a Constitutional Motion.

## II. PROCEEDINGS BEFORE THE COMMISSION

7. On May 21, 1999, the Petitioners presented Mr. Jacob's petition to the Commission. On June 9, 1999, the Commission opened Case N<sup>o</sup>. 12.158 in respect of Mr. Jacob and forwarded the pertinent parts of the petition and the Petitioners' supplementary arguments to the State and requested observations within 90 days with respect to claims raised in the petition, as well as any additional information regarding exhaustion of domestic remedies. The Commission also requested that the State stay Mr. Jacob's execution pending an investigation by the Commission of the alleged facts.

8. On September 25, 2000, the Commission reiterated its request for information to the State concerning the admissibility of the petition and the claims raised therein.

9. On August 20, 2001, the Commission wrote to the State and the Petitioners and informed them that it places itself at the disposal of the parties concerned with a view to reaching a friendly settlement in Mr. Jacob's case.

10. On August 30, 2001, the Petitioners wrote to the Commission stating the following: "We wish to inform you that we would not be willing to enter into a friendly settlement in view of the fact that the State Party itself has shown no willingness to actively participate in this matter."

11. To date, the State has not responded to any of the Commission's communications, nor has it presented any information to the Commission pertaining to the admissibility and merits of the petition, or the Commission's offer to facilitate a friendly settlement between the parties.

### III. POSITIONS OF THE PARTIES ON ADMISSIBILITY

#### A. Position of the Petitioners

##### 1. Background of Mr. Jacob's Case

12. The Petitioners inform that on June 30, 1997, Mr. Jacob was tried, and convicted for the murder of Evadney Bowen (which occurred on April 23, 1995) and sentenced to a mandatory death penalty by hanging without any opportunity to present evidence of mitigating circumstances, pursuant to Section 234 of the Criminal Code of the 1958 Revised Laws of Grenada. The Petitioners indicate that the Prosecutor's case was that the deceased and Mr. Jacob had a personal relationship and lived together for some time. The Petitioners maintain that subsequently the deceased and Mr. Jacob stopped cohabiting together approximately 6 to 7 months before her death occurred on April 23, 1995. The Petitioners inform that according to the Prosecution's case, on April 23, 1995, Mr. Jacob was inside of his parked van when he saw the deceased. Mr. Jacob asked the deceased to go with him, she refused to do so, and he caused the deceased's death.

13. The Petitioners report that Mr. Jacob did not give evidence in Court, however, Dr. Olubahkle Obikaya, a consultant psychiatrist testified on Mr. Jacob's behalf. Dr. Obikaya testified that he examined Mr. Jacob on June 23, 1997, and he was informed by Mr. Jacob, that he was labouring under an intense and unpleasant belief that the deceased, with the help of someone else had "cast a spell on him and actually believed that some harm or danger was going to come to him." Dr. Obikaya further testified that Mr. Jacob informed him that the relationship with the deceased continued, secretly, because the deceased's mother did not like the relationship. Dr. Obikaya also testified that Mr. Jacob related to him that on April 23, 1995, the date of the deceased's death, that he and the deceased were having a friendly chat and that the last thing he remembered was the deceased saying, "Dennis, you going to die." [2]

14. The Petitioners indicate that Dr. Obikaya testified that at that point something clicked in Mr. Jacob's mental state, possibly and abnormal electrical brain discharge and that it was possible that Mr. Jacob could have been in that fused state on the morning in question. Dr. Obikaya testified that the fused state is actually a "state in which an individual affirms a series of actions which [he or she] is totally unaware of, and which he is unable to account for afterwards," and that someone in that state could not know whether their action is right or wrong. The Petitioners maintain that Dr. Obikaya testified on cross-examination that it was possible that Mr. Jacob was in a fused state on the morning of April 23, 1995, and in answer from the Jury, Dr. Obikaya stated that he was convinced that Mr. Jacob was telling the truth. [3]

## 2. Petitioners Position on Admissibility

15. The Petitioners argue that Mr. Jacob has met the requirements of Article 46(1)(a) of the Convention, that all effective and available domestic remedies have been exhausted, and that the petition is admissible. The Petitioners argue that Mr. Jacob should be excused from exhausting domestic remedies pursuant to Articles 46(2)(b) of the American Convention because of the State's failure to provide Mr. Jacob with legal aid to challenge his Constitutional rights in respect of his mandatory death sentence.

16. The Petitioners indicate that Mr. Jacob appealed his conviction and sentence to the Eastern Caribbean Court of Appeal of Grenada, and his appeal was dismissed by the Court on December 8, 1997. According to the Petitioners, Mr. Jacob petitioned the Judicial Committee of the Privy Council for Special Leave to Appeal as a Poor Person, and that the Privy Council dismissed his petition on December 16, 1998.

17. The Petitioners argue that Mr. Jacob is unable to pursue a Constitutional Motion to the Supreme Court of Grenada to challenge his mandatory death sentence as being inhuman or degrading punishment or treatment because Mr. Jacob is indigent, and the State's domestic law does not provide private funds nor legal aid to indigent persons to pursue such Motions. The Petitioners claim that the Constitution is a complex legal document and that expert legal representation is therefore required to have a reasonable prospect of success on a Constitutional Motion. They argue further, that Mr. Jacob's lack of private funding and the unavailability of legal aid prohibit him from pursuing a Constitutional Motion and therefore render this remedy illusory. The Petitioners also state that there is a dearth of Grenadian lawyers who are prepared to represent Mr. Jacob without payment.

18. The Petitioners contend that the absence of legal aid for an impecunious individual is sufficient to establish that domestic remedies are not available for the purposes of exhaustion. In support of their position, they rely upon the decision of the United Nations Human Rights Committee (hereinafter referred to as "HRC") in *Champagne, Palmer & Chisolm v. Jamaica*, [4] in which the HRC stated as follows:

With respect to the authors' possibility of filing a Constitutional Motion, the Committee considers that, in the absence of Legal Aid, a Constitutional Motion does not constitute an available remedy in the case. In light of the above, the Committee finds that it is not precluded by Article 5(2)(b) of the Optional Protocol from considering the communication. [5]

19. The Petitioners also contend that Article 5(2) of the Constitution of Grenada is drafted so as to immunize from attack laws and punishments which were lawful before Independence. The Petitioners maintain that these provisions have the effect of freezing in colonial time legislation which, without exception, authorize the mandatory death penalty by hanging. In addition, the Petitioners indicate that it is not possible to argue in any Court in Grenada that the death penalty is unconstitutional, because of its mandatory nature, or because the execution of the death sentence by hanging is cruel, unless the way

in which it is to be administered would not have been lawful before Independence. Moreover, the Petitioners claim that arguments about whether or not the mandatory death penalty by hanging is lawful can only be made before this Commission under the Convention.

3 Mr. Jacob's Claims on the Merits of his Case

Articles 4, 5, 8 and 24 of the Convention – The mandatory nature of the death penalty and the prerogative of Mercy

(a) The mandatory death penalty

20. The Petitioners claim that by imposing a mandatory death sentence on Mr. Jacob upon his conviction for murder, the State violated his rights under Articles 4(1), 4(6), 5(1), 5(2), 5(6), 8 and 24 of the Convention.

21. The Petitioners referred to the legislative history of the death penalty in Grenada. The Petitioners state that until 1974, Grenada was a British Colony whose penal law consisted of the common law and local penal codes as developed in England and Wales, and that pursuant to the (British) Offences Against the Person Act 1861, the penalty for murder was death. The Petitioners claim that in the United Kingdom, Section 7 of the Homicide Act 1957 restricted the death penalty in the United Kingdom to the offence of capital murder pursuant to Section 5, or murder committed on more than one occasion under Section 6. The Petitioners also indicate that Section 5 of the Homicide Act classified a capital murder as murder by shooting or explosion, murder done in the course or furtherance of theft, murder done for the purpose of resisting or preventing arrest or escaping from custody, and murders of police and prison officers acting in the execution of their duties.

22. In addition, the Petitioners maintain that Section 2 of the Homicide Act contained provisions for reducing the offence of murder to one of manslaughter, when the murder was committed by a person, who at the time of the commission of crime, was suffering from such abnormality of mind so as to substantially impair his mental responsibility for the acts and admission in doing, or being a party to the killing (diminished responsibility). The Petitioners indicate that Section 3 of the Homicide Act 1957 extended the common law defense of provocation whereby murder may be reduced to manslaughter where there is provocation by things done or said causing a person to lose his self control. In addition, the Petitioners report that the Homicide Act 1957 was not applied in Grenada before Independence and that no provision has been made for non-capital murder or the defense of diminished responsibility.

23. According to the Petitioners, Grenada became an independent State on February 7, 1974, when it adopted its Constitution. They also indicate that Chapter I of Grenada's Constitution provides for the protection of fundamental rights and freedoms of the individual. Article 5 of Grenada's Constitution in particular provides:

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Grenada immediately before the coming into operation of this Constitution.

24. In light of the terms of Article 5 of the Constitution, the Petitioners indicate that they accept that the sentence of death for murder does not violate the Constitution of Grenada, and that Article 5(2) of Grenada's Constitution precludes the Courts of Grenada or the Privy Council from interpreting the right to freedom from inhuman or degrading punishment under the Constitution as prohibiting the administration of the death penalty in every case upon a conviction for murder. [6] At the same time, the Petitioners argue that imposing a mandatory death sentence on Mr. Jacob, without providing him with an opportunity to present evidence of mitigating circumstances relating to them or their offenses, violate his rights under Articles 4, 5, 8 and 24 of the Convention.

25. In support of their position, the Petitioners refer to the practice in other states. They argue, for example, that in the case of *Woodson v. North Carolina* [7] the United States Supreme Court held that the automatic imposition of the death sentence on all those convicted of a specific offence is inconsistent with "the evolving standards of decency that are the hallmark of a maturing society." The Petitioners argue that the Supreme Court made it plain that the application of the mandatory death sentence imposed in all cases of murder without objective criteria for its application in particular cases after a fair hearing was unconstitutional. In addition, the Petitioners indicate that the Supreme Court held further that:

[i]n capital cases the fundamental respect for humanity underlying the eighth amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. [8]

26. In addition, the Petitioners contend that the South African Constitutional Court has gone further and followed the Hungarian Constitutional Court in declaring the death penalty to be unconstitutional per se in Decision No. 23/1990(X.31). Conversely, in the case of *Bachan Singh v. The State of the Punjab*, the Supreme Court of India determined that the death penalty is not unconstitutional per se, [9] in part because there was a judicial discretion as to whether it should be imposed. Based upon these domestic authorities, the Petitioners argue that states retaining the death penalty must distinguish between capital and non-capital murder, and must provide a proper sentencing procedure for considering whether the death penalty should be imposed in capital cases.

27. In this connection, the Petitioners make reference to a 1992 amendment to Jamaica's Offences Against the Person Act 1861, which distinguishes capital from non-capital murder. They contend that if Mr. Jacob was tried in the United Kingdom or

Jamaica, he would have been tried on a charge of "non capital murder," as his offence was not a murder of such special or heinous character as to merit the death penalty. Finally, the Petitioners claim that the law of Belize has introduced judicial discretion in the application of the death penalty.

28. The Petitioners argue that the American Convention is a living, breathing and developing instrument reflecting contemporary standards of morality, justice and decency and that it shares this quality with other international instruments such as the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "European Convention"). [10] The Petitioners indicate that they accept that Article 4 of the American Convention does not render the death penalty per se unlawful. They add, however, that according to commentators, [11] Article 4 of the Convention is more restrictive of the circumstances under which the death penalty can be imposed than the comparable provisions of the ICCPR and the European Convention.

29. According to the Petitioners, Article 4 of the Convention is expressly abolitionist in its direction and aspiration, and prescribes conditions for the implementation of the death penalty. For example, the death penalty cannot be applied to people below 18 years or over 70 years or for new offences. The Petitioners contend that two conditions in particular render the imposition of the mandatory death penalty in Mr. Jacob's case a violation of Article 4. First, the State cannot be considered to have reserved the death penalty only for the "most serious offences," as required under Article 4(2). In addition, it fails to distinguish between different cases of murder or ensure like cases are treated alike, and consequently it is arbitrary and can give rise to unjust discrimination.

30. More particularly, the Petitioners assert that the drafters of the American Convention, giving due consideration to the abolitionist tendencies of the Hispanic states and the restrictionist tendencies of the United States, intended the term "only for the most serious crimes" under Article 4(2) to go beyond mere legal label and to require some categorization or opportunity to make representations as to whether a particular allegation of murder merited death. Moreover, the Petitioners contend that the way in which the death penalty is administered in Grenada renders the deprivation of life arbitrary and contrary to Article 4(1) of the American Convention, and add that the fact that certain sentences of death are lawful under Article 4(2) of the American Convention does not mean that those sentences cannot be considered arbitrary under Article 4(1), or cruel, inhuman or degrading contrary to Article 5 of the American Convention.

31. The Petitioners argue that similar conclusions can be reached with reference to Article 5 of the American Convention. According to the Petitioners, it has long been recognized by judicial authorities that the death penalty has features that prompt the description cruel and inhuman, but that this does not make it unlawfully carried out in conformity with a state's international obligations. [12] At the same time, the Petitioners argue that the death penalty can be rendered illegal because of the manner in which it is imposed. In this regard, the Petitioners submit that certain factors pertaining to the manner in which Mr. Jacob's death sentence has been imposed can be considered to

violate Article 5 of the Convention, and to render his execution unlawful under Article 4 of the Convention. These factors include the lapse of time since his death sentence were imposed, the conditions of Mr. Jacob's detention on death row, and the cruelty of sentencing people to death, when there has been a moratorium on application of the death sentence in Grenada for 20 years.

32. In addition, the Petitioners argue that the mandatory death sentence imposed on Mr. Jacob violates Articles 8 and 24 of the Convention, on the basis that Grenada's Constitution does not permit him to allege that his execution is unconstitutional as being inhuman or degrading or cruel and unusual, and does not afford Mr. Jacob a right to a hearing or a trial on the question of whether the death penalty should be either imposed or carried out. The Petitioners contend further that the State has violated Mr. Jacob's rights to equal protection of the law by imposing a mandatory death sentence without any judicial proceedings to establish whether the death penalty should be imposed or carried out in the circumstances of his case.

33. The Petitioners assert that the mandatory death sentence is an arbitrary and disproportionate punishment unless there is allowance for individual mitigation, and that even a short custodial sentence cannot be imposed without affording such an opportunity for mitigation to be presented before the judicial authority imposing sentence. According to the Petitioners, fair and objective criteria are necessary in determining the question of whether a convicted murderer should actually be executed, and that if all murderers are executed, the death penalty would be cruel because it did not allow for any discretion. The Petitioners also argue that a law which is mandatory at the sentencing stage and involves unfettered personal discretion at the commutation stage infringes both principles identified by the United States Supreme Court, and further violates the principle of equality before the law. The Petitioners argue that in Grenada, not every person who is sentenced to death is executed and that the Prerogative of Mercy operates to commute a number of sentences.

34. Finally, the Petitioners suggest that the State should consider converting the moratorium on executions that has existed in Grenada since 1978 into legislative abolition. In this regard, the Petitioners indicate that they accept that the State has not abolished the death penalty in its laws and has not applied the death penalty since 1978. The Petitioners argue that for the past twenty years people have been sentenced to death for murder and suffer all the terrors of expectation of a hanging that confinement to the death row cells in Richmond Prison brings, without any real intention on the behalf of the authorities to carry this punishment into effect. The Petitioners contend that they respect the humanitarian tendencies of the Government of Grenada that led to the moratorium in the first place, but suggest that the de facto moratorium should be turned into legislative abolition. The Petitioners assert that if the State abolishes the death penalty through legislation, Mr. Jacob's death sentence should be speedily commuted to life imprisonment, so that the agony of suspense relating to his possible execution does not hang over him for years.

b. The Prerogative of Mercy



35. The Petitioners argue that insofar as the rigors of the mandatory death penalty are mitigated by the power of pardon and commutation exercised by the Advisory Committee on the Prerogative of Mercy, as prescribed under Articles 72, 73 and 74 [13] of the Constitution of Grenada, there are no criteria for the exercise of such discretion, and no information as to whether such discretion is exercised on an accurate account of the admissible evidence as to the facts relating to the circumstances of the offence. They also claim that there is no right on the part of an offender to make either written or oral comments on the question of pardon, to see or comment on the report of the trial Judge which the Advisory Committee must consider under Article 74(1) of the Grenadian Constitution, or to comment on any reasons identified by the trial judge or others as to whether the sentence of death should be carried out.

36. The Petitioners indicate in this regard that in the case of *Reckley v. Minister of Public Safety N°.2*, [14] the Privy Council specifically held that a condemned man has no right to make representations or attend a hearing before the Advisory Committee on the Prerogative of Mercy established pursuant to Articles 73 and 74 of Grenada's Constitution. Rather, the Privy Council held that the power of pardon is personal to the responsible Minister and is not subject to judicial review, stating as follows:

The actual exercise by this designated Minister of his discretion in a death penalty case is different. To concern with a regime, automatically applicable under the designated Minister, having consulted with the Advisory Committee, decides, in the exercise of his own personal discretion, whether to advise the Governor General that the law should or should not take its course. Of its very nature, the Minister's discretion, if exercised in favor of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or as it used to be said as an act of grace. [15]

37. The Petitioners also assert that the violation of Mr. Jacob's rights to equality before the law by reason of the mandatory death penalty is further aggravated by the fact that he has no right to be heard before the Advisory Committee on the Prerogative of Mercy, which itself is alleged to constitute a violation of Article 4(6) of the American Convention. In this regard, the Petitioners argue that it may well be that poorer citizens of Grenada are less likely to receive commutation than wealthier citizens or other forms of discriminatory treatment which exist in the present arrangements, although they are unaware of any empirical studies on this issue as it pertains to Grenada. The Petitioners referred to decisions of the United States Supreme Court and the South African Constitutional Court, in which they claim that a tendency of discrimination in the application of the Prerogative of Mercy has been identified. Moreover, the Petitioners contend that it must be for the party seeking to deprive Mr. Jacob of his life to establish the absence of inequality and discrimination in the operation of its penal law.

c. Article 5 - Conditions of Detention/Method of Execution

(i) Conditions of Detention

38. The Petitioners claim that the State has violated Mr. Jacob's rights under Articles 5(1) and 5(2) of the Convention, because of his conditions of detention. According to the Petitioners, since Mr. Jacob's incarceration in Richmond Hill Prison, he has been detained in conditions that have been condemned by international human rights organizations as being in violation of internationally recognized standards. The Petitioners argue that non-governmental organizations have concluded that the State is in breach of a number of international instruments designed to give those detained a minimum level of protection, because of inadequate accommodations, sanitation, diet and health care.

39. In support of their petition, the Petitioners have relied upon information regarding prison conditions in the Caribbean generally. In this connection, the Petitioners claim that all death row prisoners in Grenada are confined in Richmond Hill Prison, which was built in the 19th Century. They also claim that Richmond Hill Prison was designed to hold 130 prisoners, but that as of October 1996, the prison had a population of 330 prisoners. Further, the Petitioners refer to numerous reports prepared by the non-governmental organization, "Caribbean Rights." For example, in its 1990 report "Deprived of their Liberty," Caribbean Rights made the following observations about prison conditions in the Caribbean generally, including Grenada:

In most of the Caribbean prisons visited, prisoners had to use a bucket in front of others and were locked in with the bucket for many hours, often for 15 or 16 hours a day. This was the case in the men's prison in St. Vincent, Grenada, Trinidad and South Camp Rehabilitation Centre and St. Catherine District Prison in Jamaica. [16]

In both St. Vincent and Grenada the men's prison uniform was a blue top and shorts, decent but not very conducive to dignity. In Grenada, there were no separate punishment cells. Prisoners on punishment were put in the special security blocks. Corporal punishment was not available, but punishment were of two types of restricted diet and loss of remission up to 90 days, though it was reported that it was rare for a prisoner to lose that much remission. There is no appeal machinery against the imposition of punishment.[17]

40. Caribbean Rights' 1990 Report also indicated that in 1990 there were approximately 20 prisoners under sentence of death in Grenada, and described conditions on death row in Grenada as follows:

The prisoners under sentence of death were kept in special security blocks attended by prison officers wearing a different uniform from the prison officers in the rest of the prison, a green combat-type uniform. There were three such blocks, each with a corridor down the middle and 8 to 10 cells on each side of the door. The cell doors are solid with a rectangular aperture at eye level. The prisoners in the blocks wore the same clothes as the other prisoners, that is a blue shirt and blue shorts. Upon the arrival of the visiting party, the prison officers in the special security blocks opened the outer door, salute to the senior officer present and recited a military style statement about the numbers locked up and everything being in order. Then the officer walked down the row shouting the name

of each prisoner as he passed. The prisoner then stood to attention in the middle of the cell, hands behind his back and replied, "Sir." ... The prisoners in the special security blocks are reported to get one hour of exercise a day if possible, sometimes more" [18] .

41. Based in part upon these observations, Caribbean Rights reached several conclusions and made several recommendations in respect of the conditions of detention of condemned prisoners in the Caribbean, including the following:

The treatment of death row prisoners exacerbates a punishment that is already completely unacceptable. The exceptional inhumanity of the physical conditions as reported in Guyana and Trinidad and seen in St. Vincent and Grenada, constitute an intolerable imposition of cruelty. It is understandable that high security must be imposed and some surveillance is necessary. But keeping death sentenced prisoners, sometimes for years, in conditions equivalent to or worse than those of punishment cells, intolerable. [19]

The holding of prisoners sentenced to death in the conditions currently obtaining in the special security blocks in Grenada is inappropriate and should cease forthwith.

That subjecting prisoners under sentence of death to living with the lights on for 24 hours a day should cease forthwith.

That restricting the programmed of activities of prisoners awaiting sentence of death to one hour of exercise a day, should cease forthwith.

That prisoners under sentence of death should be entitled to substantial amounts of visiting time with their families.

42. Similarly, in a December 1991 Report entitled "Improving Prison Conditions in the Caribbean," Caribbean Rights noted several concerns raised by Vivien Stern, the Secretary General of Penal Reform International, regarding the visitation rights of prisoners and their ability to send and receive letters:

In Grenada, the official visiting allowance is 15 minutes a month for convicted prisoners. It is 15 minutes a week for unconvicted prisoners. Normal civilized contact was impossible. The visit took place through grilles with a gap between the two grilles of about 18 inches, through which the visitor and the prisoner had to communicate. Probably the best they can do in these circumstances is to shout at each other. Writing letters is another way of keeping contact. Here too there were severe restrictions. In Grenada, prisoners can write and receive one letter a month. All ingoing and outgoing mail was read by censors, even for the most minor offenders. [20]

43. In support of their contention that Mr. Jacob's conditions of detention violate Article 5(1) and 5(2) of the Convention, the Petitioners refer to several decisions of the U.N. Human Rights Committee (hereinafter "HRC"), in which the HRC determined that conditions of detention violated Articles 7 [21] and 10(1) [22] of the International Covenant on Civil and Political Rights (ICCPR). These cases include Antonaccio v.

Uruguay, [23] in which the HRC held that detention in solitary confinement for three months and denial of medical treatment constituted a violation of the Covenant, and *De Voituret v. Uruguay*, [24] in which the HRC held that solitary confinement for three months in a cell with almost no natural light violated the applicant's rights under the Covenant. The Petitioners also rely upon the decision of *Mukong v. Cameroon*, [25] in which the HRC suggested that conditions of detention which do not meet the United Nations Standard Minimum Rules for the Treatment of Prisoners violate Articles 7 and 10(1) of the ICCPR, and that minimum standards of humane treatment of prisoners apply regardless of a state's level of development:

As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of the State party's level of development [i.e. the UN Standard Minimum Rules for the Treatment of Prisoners]. It should be noted that these are minimum requirements which the committee consider should always be observed, even if economic or budgetary conditions may make compliance with these obligations difficult. [26]

44. The Petitioners similarly argue that the European Court's jurisprudence in respect of Article 3 [27] of the European Convention support their contention that Mr. Jacob's conditions of detention violate his rights under Article 5 of the American Convention. In particular, the Petitioners rely upon the Greek Case, [28] in which the Court found conditions of detention amounting to inhumane treatment to include overcrowding, poor hygiene and sleeping arrangements, and inadequate recreation and contact with the outside world. Likewise, in the *Cyprus v. Turkey* Case [29] the Court found that conditions in which food, water, and medical treatment were withheld from detainees constituted inhuman treatment. The Petitioners also argue that these cases recognized that a failure to provide adequate medical care may constitute inhuman treatment, even in the absence of any other ill treatment.

45. Further, the Petitioners argue that the conditions under which Mr. Jacob is detained at Richmond Hill Prison constitute violations of the United Nations Standard Minimum Rules for the Treatment of Prisoners, namely, Rules 10, 11A, 11B, 12, 13, 15, 19, 22(1), 22(2), 22(3), 24, 25(1), 25(2), 26(1), 26(2), 35(1), 36(1), 36(2), 36(3), 36(4), 57, 71(2) 72(3) and 77.

46. With respect to Article 4 of the Convention, the Petitioners argue that Mr. Jacob's detention in inhuman and degrading conditions renders unlawful the carrying out of his death sentence, and that to carry out his execution in such circumstances would constitute a violation of his rights under Articles 4 and 5 of the American Convention. In support of their position, the Petitioners refer to the case of *Pratt and Morgan -v- The Attorney General of Jamaica*, [30] in which the Privy Council held that prolonged detention under sentence of death would violate the right under the Constitution of Jamaica not to be subjected to inhuman and degrading treatment. The Petitioners argue similarly that the lawfulness of Mr. Jacob's execution cannot be considered in isolation from the detention which preceded it, and that his conditions of detention should be

considered to render his execution unlawful in the same manner as prolonged detention on death row.

(ii) Method of Execution in Grenada

47. The Petitioners argue that the execution of Mr. Jacob's death sentence by hanging, as provided for under Grenadian law, constitutes cruel and inhuman treatment or punishment per se in violation of Article 5(1) and 5(2) of the Convention. In this regard, the Petitioners submit that whereas Article 4 of the Convention allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided by law must be designed in such a way as to avoid conflict with Article 5 of the Convention. [31]

48. In support of their arguments, the Petitioners provided detailed accounts of the physical, physiological and psychological effects of hanging upon a condemned prisoner, as described in the affidavits of Dr. Harold Hillman dated April 28, 1999, Dr. Albert Hunt dated July 1, 1997, and Dr. Francis Smith dated March 24, 1996. Based upon this evidence, the Petitioners allege that the execution of Mr. Jacob's death sentence by hanging would violate Article 5(2) of the Convention because:

(a) death by hanging constitutes inhuman and degrading treatment because it does not result in instantaneous death, and there is an impermissibly high risk that Mr. Jacob will suffer an unnecessarily painful and tortuous death by strangulation;

(b) the pressure in the brain will increase and this is normally accompanied by severe headaches. The increased pressure can be seen as engorgement of the face, eyes and tongue;

(c) the obstruction of the windpipe raises the carbon dioxide concentration in the blood which makes the person want to inspire, but he cannot do so, due to the obstruction of the windpipe itself. This causes great distress, as occurs during strangulation. However, the person cannot cry out nor can he react normally to distress and pain by moving his limbs violently as they are tied;

(d) the skin beneath the rope in the neck is stretched by the fall and this will be painful; and

(e) the humiliating effects of hanging on the body clearly amount to degrading treatment and punishment.

49. In addition, the Petitioners contend that the execution of Mr. Jacob by hanging in these circumstances would not meet the test of "least possible physical and mental suffering," and would therefore constitute cruel and inhuman treatment, in violation of Article 5 of the Convention.

d. Article 8 - Unavailability of Legal Aid for Constitutional Motions

50. The Petitioners claim that the State has violated Mr. Jacob's right under Article 8 of the Convention, because legal aid is not available to enable him to pursue a Constitutional Motion in the domestic courts in Grenada. The Petitioners maintain that Mr. Jacob is indigent and therefore lack the private resources to bring a Constitutional Motion to challenge violations of his Constitutional rights. The Petitioners also contend that there are a dearth of Grenadian lawyers who are willing to represent Mr. Jacob on a pro bono basis. The Petitioners therefore claim that the failure of the State to provide legal aid for Mr. Jacob to pursue a Constitutional Motion denies Mr. Jacob an effective remedy, which includes access to the Courts in fact as well as in law. In support of this contention, the Petitioners rely upon the decisions of the European Court of Human Rights in the cases *Golder v. UK*, [32] and *Airey v. Ireland*, [33] in which the European Court held that Article 6 of the European Convention [34] imposed positive obligations on the States concerned to provide legal aid in the interests of justice.

51. The Petitioners argue that a similar interpretation of Article 8 of the American Convention is appropriate. In particular, they argue that the Constitutional Motion in the circumstances of Mr. Jacob's case should be considered criminal proceedings for the purposes of Article 8(2) of the Convention, because they arise from earlier criminal proceedings, and might serve to quash his capital sentence. Consequently, the Petitioners argue that Article 8(2) of the Convention compels the State to provide legal aid to Mr. Jacob to pursue a Constitutional Motion relating to the criminal proceedings against him. The Petitioners also argue that the fact that Mr. Jacob will be executed if his Constitutional challenge fails, also weighs in favor of this interpretation.

B. Position of the State

52. To date, the State has not responded to any of the Commission's communications to it dated June 9, 1999 and September 25, 2000 nor has it presented any information to the Commission pertaining to the admissibility and merits of the petition, or the Commission's offer to facilitate a friendly settlement between the parties.

IV. ANALYSIS

A. Competence of the Commission

53. The Convention entered into force for the State of Grenada on July 18, 1978 upon deposit of its instrument of Ratification. The Petitioners allege violations of Articles 4, 5, 7, 8 and 24 of the Convention with respect to acts or omissions which transpired in Grenada after the Convention came into effect for Grenada. In addition, the petition in this case was lodged by the Petitioners, Solicitors from London, United Kingdom, on behalf of Benedict Jacob, a national of the State of Grenada. Consequently, the Commission has jurisdiction *ratione temporis*, *ratione materiae*, and *ratione personae* to consider the claims in this case.

B. Other Grounds of Admissibility

## 1. Exhaustion of Domestic Remedies

54. The Petitioners argue that Mr. Jacob has exhausted the domestic remedies of Grenada upon the dismissal of his appeal against his conviction and sentence by the Eastern Caribbean Court of Appeal in Grenada on December 8, 1997. The Petitioners indicate that Mr. Jacob petitioned the Judicial Committee of the Privy Council for Special Leave to Appeal as a Poor Person, and that the Privy Council dismissed his petition on December 16, 1998. The State has not provided the Commission with observations concerning the admissibility, including the exhaustion of domestic remedies or merits of the petition, notwithstanding the Commission's communications to the State dated June 9, 1999 and September 25, 2000. Based upon the record before it, and in accordance with the jurisprudence of the Inter-American System including the Commission's previous decisions, [35] the Commission finds that the State tacitly waived its right to object to the admissibility of the Petitioners' petition based upon the exhaustion of domestic remedies rule. Therefore, the Commission finds that this petition is admissible under Article 46(1)(a) of the Convention.

## 2. Timeliness of the Petition

55. The Petitioners indicate that this petition was timely filed under Article 46(1)(b) of the Convention. The Petitioners contend that Mr. Jacob was convicted of murder and sentenced to death on June 30, 1997, he appealed his conviction and sentence to the Eastern Caribbean Court of Appeal of Grenada, and his appeal was dismissed by the Court on December 8, 1997. The Petitioners indicate that Mr. Jacob petitioned the Judicial Committee of the Privy Council for Special Leave to Appeal as a Poor Person, and that the Privy Council dismissed his petition on December 16, 1998. The petition was filed before the Commission on May 21, 1999. The State has not contested the admissibility of the petition on the ground of timeliness or otherwise demonstrated that the petition was not timely filed. [36] Therefore, the Commission finds in accordance with its previous decisions [37] that this petition is admissible under Article 46(1)(b) of the American Convention.

## 3. Duplication of Procedures

56. The Petitioners have indicated that the subject of Mr. Jacob's petition has not been submitted for examination under any other procedure of international investigation. The State has not contested the issue of duplication of procedures. Therefore, the Commission finds that the petition is admissible under Articles 46(1)(c) and 47(d) of the Convention.

## 4. Colorable Claim

57. The Petitioners have alleged that the State has violated Mr. Jacob's rights under Articles 4, 5, 8, and 24 of the Convention, and have provided factual allegations that tend to establish that the alleged violations may be well-founded. The Commission therefore concludes, without prejudging the merits of the case, that the Petitioners have presented

colorable claims of violations of Mr. Jacob's rights and the petition is not rendered inadmissible under Articles 47(b) or 47(c) of the Convention.

## 5. Conclusion on Admissibility

58. In accordance with the foregoing analysis of the requirements of the Convention and the applicable provisions of the Commission's Regulations, and without prejudging the merits of this petition, the Commission decides to declare the claims presented in Mr. Jacob's petition admissible, pursuant to Article 46 of the Convention.

## B. The Merits of the Petition

### 1. Standard of Review

59. In response to the various standards that the parties have suggested should guide the Commission in determining the issues before it, the Commission wishes to clarify that it will undertake its review of the merits of the Petitioners' claims in accordance with the Commission's heightened scrutiny test. According to this standard of review, the Commission will subject the parties' allegations to an enhanced level of scrutiny in order to ensure that any deprivation of life effected by a State Party pursuant to a death sentence complies strictly with the provisions of the Convention, including in particular Articles 4, 5, 7, and 8 of the Convention. [38] The heightened scrutiny test is, as the Commission has previously recognized, consistent with the restrictive approach to the death penalty provisions of human rights treaties taken by the Commission and other international authorities. [39] The heightened scrutiny test is also not precluded by the Commission's fourth instance formula, according to which the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless a petitioner's allegations entail a possible violation of any of the rights set forth in the Convention. [40] The Commission will therefore apply the heightened scrutiny standard in determining the complaint in the present case.

### 2. Articles 4, 5, and 8 of the Convention - Mandatory Nature of the Death Penalty

#### a. Mr. Jacob has been sentenced to a mandatory death penalty

60. As detailed previously, the Petitioners allege: (i) violations of Articles 4, 5, 8, and 24 of the Convention, relating to the mandatory nature of the death penalty and the process for granting amnesty, pardon or commutation of sentence in Grenada; (ii) violations of Article 5 of the Convention pertaining to Mr. Jacob's conditions of detention; and (iii) violations of Article 8 of the Convention, relating to the unavailability of legal aid for Constitutional Motions in Grenada.

61. As noted previously, the State has not responded to the Commission's communications of June 9, 1999, and September 25, 2000, that the State deemed relevant pertaining to the exhaustion of domestic remedies and the claims raised in Mr. Jacob's petition, nor has the State responded to the Commission's communication regarding the



possibility of a friendly settlement in Mr. Jacob's case. As a consequence, in determining the merits of the Petitioners' allegations in relation to Mr. Jacob, the Commission will presume the facts as reported in Mr. Jacob's petition to be true pursuant to Article 39 of the Commission's Rules of Procedures, provided that the evidence does not lead to a different conclusion, in accordance with Article 39 of the Commission's Rules of Procedure.

62. Mr. Jacob was convicted of murder pursuant to Section 234 of the Criminal Code of Grenada, which provides that "[w]hoever commits murder shall be liable to suffer death and sentenced to death." [41] The crime of murder in Grenada can therefore be regarded as subject to a "mandatory death penalty," namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in imposing the death sentence and therefore once the jury found Mr. Jacob guilty of capital murder, the death penalty was the only available punishment. The State has not denied the mandatory nature of Mr. Jacob's death sentence. In the case of Paul Lallion Case 11.765 which is also before this Commission, the State indicated the following in its Reply to the petition by confirming that the sentence of death is mandatory in Grenada and states the following:

In Grenada the sentence of death is the mandatory sentence for murder under Section 230 of the Criminal Code Cap. 1 which has not been amended in any respect material to the issue under consideration since its enactment. The manner of execution of sentence authorized by law is by hanging and the passing of the sentence also provides lawful authority for the detention of the condemned man in prison until such time as the sentence is executed. The continuing constitutional validity of the death sentence is put beyond all doubt by Section 2(1) which reads:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Grenada of which he has been convicted.

63. Therefore, as the Commission has determined in previous cases, [42] that the crimes of capital murder in Grenada can be regarded as being subject to a "mandatory death penalty", namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of capital murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in sentencing an individual to death once a conviction for capital murder has been rendered.

64. As indicated in Part III of this Report, Mr. Jacob has alleged that the State violated his rights pursuant to Articles 4(1), 4(2), 4(6), 5(1), 5(2), 8 and 24 of the American Convention, because he was sentenced to a mandatory death penalty for the crime of murder. Mr. Jacob has also argued that the process for granting amnesty, pardon

or commutation of sentence in Grenada does not provide an adequate opportunity for considering individual circumstances, and in itself violates Article 4(6) of the Convention.

b. Mr. Jacob's mandatory death penalty, Articles 4, 5, and 8 of the American Convention

65. In previous cases [43] involving the application of capital punishment under the Section 234 of the Criminal Code of Grenada, the Commission has evaluated the mandatory nature of the death penalty under that legislation in light of Article 4 (right to life), [44] Article 5 (right to humane treatment) [45] and Article 8 (right to a fair trial) [46] of the Convention and the principles underlying those provisions. It has also considered the mandatory death penalty in light of pertinent authorities in other international and domestic jurisdictions, to the extent that those authorities may inform the appropriate standards to be applied under the American Convention. [47] Based upon these considerations and analysis, the Commission has reached the following conclusions.

66. First, the Commission has found that the supervisory bodies of international human rights instruments have subjected the death penalty provisions of their governing instruments to a rule of restrictive interpretation, to ensure that the law strictly controls and limits the circumstances in which a person may be deprived of his life by authorities of the state. This includes strict compliance with standards of due process. [48]

67. In addition, the Commission has identified a general recognition by domestic and international authorities that the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment. It is the absolute form of punishment that results in the forfeiture of the most valuable of rights, the right to life and, once implemented, is irrevocable and irreparable. The Commission has accordingly determined that the fact that the death penalty is an exceptional form of punishment must also be considered in interpreting Article 4 of the American Convention. [49]

68. Finally, the Commission has observed that under the express terms of Article 4 of the Convention, certain circumstances of individual offenses and individual defendants may bar the imposition or application of the death penalty altogether, and as a consequence must be taken into account in sentencing an individual to death. [50]

69. In the context of these interpretive rules and principles, the Commission has also previously evaluated mandatory death penalty legislation under Articles 4, 5 and 8 of the Convention, and has concluded that imposing the death penalty through mandatory sentencing, as Grenada and Jamaica have done in respect of crime of capital murder, is not consistent with the terms of Articles 4(1), 5(1), 5(2), 8(1) and 8(2) of the Convention and the principles underlying those Articles. [51] The Commission observes in this regard that a majority of the UN Human Rights Committee recently reached a similar

conclusion in the context of Article 6(1) of the International Covenant on Civil and Political Rights. [52]

70. The Commission has determined that imposing the death penalty in a manner that conforms with Articles 4, 5 and 8 of the Convention requires an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is a permissible or appropriate form of punishment in the circumstances of his case. In the Commission's view, this includes, but is not limited to, representations and evidence as to whether any of the factors incorporated in Article 4 of the Convention may prohibit the imposition of the death penalty. [53]

71. In reaching this conclusion, the Commission has identified a principle common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through "individualized" sentencing. [54] Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment. Mitigating factors may relate to the gravity of the particular offense or the degree of culpability of the particular offender, and may include such factors as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.

72. Applying these findings in the context of the case presently before it, the Commission has confirmed that Mr. Jacob has been convicted of capital murder pursuant to Section 234 of the Criminal Code of Grenada and that no provisions in the code have been identified that permit a judge or jury to consider the personal circumstances of an offender or his or her offense, such as the offender's record or character, the subjective factors that may have motivated his or her conduct, or the offender's likelihood of reform or social readaptation, in determining whether the death penalty is an appropriate penalty for a particular offender in the circumstances of the offender's case.

73. In Mr. Jacob's case, the Trial Judge could not consider the mitigating factors present nor the character and personal circumstances of Mr. Jacob. The Trial Court could not take into account the evidence of Dr. Olubahkle Obikaya, a consultant psychiatrist who testified as to Mr. Jacob's state of mind on the date of the crime. Dr. Obikaya testified that Mr. Jacob was labouring under an intense and unpleasant belief that the deceased (whom he had previously had a personal relationship with prior to the commission of the crime) with the help of someone else had "cast a spell on him and actually believed that some harm or danger was going to come to him." Dr. Obikaya further testified that Mr. Jacob informed him that the relationship with the deceased continued, secretly, because the deceased's mother did not like the relationship. Dr. Obikaya also testified that Mr. Jacob related to him that on April 23, 1995, the date of the deceased's death, he and the deceased were having a friendly chat and that the last thing he remembered was the deceased saying, "Dennis, you going to die." [55]

74. In addition, Dr. Obikaya testified that at that point something clicked in Mr. Jacob's mental state, possibly and abnormal electrical brain discharge and that it was possible that Mr. Jacob could have been in that fused state that morning. Dr. Obikaya testified that the fused state is actually a "state in which an individual affirms a series of actions which he is totally unaware of, for which he is unable to account for afterwards," and that someone in that state could not know whether their action is right or wrong. The Petitioners maintain that Dr. Obikaya testified on cross-examination that it was possible that Mr. Jacob was in a fused state on the morning of April 23, 1995, and in answer from the Jury, Dr. Obikaya stated that he was convinced that Mr. Jacob was telling the truth. [56] Upon satisfying the elements of Section 234 of the Code, Mr. Jacob was convicted of murder. The Trial Court had no discretion in passing sentence on him because death is the automatic penalty under the law of Grenada.

75. Consequently, the Commission concludes that once Mr. Jacob was found guilty of capital murder, the law in Grenada did not permit a hearing by the courts as to whether the death penalty was a permissible or appropriate penalty. There was no opportunity for the trial judge or the jury to consider such factors as Mr. Jacob's character or record, the nature or gravity of his crime, or the subjective factors that may have motivated his conduct, in determining whether the death penalty was an appropriate punishment. Mr. Jacob was likewise precluded from making representations on these matters, as a consequence of which there is no information on the record as to potential mitigating factors that might have been presented to the trial court. The court sentenced Mr. Jacob based solely upon the category of crime for which he was convicted.

76. In this context, and in light of the Commission's prior analysis of mandatory death penalties under the Convention, the Commission concludes that the State violated Mr. Jacob's rights under Articles 4(1), 5(1), 5(2), and 8(1) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by sentencing him to a mandatory death penalty.

77. With respect to Article 4(1) of the Convention, the Commission concludes that the trial court was compelled under the State's legislation to impose a death sentence upon Mr. Jacob with no discretion to consider his personal characteristics and the particular circumstances of his offense to determine whether death was an appropriate punishment. Mr. Jacob was not provided with an opportunity to present representations and evidence as to whether the death penalty was an appropriate punishment in the circumstances of his case. Rather, the death penalty was automatically imposed on Mr. Jacob without principled distinction or rationalization as to whether it was an appropriate form of punishment in the particular circumstances of his case. Moreover, the propriety of the sentence imposed was not susceptible to any effective form of judicial review, and Mr. Jacob's execution and death at the hands of the State is imminent, his conviction having been upheld on appeal to the highest court in Grenada. The Commission therefore concludes that the State has by this conduct violated Mr. Jacob's rights under Article 4(1) of the Convention not to be arbitrarily deprived of life and therefore, Mr. Jacob's death sentence is unlawful. [57]

78. The Commission further concludes that the State, by sentencing Mr. Jacob to a mandatory death penalty absent consideration of his individual circumstances, has failed to respect Mr. Jacob's rights to have his physical, mental and moral integrity respected contrary to Article 5(1) of the Convention, and has subjected him to cruel, inhuman, or degrading punishment or treatment in violation of Article 5(2). The State sentenced Mr. Jacob to death solely because he was convicted of a predetermined category of crime. Accordingly, the process to which Mr. Jacob has been subjected would deprive him of his most fundamental rights, his right to life, without considering the personal circumstances and the particular circumstances of his offense. Not only does this treatment fail to recognize and respect Mr. Jacob's integrity as an individual human being, but in all of the circumstances has subjected him to treatment of an inhuman or degrading nature. Consequently, the State has violated Article 5(1) and 5(2) of the Convention in respect of Mr. Jacob. [58]

79. Finally, the Commission concludes that the State has violated Article 8(1) of the Convention, when read in conjunction with the requirements of Article 4 of the Convention, by subjecting Mr. Jacob to a mandatory death sentence. By denying Mr. Jacob an opportunity to make representations and present evidence to the trial judge as to whether his crime permitted or warranted the ultimate penalty of death, under the terms of Article 4 of the Convention or otherwise, the State also denied Mr. Jacob of his right to fully answer and defend the criminal accusations against him, contrary to Article 8(1) of the Convention. [59]

80. It follows from the Commission's findings that, should the State execute Mr. Jacob pursuant to his death sentence, this would constitute further egregious and irreparable violations of Articles 4 and 5 of the Convention.

### 3. Article 4(6) of the Convention and the Prerogative of Mercy in Grenada

81. Article 4(6) of the Convention provides that "[e]very person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

82. The Petitioners in the present case have also contended that the process for granting amnesty, pardon or commutation of sentence in Grenada is not consistent with Article 4(6) of the Convention because it does not provide for certain procedural rights which the Petitioners assert are integral to render this right effective. In this connection, the authority of the Executive in Grenada to exercise its Prerogative of Mercy is prescribed

in Sections 72, 73 and 74 of the Constitution of Grenada, which provide as follows:

72(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf.-  
(a) grant a pardon, either free or subject to lawful conditions, to any person convicted of any offence;

- (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
  - (c) substitute a less severe form of punishment for any punishment imposed on a person for any offence; or
  - (d) remit the whole or any part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Crown on account of any offence.
- (2) The powers of the Governor-General under subsection (1) of this section shall be exercised by him in accordance with the advice of such Minister as may for the time being be designated by the Governor-General, acting in accordance with the advice of the Prime Minister.

73 (1) There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of –

- (a) the Minister for the time being designated under Section 72(2) of this Constitution who shall be the Chairman;
- (b) the Attorney General;
- (c) the chief medical officer of the Government of Grenada; and
- (d) three other members appointed by the Governor-General, by instrument in writing under his hand.

(2) A member of the Committee appointed under subsection (1)(d) of this section shall hold his seat thereon for such period as may be specified in the instrument by which he was appointed:

Provided that his seat shall become vacant –

- (a) in the case of a person who, at the date of his appointment was a Minister, if he ceases to be a Minister; or
  - (b) if the Governor-General by instrument in writing under his hand, so directs.
- (3) The Committee may act notwithstanding any vacancy in its membership or absence of any member and its proceedings shall not to be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings.
- (4) The Committee may regulate its own procedure.
- (5) In the exercise of his functions under this section, the Governor-General shall act in accordance with the advice of the Prime Minister.

74(1) Where any person has been sentenced to death (otherwise than by a court-martial) for an offence, the Minister for the time being designated under section 72(2) of this Constitution shall cause a written report of the case from the trial judge (or, if a report cannot be obtained from the judge, a report on the case from the Chief Justice), together with such other information derived from the record of the case or elsewhere as he may require, to be taken into consideration at a meeting of the Advisory Committee on the Prerogative of Mercy; and after obtaining the advice of the Committee he shall decide in his own deliberate judgment whether to advise the Governor-General to exercise any of his powers under section 72(1) of this Constitution.

(2) The Minister for the time being designated under section 72(2) of this Constitution may consult with the Advisory Committee on the Prerogative of Mercy before tendering advice to the Governor-General under section 72(1) of this Constitution in any case not

falling within subsection (1) of this section but he shall not be obliged to act in accordance with the recommendation of the Committee.

83. In addressing this issue, the Commission first observes that in the cases of Rudolph Baptiste and Donnason Knights from Grenada, the Commission determined that the process for exercising the Prerogative of Mercy under Sections 72, 73, and 74 of the Grenadian Constitution did not guarantee the condemned prisoners in those cases an effective or adequate opportunity to participate in the mercy process, as required under Article 4(6) of the Convention. [60]

84. In reaching this conclusion, the Commission interpreted the right to apply for amnesty, pardon or commutation of sentence under Article 4(6), when read together with the State's obligations under Article 1(1) of the Convention, as encompassing certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections were held to include the right on the part of condemned prisoners to submit a request for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, 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. [61] It was also held to entail the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. [62]

85. In making this determination in the cases of Rudolph Baptiste, Donnason Knights, and McKenzie et al., the information before the Commission indicated that neither the legislation nor the courts in Grenada and in Jamaica guaranteed the prisoners in those cases any procedural protection in relation to the exercise of the Prerogative of Mercy. Rather, the petitioners and the State in those cases indicated that according to domestic jurisprudence at that time, the exercise of the power of pardon in Jamaica involved an act of mercy that was not the subject of legal rights and therefore is not subject to judicial review, and cited in support the decision of the Judicial Committee of the Privy Council in the Reckley Case, *supra*.

86. Since adopting its report in the cases of Rudolph Baptiste and Donnason Knights and McKenzie et al., the Commission has received information that in a September 12, 2000, judgment in the case of Neville Lewis et al. v. The Attorney General of Jamaica, the Judicial Committee of the Privy Council found that an individual's petition for mercy under the Jamaican Constitution is open to judicial review. [63] The Judicial Committee of the Privy Council also found that the procedure for mercy must be exercised by procedures that are fair and proper, which require, for example, that a condemned individual be given sufficient notice of the date on which the Jamaican Privy Council will consider his or her case, to be afforded an opportunity to make representations in support of his or her case, and to receive copies of the documents that will be considered by the Jamaican Privy Council in making its decision. [64]

87. Notwithstanding the determination in the Neville Lewis Case, however, there is no information in the present case indicating that the State has extended the legal requirements articulated in that decision to Mr. Jacob. Accordingly, based upon the

information available, the Commission finds that the procedure available to Mr. Jacob to seek amnesty, pardon or commutation of sentence has not guaranteed him an effective or adequate opportunity to participate in the mercy process.

88. The Commission also concludes that the State has violated Mr. Jacob's rights pursuant to Article 4(6) of the American Convention by failing to guarantee him an effective right 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 decision from the Advisory Committee within a reasonable time prior to his execution.

89. Given its foregoing conclusions as to the legality of Mr. Jacob's death sentence under Articles 4, 5 and 8 of the Convention, the Commission does not consider it necessary to determine whether sentencing Mr. Jacob to a mandatory death penalty violated his rights to equal protection of the law contrary to Article 24 of the Convention.

#### CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO [73]

1. Although I endorse the findings, reasoning and motives of my fellow commissioners in this report, I would like to take the matter further and express my understanding concerning the lawfulness of the death penalty in the Inter-American System.

2. The American Declaration of the Rights and Duties of Man (hereinafter American Declaration), approved in the Ninth International American Conference, which took place in Santa Fe, Bogotá in May and June of 1948, affirms that "Every human being has the right to life, liberty and the security of his person" (Article I) and, moreover, that "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" (Article II).

3. Article 4 of The American Convention on Human Rights (hereinafter American Convention), approved on November 22, 1969 in San Jose, Costa Rica, states that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

4. At the same time, the American Convention, by including the right to personal integrity in the civil and political rights framework, affirms that "No one shall be subjected to torture or to cruel, inhumane, or degrading punishment or treatment."

5. However, the death penalty is accepted by the American Convention in its original version. Article 4, Section 2 allows the death penalty to be applied by member states only for the most serious crimes.



6. There is a contradiction among the aforementioned articles which repudiate torture, cruel, inhumane or degrading punishment or treatment.
7. The American Declaration considers life to be a fundamental right, and the American Convention condemns torture or the imposition of cruel, inhumane or degrading punishment or treatment. The elimination of a life could be deemed torture or cruel, inhumane or degrading punishment or treatment.
8. It seems that the tolerance expressed in Article 4, Section 2 of the American Convention reveals the sole adoption of a political position of conciliation between all member-states in order to approve a more general article, the one about the right to life.
9. Before analyzing what it means for some States to retain the death penalty as a part of their legal systems, it is important to note that the Inter-American Convention to Prevent and Punish Torture, signed in Cartagena de Indias, Colombia, on December 9th, 1985, describes the meaning of torture as follows: "Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose" (Article 2).
10. Notice that this article addresses torture as a personal punishment or penalty in all circumstances.
11. The death penalty brings immeasurable suffering to the individual. Is it possible to imagine the anguish that the individual feels when he/she is informed of the verdict? Or the moments leading up to the actual execution? Would it be possible to evaluate the suffering of those who wait on death row for execution, in some cases for several years? In the United States, fifteen, sixteen or seventeen year-old minors, who committed homicide and subsequently received the death penalty, wait for fifteen years or longer for their execution. Is it possible to imagine a fate worse than remaining between hope and despair until the day of execution?
12. The OAS member-states, by adopting the Convention on Forced Disappearance of Persons, reaffirms that "the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in the Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights."
13. It is important to mention that in 1998 and 1999, the United States was the only country in the world known for executing minors under 18 years of age. To that extent, it is important to note that the United States has accepted the International Covenant on Civil and Political Rights since September 1992, Article 6(5) of which establishes that the death penalty cannot be imposed on minors under 18 years old or on pregnant women. The U.S. Senate opted to express its reservation to this section at the moment of its ratification but currently, there is an international consensus opposed to that reservation based on Article 19 (c) of the Vienna Convention on the Law of Treaties.

This Convention gives the State the possibility to formulate reservations, but these reservations cannot be incompatible with the object and purpose of the treaty.

14. In June 2000, Shaka Sankofa, formerly known as Gary Graham, was executed in the State of Texas for a crime he committed when he was 17 years old. He was executed after waiting 19 years on death row, although the Inter-American Commission on Human Rights (hereinafter "IACHR" or "Commission") had formally presented requests to the American government to suspend the act until the case was decided by the Commission. There were serious doubts regarding whether Shaka Sankofa had really committed the crime. The U.S. Government did not respond to the Commission's recommendation but could not escape from the jurisdiction of the IACHR on the protection of human rights, according to the American Declaration. The Commission thus sent out a press release condemning the U.S. decision, since it was not in accordance with the Inter-American system of protection of human rights. [74]

15. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter "Convention of Belém do Pará"), approved in Belém do Pará, Brazil, on June 9, 1994, does not allow the imposition of the death penalty on women. Article 3 states "Every woman has the right to be free from violence in both the public and private spheres" and Article 4 states that "Every woman has the right to have her life respected." Regarding the duties of States, the Convention of Belém do Pará establishes that States should "refrain from engaging in any act or practice of violence against women and ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation." Therefore, if every woman has the right to life, and the right to be free from violence, and the State is denied the practice of violence against women, it seems that the Convention of Belém do Pará prohibits the application of the death penalty to women. There is no discrimination against men or children. It cannot be argued that it is "positive discrimination" or "affirmative action", because it only serves to preserve the inherent rights of the individual. For instance, pregnant women or women with children are entitled to rights based solely on the fact of their exclusive female condition. Thus, the same rights cannot be extended to men. Positive discrimination is usually applied to bring about equality, through temporary and proportional measures, to groups of people that experience de facto inequality. There is no inequality between men and women with regard to the right to life. In any case, the imposition of the death penalty is not a proportional measure, as we will see later on. When it comes to common rights—such as the right to life—we cannot argue positive discrimination. All persons are equal before the law. The prohibition of the death penalty for women was based on both the female condition and the human condition.

16. Article 24 of the American Convention affirms that all persons are equal before the law, and consequently, they are entitled, without discrimination, to equal protection of the law. Although that Convention does not define discrimination, the IACHR understands that discrimination includes distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social cultural or any other field of

public life (Manual on the Preparation of Reports on Human Rights, International Covenant on Civil and Political Rights, Article 26.)

17. It is also important to note that Article 37(a) of the Convention on the Rights of the Child prohibits the imposition of the death penalty on minors under 18 years of age.

18. The above-mentioned Convention is considered a universal legal instrument in the area of human rights. (Only the United States and Somalia have failed to ratify it.)

19. Article 37 of the Convention on the Rights of Child states: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

20. Although the U.S. has not ratified the Convention on the Rights of the Child, it became a signatory to the Convention in February 1995, and has thus accepted its legal obligations. Article 18 of the Vienna Convention on the Law of Treaties establishes that the States that have signed a treaty, but not ratified it, shall refrain from engaging in any act that is contrary to its purpose until it has decided to announce its intention of not becoming part of that treaty. Despite the fact that the U.S. has not ratified the Convention, the U.S. State Department has already recognized that the Vienna Convention on the Law of Treaties serves as a precedent for international treaty proceedings. The U.S. State Department considers the Convention a declaration of customary law based on the Vienna Convention on the Law of Treaties, which establishes the importance of treaties as sources of international law as well as a method of peaceful development and cooperation between nations, no matter what their Constitutions and social systems entail.

21. As in the case of the death penalty for women above mentioned, this is not a case in which positive discrimination could be applied because Article 37 (a) of the Convention on the Rights of the Child aims to preserve rights that are created not only for children but for all human beings.

22. If that is the case, then Article 4 of the American Convention has lost its previous meaning. Therefore States that have signed and ratified it as well as other international instruments cannot impose the death penalty upon any person, regardless of gender or any other personal condition.

23. The issue will be examined under legal hermeneutics of positive law.

24. International law entails mechanisms that are above the State. According to the distinguished Italian jurist Norberto Bobbio, the universal character of international law emerges nowadays-after the Second World War and the creation of the United Nations (UN)-no longer as eternal natural law, but as a means of constituting positive law of social and historic development (as natural law and the state of nature). Mr. Bobbio

defends the idea of a global State and the idea-limit of legal and contemporary universality, that is, a universal positive law. [75]

25. In the present case, we cannot allow a previous law with the same content of a new law to supersede the new law. That would be considered an antinomy, and therefore it has to be solved. What are the rules that should prevail? There is no doubt that they are incompatible. But how could we solve the problem?

26. According to Mr. Bobbio, the criteria to solve an antinomy are the following: a) chronological criteria, b) hierarchical criteria, c) specialty criteria. [76]

27. According to the chronological criteria the new law prevails over the previous law—*lex posteriori derogat priori*. According to the hierarchy criteria, international law prevails over national law. Lastly, the specialty criteria could also apply in this case, since it is a specific law with a specific purpose.

28. It is impossible to argue that the death penalty as described in Section 2 of Article 4 of the American Convention is a specific law as opposed to the general law of the right to life. It is also not possible to accept the idea that the death penalty is considered a particular penalty that does not entail a violation of the right to life or torture or any other cruel or inhumane treatment.

29. The Inter-American Court of Human Rights affirms that the imposition of restrictions on the death penalty should be effected by setting up a limit through an irreversible and gradual process, which would be applied both in countries that have not abolished the death penalty and in those that have done so. (Advisory Opinion – OC-3/83).

30. The Court also understands that the American Convention is progressive to the extent that, without deciding to abolish the death penalty, it adopts certain measures to limit it and diminish its application until it is no longer applicable.

31. It is worth reviewing the preparatory work of the American Convention that illustrates the interpretation of Article 4. The proposal to outlaw the death penalty made by several delegations did not receive any opposing vote, despite the fact that the majority of votes had not been reached. The development of negotiations in the Conference can be reviewed in the following declaration presented before the Plenary Session of Completion and signed by 14 of 19 participants (Argentina, Costa Rica, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela):

The delegations that sign below, participants of the Specialized Inter-American Conference on Human Rights, taking into consideration the highly prevailing feeling, expressed in the course of the debates on the abolishment of the death penalty, in accordance with the purest humanistic traditions of our peoples, solemnly declare our firm aspiration of seeing the application of the death penalty in the American context

eradicated as of now, and our indeclinable purpose of effecting all possible efforts so that, in the short term, an additional protocol to the American Convention on Human Rights "Pact of San Jose, Costa Rica" might be adopted, consecrating the definitive abolition of the death penalty, and putting America once more in the forefront of the protection of fundamental human rights." (author's translation from the original in Spanish, Acts and documents, OAS-Serv. K-XVI-I2, Washington – DC, 1973, hereafter Acts and Documents, repr. 1978, Spanish version, p. 161, 195, 296 and 449/441).

32. In agreement with these assertions, the Commission's Rapporteur made clear, on this article, his firm tendency towards the abolition of this penalty. (Acts and documents, *supra*, n.296).

33. Moreover, the rule of law (Estado de derecho) implies, when punishment is imposed, the knowledge of what the penalty actually means. When the purpose of the punishment applied is not only retribution, but the recuperation or rehabilitation of the convict, he or she knows what will happen in his or her future. If the punishment is purely retributive, as in a sentence imposing imprisonment for life, the convict still envisages his future. But if the convict is sentenced to death, the State does not point to what the elimination of his being will bring him. Science, with all its developments, has not managed, up to now, to unveil the after-death: future life, with prize or punishment? Pure and simple elimination?

34. In this sense, the rule of law forbids the imposition of a penalty whose consequences cannot be unveiled.

35. In truth, all punishment enacted by the legislator constitutes species of sanctions, distributed according to a rational scale that attempts to take into consideration a series of factors specific to each hypothesis of unlawfulness.

36. The right and obligation to punish that belongs to the State expresses itself in a variety of figures and measures, according to gradual solutions, measurable in money or in amounts of time. This gradual order is essential to criminal justice, for it would not be realized without a superior criterion of equality and proportionality in the distribution of punishment, for transgressors would then receive more than their just deserts.

37. With the imposition of the death penalty, however, the aforementioned serial harmony is abruptly and violently shattered; one jumps from the temporal sphere into the non-time of death.

38. With what objective criterion or with what rational measure (for ratio means reason and measure) does one shift from a penalty of 30 years imprisonment or a life sentence to a death penalty? Where and how is proportion maintained? What is the scale that ensures proportionality?

39. It could be argued that there is also a qualitative difference between a fine and detention, but the calculus of the former can be reduced to chronological criteria, being

determined, for instance, in terms of work days lost, so that it has a meaning of punishment and suffering to the perpetrator, linked to his patrimonial situation. In any circumstance, these are rational criteria of convenience, susceptible to contrast with experience, that government the passage from one type of punishment to the other, whereas the notion of "proportion" is submerged in face of death.

40. Summing up, the option for the death penalty is of such order that, as Simmel affirmed, it emphasizes all contents of the human life, and it could be said that it is inseparable from a halo of enigma and mystery, of shadows that cannot be dissipated by the light of reason: to attempt to fit it into the scheme of penal solutions is equal to depriving it from its essential meaning to reduce it to the violent physical degradation of a body (quoted by Miguel Reale, in *O Direito como experiencia*).

41. Hence, the conclusion of the eminent philosopher and jurist Miguel Reale: Analyzed according to its semantic values, the concept of punishment and the concept of death are logically and ontologically impossible to reconcile and that, therefore the "death penalty" is a "contradictio in terminis" (cf. *O Direito como Experiencia*, 2nd edition, Saraiva, São Paulo, Brasil)

42. The jurist Hector Faundez Ledesma writes on this topic: "as the rights consecrated in the Convention are minimum rights, it cannot restrict their exercise in a larger measure than the one permitted by other international instruments. Therefore, any other international obligation assumed by the State in other international instruments on human rights is of utmost importance, and its coexistence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual."

43. "The same understanding", continues the jurist, "is extensive to any other conventional provision that protects the individual in a more favorable way, be it contained in a bilateral or multilateral treaty, and independently of its main purpose" (*El Sistema Interamericano de Protección de los Derechos Humanos*, 1996, pp. 92-93).

44. Moreover, Article 29(b) of the American Convention establishes, in the same line of thought, that no disposition of the Convention may be interpreted in the sense of "restricting the enjoyment or exercise of any right or freedom recognized by the virtue of the laws of any State Party". In this sense, it is opportune to refer to the IACHR report on Suriname, and the Advisory Opinions 8 and 9 (of the Inter-American Court on Human Rights, 1987).

45. On this opportunity, the IACHR affirmed that the prohibition of imposing the death penalty in cases where the offender was a minor at the time of the crime was an emerging principle of international law. Twelve years later there is no doubt that this principle is totally consolidated. The ratification of the Convention on the Rights of the Child by 192 States, where the death penalty of minor offenders is prohibited, is a irrefutable proof of the consolidation of the principle (Cf. Report presented by Amnesty International to the IACHR, in Washington, on March 5th, 1999).

46. It is true that the Universal Declaration on Human Rights does not refer specifically to the prohibition of the death penalty, but consecrates in its Article 3 the right of every person to his life, liberty and security (the same provision can be found on Article I of the American Declaration of the Rights and Duties of Man). Adopted by the General Assembly of the United Nations in 1948, under the guise of a recommendatory resolution, the Universal Declaration is held—by many important scholars—to be a part of the body of international customary law and a binding norm (*jus cogens*) – as defined in Article 53 of the Vienna Convention on the Law of Treaties. *Mutatis Mutandi*, it would be lawful to affirm that the Convention on the Rights of the Child, by reason of its breadth and binding character, must also be observed by the only two States that have not ratified it, as has already been said, and has been recognized by the Department of State of the United States of America.

47. It is convenient to observe, furthermore, that the European Court of Human Rights, in its decision in the *Soering Case*—Jens Soering, born in Germany, in detention in England and submitted to an extradition procedure on behalf of the Government of the United States pending charges of murder committed in Virginia, a State that punishes this crime with the death penalty—made opportune comments regarding Article 3 of the European Convention, which establishes the interdiction of torture, inhuman cruel or degrading treatment or punishment. The Court considered that the request could not be granted unless the person subject to extradition would be guaranteed his or her rights under Article 3 of the Convention (cf. *Jurisprudence de la Cour européenne des droits de l’homme*, 6th ed. 1998, Sirey, Paris, pp. 18 and ff.).

48. The Court concluded that the extradition to a country that applied the death penalty did not constitute a breach of the right to life or to the right to personal integrity since the death penalty is not, in itself, explicitly prohibited by the European Convention. Nonetheless, the possibility that the condemned could spend years waiting for the moment—totally unpredictable, by the way—of the execution of the punishment, the so called "death row syndrome", was considered by the Court as constituting a cruel treatment and, therefore, a breach of the right to personal integrity.

49. It is, doubtlessly, an ambiguity: if there is a delay in imposing the penalty, there is violation of the right; if the sentence is carried out immediately, the State's action will not be considered a breach of the fundamental right to life.

50. This decision gives rise to the conclusion that little by little, the traditional vision, the positivistic application of the law, is being abandoned. Instead of a literal interpretation of the texts in discussion, a teleological hermeneutics is searched, in this case, of the European Convention, to achieve the major conclusion that the death penalty should not be permitted in any hypothesis.

51. Therefore, the absolute prohibition, in the European Convention, of the practice of torture or of inhuman or degrading treatment or punishment shows that Article 3, referred to above, proclaims one of the fundamental values of democratic societies.

The judgment underlines that provisions in the same sense can be found in the International Covenant on Civil and Political Rights of 1966, and in the American Convention on Human Rights of 1969, protecting, in all its extension and depth, the right of the human person. The Court concludes that it is an internationally approved norm.

52. It is true that the concept of inhuman or degrading treatment or punishment depends upon a whole set of circumstances. It is not for any other reason that one should have utmost care to ensure the fair balance between the requirements of the communities' general interest and the higher imperatives of the protection of the fundamental rights of the individual, that take form in the principles inherent to the European Convention taken as a whole.

53. Amnesty International has affirmed that the evolution of the norms in Western Europe concerning the death penalty leads to the conclusion that it is an inhuman punishment, within the meaning of Article 3 of the European Convention. It is in this sense that the judgment of the court in the Soering case should be understood.

54. For its part, the Inter-American Court of Human rights has already affirmed that "The right to life and the guarantee and respect thereof by States cannot be conceived in a restrictive manner. That right does not merely imply that no person may be arbitrarily deprived of his or her life (negative obligation). It also demands of the States that they take all appropriate measures to protect and preserve it (positive obligation)." (Cf. Repertorio de Jurisprudencia del Sistema Interamericano de Derechos humanos, 1998, Washington College of Law, American University, 1/102).

55. It was for the same reason that the European Court, in the aforementioned Soering decision, considered that "Certainly, the Convention is a living instrument which ... must be interpreted in the light of present-day conditions"; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field" (par. 102).

56. In fact, to determine whether the death penalty, because of current modifications of both domestic and international law, constitutes a treatment prohibited by Article 3, it is necessary to take into consideration the principles that govern the interpretation of that Convention. In this case, both in the European Convention and in the American Convention, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (Article 3 of the European Convention); "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." (Article 5(2) of the American Convention on Human Rights).

57. In the same line of thought, in the case between Ireland and the United Kingdom, the European Court had already decided that "The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (...) Article 3 (art. 3) makes no provision for exceptions (...) the



only relevant concepts are torture and inhuman or degrading treatment, to the exclusion of "inhuman or degrading punishment". (par. 163-164)

58. More recently, in its Advisory Opinion OC-16, of October 1, st 1999, requested by Mexico, the Inter-American Court on Human Rights considered it instructive to state, as regards the right to information about consular assistance, as part of the due process guarantees, that "in a previous examination of Article 4 of the American Convention, the Court observed that the application and imposition of capital punishment are governed by the principle that no one shall be arbitrarily deprived of his life. Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to the most serious crimes. In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it." (par 134).

59. It is reasonable to ask what is still lacking for the universal elimination of the death penalty? Simply the total recognition of the rights emanated from the treaties.

60. In support of this idea, we find the concurring vote, in the above-mentioned Advisory Opinion requested by Mexico, of Judge Cancado Trindade, wherein relevant assertions are made concerning the hermeneutics of law in face of the new protection demands.

61. In his concurring vote, the illustrious international legal scholar and current President of the Court (1999/2001) underlines that "The very emergence and consolidation of the corpus juris of the International Law of Human Rights are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (el Derecho) came to the encounter of the human being, the ultimate addressee of its norms of protection." (Concurring vote, par. 4).

62. The author of the concurring vote also warns that "In the same sense the case-law of the two international tribunals of human rights in operation to date has oriented itself, as it could not have been otherwise, since human rights treaties are, in fact, living instruments, which accompany the evolution of times and of the social milieu in which the protected rights are exercised" (ibid, par. 10).

63. In this sense the European Court on Human Rights, in its *Tyrer vs. United Kingdom* Case (1978), when determining the unlawfulness of physical punishment applied to teenagers in the Isle of Man, affirmed that the European Convention on Human Rights is "a living instrument which ... must be interpreted in the light of present-day conditions."

64. Finally, with the demystification of the postulates of the voluntarism legal positivism, it has become clear that the answer to the problem of the basis and the

validity of general international law can only be found in the universal legal consciousness, from the affirmation of an idea of objective justice.

65. Furthermore, in a meeting of representatives of the human rights treaty bodies, it was emphasized that conventional procedures are part of a broad international system of human rights protection, which has—as a basic postulate—the indivisibility of human rights (civil, political, economic, social and cultural). To ensure in practice the universalization of human rights, the meeting recommended the universal ratification, up to the year 2000, of the six core human rights treaties of the United Nations (the two International Covenants of 1966; the conventions on the elimination of racial discrimination and discrimination against women; the UN Convention against Torture; and the Convention on the Rights of the Child), of the three regional conventions on human rights (European, American and African), and the ILO Conventions that concern basic human rights. The meeting warned that the non-compliance of states respecting their obligation to ratify constituted a breach of conventional international obligations and that the invocation of state immunity, in this context, would result in a "double standard" that would punish the States that duly complied with their obligations. (Cancado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol 1, Fabris Ed. 1997, pp. 199-200)

66. Article 27 of the Vienna Convention on the Law of Treaties of 1969 forbids the invocation of domestic law to justify the non-compliance of an international obligation. Moreover, according to Article 31 of the Vienna Convention: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". It follows also that, according to the doctrine of "effet utile", the interpreter must not deny any term of a normative provision its value in the text: no provision can be interpreted as not having been written.

67. In effect, the Inter-American Court, in its Advisory Opinion OC-14/94, has held that: "Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions [Greco-Bulgarian Communities, Advisory Opinion, 1930, P.C.I.J., Series B, No. 17, p. 32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 167; and, I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) 12, at 31-2, para. 47]." (par. 35).

68. In view of the considerations here presented, it can be said that the norm of Article 4, section 2 of the American Convention, has been superseded by the aforementioned conventional provisions, following the best hermeneutic of the

International Law of Human Rights, with the result that it is prohibitive, for domestic law—even if older than the American Convention—to apply cruel punishment, such as the death penalty.

69. This result also follows from the principle of the International Law of Human Rights that all action must have as its basic goal the protection of victims.

70. In light of these considerations, provisions such as Article 4(2) of the American Convention on Human Rights should be disregarded, in favor of legal instruments that better protect the interests of the victims of violations of human rights.

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[1] Section 234 of the Criminal Code (Cap. 76 of Volume 1 of the 1958 Revised Laws of Grenada).

[2] Pages 58-59 of the Trial Transcript.

[3] Pages 59-60 of the Trial Transcript.

[4] U.N.H.R.C., *Champagnie, Palmer & Chisolm v. Jamaica*, Communication N° 445/1991.

[5] Article 5(2) of the Optional Protocol to the International Covenant on Civil and Political Rights provides: "The Committee shall not consider any communication from an individual unless it has ascertained that: (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged".

[6] In this regard, see *Guerra v. Baptiste and others* [1995] 4 All E.R. 583 (P.C.). In this case, the appellant, who had been convicted of murder in Trinidad and Tobago and sentenced to death, argued, inter alia, that to execute him after the period of time that he spent on death row would constitute a breach of his rights under the Constitution of Trinidad and Tobago and the principles established by the Privy Council in the case of *Pratt and Morgan v. A.G. for Jamaica*. In finding that the Court had jurisdiction to entertain the appellant's constitutional argument, the Judicial Committee of the Privy Council relied upon its determination in *Pratt and Morgan* and found that judges in Trinidad and Tobago would as a matter of common law have the power to stay a long delayed execution as not being in accordance with the due process of law, and therefore that a long delayed execution was not barred from challenge as cruel and unusual punishment under the Constitution. At the same time, the Court confirmed that the death penalty itself could not be challenged under the Constitution of Trinidad and Tobago: Before the coming into force of the Constitution of Trinidad and Tobago 1976 (and indeed the 1982 Constitution) capital punishment was accepted as a punishment which could lawfully be imposed, so that execution pursuant to a lawful sentence of death could amount to depriving a person of his life by due process of law, and could not itself amount to cruel and unusual punishment contrary to s. 5(2)(b).

[7] *Woodson v. North Carolina*, 49 L Ed 2d 944 (1976).

[8] *Id.*, at 961.

[9] *Bachan Singh v. the State of the Punjab*, (1980) 2 SCC 684).

[10] See e.g. *Soering v. UK* (1989) 11 EHHR 439.

[11] See William Schabas, *Abolition of the Death Penalty in International Law* (1993), pp. 263-279.

[12] See *State v. Makwanyane and McHunu*, Judgment, Case N°. CCT/3/94 (6 June 1995) (Constitutional Court of South Africa). See also U.N.H.R.C., *Ng v. Canada*, Communication N°. 469/1991, at p. 21 (suggesting that every execution of a sentence of death may be considered to be cruel and inhuman treatment within Article 7 of the ICCPR).

[13] Articles 72, 73 and 74 of the Constitution of Grenada read as follows:

72(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf.-  
(a) grant a pardon, either free or subject to lawful conditions, to any person convicted of any offence; (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence; (c) substitute a less severe form of punishment for any punishment imposed on a person for any offence; or (d) remit the whole or any part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Crown on account of any offence.

(2) The powers of the Governor-General under subsection (1) of this section shall be exercised by him in accordance with the advice of such Minister as may for the time being be designated by the Governor-General, acting in accordance with the advice of the Prime Minister.

73 (1) There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of – (a) the Minister for the time being designated under Section 72(2) of this Constitution who shall be the Chairman; (b) the Attorney General; (c) the chief medical officer of the Government of Grenada; and (d) three other members appointed by the Governor-General, by instrument in writing under his hand.

(2) A member of the Committee appointed under subsection (1)(d) of this section shall hold his seat thereon for such period as may be specified in the instrument by which he was appointed: Provided that his seat shall become vacant – (a) in the case of a person who, at the date of his appointment was a Minister, if he ceases to be a Minister; or (b) if the Governor-General by instrument in writing under his hand, so directs.

(3) The Committee may act notwithstanding any vacancy in its membership or absence of any member and its proceedings shall not to be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings.

(4) The Committee may regulate its own procedure.

(5) In the exercise of his functions under this section, the Governor-General shall act in accordance with the advice of the Prime Minister.

74(1) Where any person has been sentenced to death (otherwise than by a court-martial) for an offence, the Minister for the time being designated under section 72(2) of this Constitution shall cause a written report of the case from the trial judge (or, if a report cannot be obtained from the judge, a report on the case from the Chief Justice), together with such other information derived from the record of the case or elsewhere as he may require, to be taken into consideration at a meeting of the Advisory Committee on the Prerogative of Mercy; and after obtaining the advice of the Committee he shall decide in his own deliberate judgment whether to advise the Governor-General to exercise any of his powers under section 72(1) of this Constitution.

(2) The Minister for the time being designated under section 72(2) of this Constitution may consult with the Advisory Committee on the Prerogative of Mercy before tendering advice to the Governor-General under section 72(1) of this Constitution in any case not falling within subsection (1) of this section but he shall not be obliged to act in accordance with the recommendation of the Committee.

[14] *Reckley v. Minister of Public Safety* (Nº. 2) (1996) 2 WLR 281.

[15] *Id.*, pp. 290 d- f.

[16] Caribbean Rights Report 1990, p. 40.

[17] *Id.*, pp. 62-63.

[18] *Id.* p. 80.

[19] *Id.* p. 81.

[20] Caribbean Rights Report 1991, p.30.

[21] Article 7 of the ICCPR provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[22] Article 10(1) of the ICCPR provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

[23] U.N.H.R.C., *Antonaccio v. Uruguay*, U.N. Doc. A/37/40.

[24] U.N.H.R.C., *De Voituret v. Uruguay*, U.N. Doc. A/39/40.

[25] U.N.H.R.C., *Mukong v. Cameroon*, Communication No. 458/1991.

[26] *Id.*

[27] Article 3 of the European Convention provides: "No one shall be subjected to torture or to inhuman and degrading treatment or punishment."

[28] Eur. Court H.R., *Greek Case*, 12 YB 1 (1969).

[29] Eur. Court H.R., *Cyprus v. Turkey*, Application 6780/74 and 6950/75.

[30] *Pratt and Morgan –v- The Attorney General of Jamaica* [1994] 2 AC 1.

[31] The Petitioners cite in this regard the decision of the UN Human Rights Committee in the case *Ng v. Canada*, Communication No. 469/1991, in which the Committee stated that when imposing capital punishment in accordance with Article 7 of the International Covenant on Civil and Political Rights, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering."

[32] *Golder v. UK* (1975) Series A Nº. 18.

[33] *Airey v. Ireland* (1979) Series A Nº. 32.

[34] Article 6(3) of the European Convention provides: "Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

[35] *Donnason Knights*, (Grenada) Report Nº 47/01, Annual Report of the Inter-American Commission on Human Rights 2000, Volume II, at 841 OEA/Ser.L/V/II. 111, Doc. 20 rev., 16 April 2001; and the following cases can be found in Annual Report of the Inter-American Commission on Human Rights 1999, Volume I, OEA/Ser.L/VII.106, Doc. 3 rev., April 13, 2000 - *Paul Lallion* (Grenada) Report Nº 124/99, Case 11.765 at; *Rudolph Baptiste*, Report Nº. 38/00, Case 11.743 (Grenada); *Michael Edwards*, Report Nº. 24/00, Case Nº. 12.067 (The Bahamas), at 177, *Omar Hall*, Report Nº. 25/00, Case 12.068, at 184 (The Bahamas); *Brian Schroeter and Jeronimo Bowleg*, at 190, (The Bahamas).

36 See I/A Court H.R., Neira Alegria Case, Preliminary Objections, Judgment, December 11, 1991 pp. 44-45, at paras. 25-31.

37 *Donnason Knights*, (Grenada) Report N° 47/01, Annual Report of the Inter-American Commission on Human Rights 2000, Volume II, at 841 OEA/Ser.L/V/II. 111, Doc. 20 rev., 16 April 2001; and the following cases can be found in Annual Report of the Inter-American Commission on Human Rights 1999, Volume I, OEA/Ser.L/VII.106, Doc. 3 rev., April 13, 2000 - Paul Lallion (Grenada) Report N° 124/99, Case 11.765 at; Rudolph Baptiste, Report N°. 38/00, Case 11.743 (Grenada); Michael E.dwards, Report N° 24/00, Case 12.067 (The Bahamas), at 177, Omar Hall Report N° 25/00, Case 12.068, at 184 (The Bahamas); Brian Schroeter and Jeronimo Bowleg, at 190, (The Bahamas).

[38] *Donnason Knights*, (Grenada) Report N° 47/01, Annual Report of the Inter-American Commission on Human Rights 2000, Volume II, at 841 OEA/Ser.L/V/II. 111, Doc. 20 rev., 16 April 2001; and the following cases can be found in Annual Report of the Inter-American Commission on Human Rights 2000, Volume I, OEA/Ser.L/VII.111, Doc. 3 rev., April 16, 2000 - Rudolph Baptiste, Report N° 38/00, Case . 11.743 (Grenada) ANNUAL REPORT OF THE IACHR 1999, p. 721, at p. 738; Report N° 48/01, Michael Edwards, Case 12.067 (The Bahamas) at 620, Omar Hall, Case 12.068, at 620 (The Bahamas), Brian Schroeter and Jeronimo Bowleg, at 620 (The Bahamas); McKenzie et al. (Jamaica), Report N° 41/00, ANNUAL REPORT OF THE IACHR 1999, P. 918, At P. 967.

[39] See e.g Rudolph Baptiste, *Donnason Knights*, *Mckenzie et al.* Case, *supra*, para. 169.

40 See *Santiago Marzioni v. Argentina*, Report N°. 39/96, ANNUAL REPORT OF THE IACHR 1996, p. 76, paras. 48-52. See also *Clifton Wright v. Jamaica*, Case 9260 , ANNUAL REPORT OF THE IACHR 1987-88, p. 154.

41 Section 234 of the Criminal Code, Title XVIII, Cap. 76 , p. 790, contains a proviso to the death penalty for a crime of murder. The proviso states:

Provided that the sentence of death shall not be pronounced or recorded against a person convicted of murder if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years; but, in lieu of such punishment, the Court shall sentence the juvenile offender to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of any other Law or Ordinance, be liable to be detained in such place and under such conditions as the Governor may direct, and whilst so detained shall be deemed to be in legal custody.

42 *Donnason Knights*, (Grenada) Report N°. 47/01, Annual Report of the Inter-American Commission on Human Rights 2000, Volume II, at 841 OEA/Ser.L/V/II. 111, Doc. 20 rev., 16 April 2001; and the following cases can be found in Annual Report of the Inter-American Commission on Human Rights 2000, Volume I, OEA/Ser.L/VII.111, Doc. 3 rev., April 16, 2000 - Rudolph Baptiste, Report No. 38/00, Case No. 11.743 (Grenada) ANNUAL REPORT OF THE IACHR 1999, p. 721, at p. 738 ; Report N°. 48/01, Michael Edwards, Case N°. 12.067 (The Bahamas) at 620; Omar Hall, Case 12.068, at 620 (The Bahamas) Brian Schroeter and Jeronimo Bowleg, at 620 (The Bahamas). McKenzie et al. (Jamaica), Report No. 41/00, ANNUAL REPORT OF THE IACHR 1999, P. 918, at p. 967, para 178.

43 Donnason Knights, (Grenada) Report N° 47/01, Annual Report of the Inter-American Commission on Human Rights 2000, April 16, 2001- Rudolph Baptiste, Report N° 38/00, Case 11.743 (Grenada) ANNUAL REPORT OF THE IACHR1999, p. 721, at p. 738.

44 Article 4 of the American Convention provides as follows:

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

45 Article 5 of the Convention provides as follows:

Article 5 – Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

46 Article 8(1) of the Convention provides: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

47 See e.g. Convention, Article 29 (providing, inter alia, that no provision of the Convention may be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention to which one of the said states is a party, or to exclude or limit the effect that

the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have).

48 Donnason Knights, supra at 875-882, Rudolph Baptiste, supra at 740-763; and McKenzie et al. Case, supra, para. 186-187, citing I/A Court H.R., Advisory Opinion OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), ANNUAL REPORT 1984, p. 31, para. 52 (finding that the text of Article 4 of the Convention as a whole reveals a clear tendency to restrict the scope of the death penalty both as far as its imposition and its application are concerned); Anthony McLeod v. Jamaica, Communication N<sup>o</sup>. 734/1997, U.N.Doc CCPR/C/62/734/1997. See similarly Baptiste Case, supra, paras. 74-75.

49 Donnason Knights, supra at 875-882, Rudolph Baptiste, supra at 740-763; McKenzie et al. Case, supra, para.188, citing, inter alia, Woodson v. North Carolina 49 L Ed 2d 944, 961 (finding that "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

50 Id, para. 189, citing Advisory Opinion OC-3/83, supra, para. 55 (observing with regard to Article 4 of the Convention that "three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.").

51 Id, paras. 193-207. See similarly Baptiste Case, supra, paras. 80-94.

52 UNHRC, Eversley Thompson v. St. Vincent and the Grenadines, Communication N<sup>o</sup> 806/1998 (October 18, 2000).

53 Donnason Knights, supra at 875-882, Rudolph Baptiste, supra at 740-763; and McKenzie et al. Case, supra, para. 207.

54 McKenzie et al. Case, supra, paras. 208, 212-219, citing Woodson v. North Carolina 49 L Ed 2d 944 (U.S.S.C.);The State v. Makwanyane and McHunu, Judgment, Case N<sup>o</sup>. CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa); Bachan Singh v. State of Punjab (1980) 2 S.C.C. 475 (Supreme Court of India). See also Baptiste Case, supra.

55 Pages 58-59 of the Trial Transcript.

56 Pages 59-60 of the Trial Transcript.

57 See similarly McKenzie et al. Case, supra, para. 234; Baptiste Case, supra, para. 127.

58 See similarly McKenzie et al. Case, supra, para. 235; Baptiste Case, supra, para. 128.

59 See similarly McKenzie et al. Case, supra, para. 237; Baptiste Case, supra, para. 130.

60 Rudolph Baptiste supra, 760-76; Donnason Knights, supra 878-882; and McKenzie et al. Case, supra, paras. 227-232.

61 Id., para. 228.

62 Id. The Commission reasoned that the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention may be regarded as similar to the right under Article XXVII of the American Declaration of every person "to



seek and receive" asylum in foreign territory, in accordance with the laws of each country and with international agreements, which the Commission has interpreted, in conjunction with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, as giving rise to a right under international law of a person seeking refuge to a hearing in order to determine whether that person qualifies for refugee status. See *Haitian Center for Human Rights and others v. United States*, Case N° 10.675 (13 March 1997), Annual Report of the IACHR 1996, para. 155. The Commission also observed that some common law jurisdictions retaining the death penalty have prescribed procedures through which condemned prisoners can engage and participate in the amnesty, pardon or commutation process. See Ohio Constitution, Art. III, s. 2, Ohio Revised Code Ann., s. 2967.07 (1993). See also *Ohio Adult Parole Authority v. Woodward*, Court File N°. 96-1769 (25 March 1998) (U.S.S.C.).

63 *Neville Lewis et al. v. The Attorney General of Jamaica and The Superintendent of St. Catherine District Prison*, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (12 September 2000) (J.C.P.C.), at p. 23.

64 *Id.*, at 23-24.

65 United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 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. (N° 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (N° 1) at 35, U.N. Doc E/5988 (1977).

66 See similarly European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Second General Report on the CPT's Activities Covering the Period 1 January to 31 December 1991, Ref. CPT/Inf. (92) 3 (13 April 1992), paras. 44-50 (criticizing prison conditions involving overcrowding, the absence of at least one hour of exercise in the open air every day for prisoners, and the practice of prisoners discharging human waste in buckets, and stating that the Committee is "particularly concerned when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment. The cumulative effect of such conditions can prove extremely detrimental to prisoners.)

67 Article 28 provides that "petitions addressed to the Commission shall contain the following information: (f) the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated."

68 See I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, ANNUAL REPORT 1991, para. 28 interpreting Article 8(1) of the Convention as follows:

For cases which concern the determination of a person's rights and obligations of a civil, labor, fiscal or any other nature, article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases.

See also I/A Comm. H.R., *Loren Laroye Riebe Star and others v. Mexico*, Report N°. 49/99 (13 April 1999), ANNUAL REPORT 1998, para. 70 (interpreting Article 8(1) in

the context of administrative proceedings leading to the expulsion of foreigners as requiring certain minimal procedural guarantees, including the opportunity to be assisted by counsel or other representative, sufficient time to consider and refute the charges against them and to seek and adduce corresponding evidence.).

69 See similarly *Currie v. Jamaica*, Communication N° 377/1989, U.N. Doc. N°. CCPR/C/50/D/377/1989 (1994), para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights required the State to provide legal assistance).

70 See *Peru Case*, supra, pp. 190-191.

71 I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies*, supra, para. 30.

72 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.).

[73] When the preliminary merits report in this matter was approved pursuant to Article 50 of the Convention, the Commission's composition included Prof. Hélio Bicudo, who at that time adopted a separate opinion. Accordingly, Prof. Bicudo's separate opinion has been included with the final report in this case approved under Article 51 of the Convention, even though Prof. Bicudo's term as a Commission member expired on December 31, 2001.

74 Press Release N° 9/00, Washington, D.C. June 28, 2000: "The Inter-American Commission on Human Rights deplores the execution of Shaka Sankofa, formerly known as Gary Graham, in the State of Texas on June 22, 2000. Mr. Sankofa was executed, despite formal requests by the Commission for the United States to ensure a suspension of Mr. Sankofa's execution pending the determination of a complaint lodged on his behalf before the Commission".

In 1993, the Commission received a complaint on behalf of Mr. Sankofa, alleging that the United States, as a Member State of the Organization of American States, had violated Mr. Sankofa's human rights under the American Declaration of the Rights and Duties of Man, including his right to life under Article I of that instrument. In particular, it was contended that Mr. Sankofa was sentenced to death for a crime that he was alleged to have committed when he was 17 years of age, that he was innocent of that crime, and that he had been subjected to legal proceedings that did not comply with international due process standards.

On August 11, 1993, the Commission opened Case N°. 11.193 in respect of Mr. Sankofa's complaint. Following a hearing on the matter on October 4, 1993, the Commission transmitted to the United States on October 27, 1993 a formal request for precautionary measures under Article 29(2) of the Commission's Regulations, asking that the United States ensure that Mr. Sankofa's death sentence was not carried out, in light of his pending case before the Commission. At that time, Mr. Sankofa's execution, which had previously been scheduled for August 17, 1993, was postponed pending the completion of domestic judicial procedures.

In February 2000, the Commission was informed that Mr. Sankofa's domestic proceedings were nearly completed, and that the issuance of a new warrant of execution

was imminent. Accordingly, in a February 4, 2000 letter to the United States, the Commission reiterated its October 1993 request for precautionary measures. Subsequently, in May 2000, the Commission received information that Mr. Sankofa's petition before the U.S. Supreme Court had been dismissed and that his execution was scheduled for June 22, 2000. Accordingly, on June 15, 2000, during its 107th Period of Sessions, the Commission adopted Report N°. 51/00, in which it found Mr. Sankofa's petition to be admissible and decided that it would proceed to examine the merits of his case. Also in this report, the Commission again reiterated its request that the United States suspend Mr. Sankofa's death sentence pending the Commission's final determination of his case.

By communication dated June 21, 2000, the United States acknowledged the receipt of the Commission's February 4, 2000 communication and indicated that it had forwarded the same to the Governor and Attorney General of Texas. On June 22, 2000, however, the Commission received information that the Texas Board of Pardons and Paroles declined to recommend that Mr. Sankofa be granted a reprieve, commutation or pardon, and that his execution was to proceed on the evening of June 22, 2000. Consequently, by communication of the same date, the Commission requested that the United States provide an urgent response to its previous request for precautionary measures.

Regrettably, the United States did not respond to the Commission's June 22, 2000 request, and Mr. Sankofa's execution proceeded as scheduled.

The Commission is gravely concerned that, despite the fact that Mr. Sankofa's case had been admitted for consideration by a competent international human rights body, the United States failed to respect the Commission's requests to preserve Mr. Sankofa's life so that his case could be properly and effectively reviewed in the context of the United States' international human rights obligations. In light of the irreparable damage caused by such circumstances, the Commission calls upon the United States and other OAS Member States to comply with the Commission's requests for precautionary measures, particularly in those cases involving the most fundamental right to life.”

75 Teoria do Ordenamento Juridico, Universidade de Brasilia, 1991, p. 64.

76 Op. cit 2, p. 92