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THE MANDATORY DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: AN EVOLUTION IN THE DEVELOPMENT AND IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS PROTECTIONS

Brian D. Tittmore*

INTRODUCTION

On March 11, 2002, the Judicial Committee of the Privy Council issued its landmark judgments in a trilogy of cases involving defendants Peter Hughes, Berthill Fox, and Patrick Reyes.¹ In these judgments, the Privy Council disposed

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¹ The Queen v. Hughes, [2002] 2 W.L.R. 1058, [2002] U.K.P.C. 12, [2002] 2 A.C. 259 (appeal taken from St. Lucia); Fox v. The Queen, [2002] 2 W.L.R. 1077, [2002] U.K.P.C. 13, [2002] 2 A.C. 284 (appeal taken from St. Kitts & Nevis); Reyes v. The Queen, [2002] 2 W.L.R. 1034, [2002] U.K.P.C. 11, [2002] 2 A.C. 235 (appeal taken from Belize). *See also* Watson v. The Queen, [2004] 3 W.L.R. 841, [2004] U.K.P.C. 34 (appeal taken from Jam.) (finding the mandatory death penalty under Jamaica's Offences Against the Person (Amendment) Act 1992 to constitute inhumane or degrading punishment under section 17(1) of the Jamaican Constitution). In two further judgments issued on July 7, 2004, the Privy Council determined that it was unable to pronounce the mandatory death penalty to be unconstitutional in Barbados and the Republic of Trinidad & Tobago. The Council based its rulings upon the "savings clauses" contained in the constitutions of those states that prevent laws that were in existence when the constitutions came into force from being declared invalid under the constitutions' human rights provisions. In so determining, however, the Court maintained its position in *Hughes*, *Fox*, and *Reyes* that the mandatory death penalty constituted cruel and unusual punishment under international law and the human rights provisions of those constitutions, but held that the law could not be invalidated for that reason. *See* Matthew v. The State, [2004] 3 W.L.R. 812, [2004] U.K.P.C. 33, para. 12 (appeal taken from Trin. & Tobago); Boyce v. The Queen, [2004] 3 W.L.R. 786, [2004] U.K.P.C. 32, paras. 25, 27 (appeal taken from Barb.). The Judicial Committee of the Privy Council remains the court of final appeal for the overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of republics, to the Judicial Committee. This jurisdiction includes all English-speaking countries of the Commonwealth Caribbean with the exception of Guyana. *See* VELMA NEWTON, COMMONWEALTH CARIBBEAN LEGAL SYSTEMS: A STUDY OF SMALL JURISDICTIONS 37–38 (Wm. W. Gaunt & Sons, Inc. 1989) (1988). *See also* Judicial Committee of the Privy Council, <http://www.privy-council.org.uk> (noting the court's jurisdiction) (last visited Sept. 11, 2004).

of appeals from decisions of the Eastern Caribbean Court of Appeal and the Court of Appeal of Belize² by concluding that the automatic imposition of the death penalty upon conviction for a crime without an opportunity for presenting and considering mitigating circumstances in the sentencing process — commonly referred to as the “mandatory death penalty” — contravened the right to humane treatment under the constitutions of St. Lucia, St. Christopher and Nevis, and Belize not to be subjected to inhuman or degrading punishment or other treatment. These judgments were issued subsequent to the adoption of a series of similar decisions by the human rights supervisory bodies of the inter-American system, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights, which found the mandatory death penalty in the Commonwealth Caribbean³ to be incompatible with the right to life, the right to humane treatment, and the right to due process under regional human rights instruments.⁴

Among the most significant and compelling aspects of the litigation surrounding the issue of the mandatory death penalty in the Caribbean region has been the interplay between the procedures and jurisprudence of the inter-American human rights system and those of relevant domestic courts. In particular, the supervisory bodies of the inter-American system have relied upon the decisions of appellate courts in certain states employing the death penalty,⁵ and have concluded that the practice of mandatory sentencing for the death penalty contravened applicable international human rights norms. Subsequently, appellate courts in the Caribbean region explicitly relied upon the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in interpreting

² *Spence v. The Queen*, Crim. App. Nos. 20 of 1998 and 14 of 1997 (Apr. 2, 2001) (E. Carib. Ct. Apps.) (appeals taken from St. Vincent & the Grenadines and St. Lucia) (judgment from a consolidated appeal including the case of *Hughes v. The Queen*), at <http://www.ecsupremecourts.org.lc/index.htm>.

³ For present purposes, the Commonwealth Caribbean is comprised of the twelve English-speaking Caribbean Member States of the Organization of American States (“OAS”): Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, and Trinidad & Tobago.

⁴ See, e.g., *Hilaire, Constantine & Benjamin v. Trinidad & Tobago*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002); *McKenzie v. Jamaica*, Case 12.023, Inter-Am. C.H.R. 41, OEA/ser. L./V./II.106, doc. 6 (1999), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_94_ing.pdf (last visited Dec. 6, 2004); *Edwards v. The Bahamas*, Case 12.067, Inter-Am. C.H.R. 24, OEA/ser. L./V./II.106, doc. 6 (2000), available at <http://www.cidh.org/annualrep/99eng/admissible/bahamas12067.htm> (last visited Dec. 6, 2004). Decisions and other publications of the Inter-American Court of Human Rights can be found on its website at <http://www.corteidh.or.cr>. Decisions and other publications of the Inter-American Commission on Human Rights can be found on its web site at <http://www.cidh.org>.

⁵ The appellate courts include the United States Supreme Court, the South African Constitutional Court, and the Supreme Court of India.

and applying rights that are protected under national constitutions. Moreover, the Judicial Committee of the Privy Council found that the protection of due process of law under national constitutions extend to the procedures before the inter-American human rights system,⁶ with the consequence that states were barred from executing capital defendants while their pending cases were before the Inter-American Commission on Human Rights and, where available, the Inter-American Court of Human Rights.⁷

This article provides an account of the mandatory death penalty litigation before the inter-American human rights system and its interface with the judicial systems of Commonwealth Caribbean states. The discussion highlights several significant consequences that have flowed from this litigation. Contrary to the traditional experience of the inter-American system with capital petitions, the interaction between national and international proceedings permitted the human rights bodies of the inter-American system to process complaints filed on behalf of capital defendants while they were still alive through stays of execution granted by the respective national courts.⁸ The litigation of these issues before domestic and international tribunals also has prompted changes in the criminal legal procedures of several Caribbean countries where capital defendants are now being provided with individualized sentencing proceedings.⁹ Further, the proceedings

⁶ See *Thomas & Hilaire v. Baptiste*, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1 (P.C.) (appeal taken from Trin. & Tobago), available at <http://www.privacy-council.org.uk/output/Page170.asp>; *Lewis v. Attorney Gen. of Jamaica*, [2000] 3 W.L.R. 1785, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.), available at <http://www.privacy-council.org.uk/output/Page169.asp>.

⁷ Of the thirteen Commonwealth Caribbean states that are also Member States of the OAS, only two have accepted the contentious jurisdiction of the Inter-American Court of Human Rights since its creation: Trinidad & Tobago, which accepted the Court's jurisdiction in 1991 and subsequently denounced the American Convention, and consequently the Court's jurisdiction, in 1998; and Barbados, which accepted the Court's contentious jurisdiction in 2000.

⁸ Member States of the inter-American system have generally failed to comply with requests from the inter-American human rights bodies to stay executions pending the investigation of complaints filed on behalf of capital petitioners. See, e.g., 2002 Annual Report of the Inter-Am. Ct. H.R., OEA/ser. L./V./II.117, doc. 1 rev. 1, paras. 77-78, 82-86 (2003) (describing precautionary measure requests adopted by the Commission in capital cases in which the petitioners were executed), available at <http://www.cidh.org>; *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 198 (noting that the Republic of Trinidad & Tobago had executed one alleged victim in the case, Joey Ramiah, notwithstanding the fact that the Court had adopted provisional measures in Mr. Ramiah's favor).

⁹ See, e.g., *The Queen v. Reyes*, Judgment on Sentencing of Oct. 25, 2002 (unreported) (on file with author) (appeal taken from Belize) (providing the defendant with an individualized sentencing judgment after the Judicial Committee of the Privy Council had found the mandatory death penalty provision of the Belize Criminal Code to be

involving the mandatory death penalty have contributed to the evolution of domestic and international standards governing the implementation of capital punishment,¹⁰ at a time when the application of the death penalty in retentionist states is coming under enhanced domestic and international scrutiny.¹¹ Finally,

unconstitutional and remitted the case back to the Belize courts); *New Law to Remove Automatic Death Penalty*, JAM. OBSERVER, Oct. 6, 2004 (reporting that the Jamaican government had tabled a bill in Parliament amending the country's Offenses Against the Person Act to give judges greater sentencing discretion in capital murder convictions), available at <http://www.jamaicaobserver.com>.

¹⁰ At the present time, several international human rights instruments permit states to retain the death penalty, though subject to certain conditions. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 6, 999 U.N.T.S. 171, available at <http://www.ohchr.org/english/law/ccpr.htm> (last visited Dec. 6, 2004); American Convention on Human Rights, "Pact of San Jose, Costa Rica," Nov. 22, 1969, art. 4, 1144 U.N.T.S. 123, OAS Off. Rec. OEA/ser. K./XVI.1.1 (entered into force July 18, 1978) [hereinafter American Convention], reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 29, OEA/ser. L./V.1.4, rev. 9 (2003) [hereinafter BASIC DOCUMENTS], available at <http://www.corteidh.or.cr/public/Basing10.pdf> (last visited Dec. 6, 2004). But see Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, 29 I.L.M. 144 [hereinafter Protocol to Abolish the Death Penalty], reprinted in BASIC DOCUMENTS, *supra*, at 93. Despite the fact that the ICCPR permits the death penalty, U.N. human rights bodies have consistently advocated the abolition of the punishment. See, e.g., *Question of the Death Penalty*, U.N. Comm. on Hum. Rights Res. 1997/12, U.N. Doc. E.CN. 4/1997/12 (1997); 1998/8, U.N. Doc. E/CN.4/1998/8 (1998); 1999/61, U.N. Doc. E.CN. 4/1999/61 (1999); 2000/65, U.N. Doc. E/CN.4/2000/65 (2000). According to recent statistics, over one-half of world states have abolished the death penalty in law or in practice. Amnesty International, *Facts and Figures on the Death Penalty*, AI Index: ACT50/008/2004 (Apr. 2004), available at <http://www.amnesty.org/death>.

¹¹ Significant developments within the political and legal systems of states concerning the application of capital punishment include the 1993 decision of the Judicial Committee of the Privy Council in the case *Pratt & Morgan v. Attorney Gen. for Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993) (appeal taken from Jam.). In *Pratt & Morgan*, the Committee found that in any case in which a prisoner is to be executed more than five years after he or she is sentenced, there are strong grounds to believe that such delay constitutes inhuman or degrading punishment, thus rendering the execution constitutionally prohibited. See similarly *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). In the United States, political developments include the decision by Illinois Governor George Ryan in January 2003 to commute the death sentences of 167 death row inmates in that state following a commission finding on capital punishment, convened by the Governor, that a system could not be devised to ensure that innocent people would not be executed. See <http://www.deathpenaltyinfo.org> (last visited Dec. 6, 2004). In addition, on September 12, 2000, the United States Department of Justice released the first comprehensive review of the federal death penalty since the punishment was reinstated in 1988. The data showed, inter alia, that federal prosecutors were almost twice as likely to recommend the death penalty for black defendants when the victim was non-black than when the victim was black. Additionally, forty-three percent of the 183 cases in which the death penalty was sought came from forty-nine of the ninety-four federal judicial districts, which in turn led to concerns about racial and geographic disparity in the

the experience of the mandatory death penalty in the Caribbean illustrates the effective role that an enlightened judiciary can play in prompting states to abide by their international commitments, when the executive and legislative branches of government have failed to take the necessary steps to give effect to the international human rights instruments that they themselves have undertaken to uphold and respect.

implementation of the federal death penalty. United States Department of Justice, *The Federal Death Penalty System: A Statistical Survey (1988–2000)*, available at http://www.usdoj.gov/dag/pubdoc/_dp_survey_final.pdf. See also JIM DWYER, ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000). For its part, the United States Supreme Court, in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), concluded that the execution of mentally retarded individuals constituted cruel and unusual punishment prohibited by the 8th Amendment of the U.S. Constitution. Also notable is the Supreme Court of Canada's decision in the case of *United States v. Burns*, [2001] 1 S.C.R. 283, in which the Court upheld a decision to set aside the Minister of Justice's decision to extradite the respondents to the state of Washington for trial on murder charges. This decision was reached without seeking assurances from the United States, pursuant to Article 6 of the extradition treaty between the two countries, that the death penalty would not be imposed or, if imposed, would not be carried out. The Court based its decision in part upon the fact that "recent and continuing disclosures of wrongful convictions for murder in Canada and the United States provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent. This history weighs powerfully in the balance against extradition without assurances when fugitives are sought to be tried for murder by a retentionist state, however similar in other respects to our own legal system." *Id.* at 288.

Notable international developments on the death penalty include its abolition in Europe as a condition of membership in the European Union, which has also been reflected in extradition treaties with European states. See, e.g., European Convention on Extradition, Dec. 13, 1957, art. 11, E.T.S. No. 24 (providing that extradition may be refused "[i]f the offence for which extradition is requested is punishable by death under the law of the requesting Party . . . unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out"). In addition, the death penalty is not a form of punishment that may be imposed by the U.N. ad hoc tribunals for the former Yugoslavia and Rwanda and the International Criminal Court. See *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), art. 77; *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. Doc. S/RES/955 (1994), art. 23; *Statute of the International Criminal Tribunal for the former Yugoslavia*, S.C. Res. 827, U.N. Doc. S/RES/827 (1993), art. 24. Also of note are the decisions of the International Court of Justice in the *LaGrand Case* and the *Case of Avena and Other Mexican Nationals*, in which the Court found that the United States was responsible for Article 36 violations of the Vienna Convention on Consular Relations by failing to provide condemned prisoners with notification of their right to consular assistance. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27); *Case of Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).

I. BACKGROUND TO THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Before entering into a discussion of the mandatory death penalty litigation in the Commonwealth Caribbean, it is useful to place the analysis within the structural and procedural context of the inter-American human rights system.

A. Structure and Function of the Inter-American Human Rights System

The Organization of American States ("OAS") is an international organization created by Western Hemisphere States in 1948 with the purposes of achieving an order of peace and justice, promoting solidarity, and defending their sovereignty, territorial integrity, and independence.¹² The OAS Charter, the governing instrument for the organization, was approved during the Ninth International Conference of American States held in Bogotá in 1948. The origins of the inter-American regional system can be traced as far back as the 1826 Congress of Panama, where Simon Bolivar urged participating states to consider a confederation of Latin American States.¹³ The system has now expanded to encompass thirty-five Member States of North, Central, and South America.¹⁴

The recognition and protection of individual human rights has constituted a subject of consideration within the inter-American system since its earliest meetings and conferences, which addressed such issues as labor rights and protection against discrimination.¹⁵ Consistent with this tradition and as part of its agenda

¹² CHARTER OF THE ORGANIZATION OF AMERICAN STATES, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS CHARTER], reprinted in BASIC DOCUMENTS, *supra* note 10, at 233 (stipulating that the OAS is a "regional agency" within the meaning of U.N. CHARTER art. 52).

¹³ For a discussion of the inter-American system's historical evolution, see THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS 37-44 (4th ed. 1995). See also Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLITICAL ISSUES 429-93 (Theodor Meron, ed., 1984).

¹⁴ The thirty-five Member States of the organization are: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts and Nevis, Suriname, Trinidad & Tobago, United States, Uruguay, and Venezuela. Of these, thirty-four are active members, with the government of Cuba having been suspended since 1962. OAS CHARTER, Ratifications, OAS Treaty Series, Nos. 1-C, 61, available at <http://www.oas.org/juridico/english/signs/a-41.html> (last visited Dec. 6, 2004).

¹⁵ See BASIC DOCUMENTS, *supra* note 10, at 5-6 (citing resolutions adopted by the Eighth International Conference of American States in Lima, Peru in 1939, including the resolution on "Freedom of Association and Freedom of Expression for Workers" and the "Lima Declaration in Favor of Women's Rights").

in approving the OAS Charter in 1948, the Ninth International Conference of American States adopted the American Declaration of the Rights and Duties of Man ("American Declaration").¹⁶ While the American Declaration was initially adopted on the understanding that it had not been incorporated by reference into the Charter and lacked the status of positive substantive law,¹⁷ the Inter-American Commission and Court have since ruled, based upon developments since 1948, that the American Declaration constitutes a source of international obligation for all OAS Member States.¹⁸ Also, OAS Member States, by approving the Commission's Statute during the General Assembly's ninth regular session in 1979 and through state practice, have recognized the Commission's authority to receive individual petitions of American Declaration violations against Member States that are not parties to the American Convention on Human Rights ("American Convention").¹⁹

¹⁶ American Declaration of the Rights and Duties of Man, May 2, 1948 [hereinafter American Declaration], reprinted in BASIC DOCUMENTS, *supra* note 10, at 19.

¹⁷ See BUERGENTHAL & SHELTON, *supra* note 13, at 39 (citing *Report of the Delegation of the United States of America to the Ninth International Conference of American States, Bogotá, Colombia, March 30–May 2, 1948*, Department of State, at 35–36 (Publ. No. 3263, 1948)); *Report of the Inter-American Council of Jurists Concerning Resolution XXXI of the Bogotá Conference, Sept. 26, 1949*, Inter-American Juridical Committee, reprinted in PAN AMERICAN UNION, HUMAN RIGHTS IN THE AMERICAN STATES 163, 164–65 (prelim. ed., 1960).

¹⁸ See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC–10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, paras. 35–45 (1989), reprinted in 29 I.C.M. 378 [hereinafter IACHR Advisory Opinion OC–10/89]; *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R. 3, OEA/ser. L./V./II.71, doc. 9 rev. 1, paras. 46–49 (1987) (explaining the obligation of the United States, as an OAS member, regarding the Inter-American Commission on Human Rights), available at <http://www.cidh.org/annualrep/86.87eng/EUU9647.htm>.

¹⁹ See *Statute of the Inter-American Commission on Human Rights*, OAS G.A. Res. 447, 9th Sess. (1979) [hereinafter Commission's Statute], reprinted in BASIC DOCUMENTS, *supra* note 10, at 137. Article 20 of the Commission's Statute provides:

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18: a. to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man; b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and, c. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether

Subsequently in 1969, during the Inter-American Specialized Conference on Human Rights held in San José, Costa Rica, OAS Member States adopted the American Convention,²⁰ which entered into force in 1978 and serves as the main human rights instrument of the inter-American system. The subject matter of the inter-American human rights system has since expanded to include numerous protocols and conventions addressing a variety of human rights issues. These protocols and conventions include the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")²¹ the Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty,²² the Inter-American Convention to Prevent and Punish Torture,²³ the Inter-American Convention on Forced Disappearance of Persons ("Forced Disappearances Convention"),²⁴ and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, also known as the "Convention of Belém do Pará."²⁵

As with other intergovernmental human rights systems, the inter-American system has created mechanisms for monitoring compliance by Member States with their human rights commitments. In 1959, eleven years after the OAS

the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

Id. at art. 20.

The Commission first amended its Statute to include the possibility of examining individual petitions and making specific recommendations to Member States relative to those petitions during its 13th Period of Sessions in 1966. See BASIC DOCUMENTS, *supra* note 10, at 8–9 (citing *Report on the Work Accomplished by the Inter-American Commission of Human Rights During its Thirteenth Period of Sessions, from April 18 to 28, 1966*, Inter-Am. C.H.R., OEA/ser. L./V./II.14, doc. 35, at 26–27 (1966)).

²⁰ American Convention, *supra* note 10. As of June 2004, twenty-four OAS Member States were parties to this convention.

²¹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Nov. 17, 1988 [hereinafter Protocol of San Salvador], *reprinted in* BASIC DOCUMENTS, *supra* note 10, at 79. As of December 2004, thirteen OAS Member States were parties to this Protocol.

²² Protocol to Abolish the Death Penalty, *supra* note 10. As of December 2004, eight OAS Member States were parties to this Protocol.

²³ Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, *reprinted in* BASIC DOCUMENTS, *supra* note 10, at 97. As of December 2004, sixteen OAS Member States were parties to this Convention.

²⁴ Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, *reprinted in* BASIC DOCUMENTS, *supra* note 10, at 107. As of December 2004, ten OAS Member States had ratified this Convention.

²⁵ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," *adopted on* June 9, 1994 [hereinafter Convention of Belém do Pará], *reprinted in* BASIC DOCUMENTS, *supra* note 10, at 117. As of December 2004, thirty-one OAS Member States had ratified this Convention.

Charter's adoption, Member States created the Inter-American Commission during the Fifth Meeting of Consultation of Ministers of Foreign Affairs, with the purpose of monitoring observance of the human rights recognized within the system.²⁶ In 1967, the OAS Charter was amended through the Protocol of Buenos Aires to include the Commission as an organ of the OAS, with principal responsibility for promoting the observance and protection of human rights in the hemisphere and serving as a consultative organ of the OAS in these matters.²⁷

The Inter-American Commission on Human Rights is comprised of seven members "of high moral character and [with] recognized competence in the field of human rights."²⁸ These members are elected in a personal capacity by the General Assembly of the OAS from a list of candidates proposed by OAS Member States. The Commission's members, who serve on a part-time basis and without remuneration, are elected for a term of four years and may only be re-elected once.²⁹ The Commission is supported by a full-time Secretariat based at the Commission's headquarters in Washington, D.C., which is comprised of an Executive Secretary, and approximately twenty attorneys and fourteen administrative personnel as well as numerous fellows and interns. As suggested above, the Commission derives its authority from the OAS Charter,³⁰ the American Declaration,³¹ the American Convention,³² the Commission's Statute,³³ and its Rule of Procedure.³⁴ In particular, by ratifying the OAS Charter, all Member States are at a minimum subject to the Commission's jurisdiction to receive and examine communications that contain denunciations of alleged violations of the human rights set forth in the American Declaration.³⁵ The Commission is also competent to receive complaints

²⁶ *The Inter-American Court of Human Rights*, in BASIC DOCUMENTS, *supra* note 10, at 14.

²⁷ OAS CHARTER, *supra* note 12, at arts. 112, 150.

²⁸ Commission's Statute, *supra* note 19, at art. 2; Rules of Procedure of the Inter-American Commission on Human Rights, *approved* Dec. 4-8, 2000, art. 1(3) [hereinafter Commission's Rules of Procedure], *reprinted* in BASIC DOCUMENTS, *supra* note 10, at 147.

²⁹ Commission's Statute, *supra* note 19, at arts. 3, 6.

³⁰ OAS CHARTER, *supra* note 12, at arts. 112, 150.

³¹ American Declaration, *supra* note 16.

³² American Convention, *supra* note 10.

³³ Commission's Statute, *supra* note 19, at art. 1(2). Providing that:

For the purposes of the present Statute, human rights are understood to be: (a) The rights set forth in the American Convention on Human Rights, in relation to States Parties thereto; [and] (b) The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Id.

³⁴ Commission's Rules of Procedure, *supra* note 28.

³⁵ See Commission's Statute, *supra* note 19, at art. 20; Commission's Rules of Procedure, *supra* note 28, at arts. 23, 49-50; IACHR Advisory Opinion OC-10/89, *supra* note 18, at paras. 35-45; *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R. 3, OEA/ser. L./V./II.71, doc. 9 rev. 1, paras. 46-49 (1987).

regarding violations of other treaties within the inter-American system, including the Additional Protocol of San Salvador,³⁶ the Forced Disappearances Convention,³⁷ and the Convention of Belém do Pará.³⁸

In addition to receiving individual complaints of human rights violations, the Commission's functions and duties encompass a broad variety of other responsibilities, including conducting on-site investigations with the Member States' consent, providing Member States and other OAS organs with advice on human rights matters, undertaking promotional initiatives in the area of human rights protection, and litigating before the Inter-American Court of Human Rights.³⁹ As the Commission is a part-time body, it generally meets in two three-week-long

³⁶ Protocol of San Salvador, *supra* note 21, at art. 19(6). Providing that:

Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

Id.

³⁷ Inter-American Convention on Forced Disappearance of Persons, *supra* note 24, at art. XIII. Providing that:

For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statu[t]e [sic] and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures.

Id.

³⁸ See Convention of Belém do Pará, *supra* note 25, at art. 12. Providing that:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

Id.

³⁹ See Commission's Statute, *supra* note 19, at arts. 18–20; Commission's Rules of Procedure, *supra* note 28, at arts. 51–55, 69–74.

regular sessions per year,⁴⁰ during which time it must undertake a significant portion of its work, including convening hearings and approving reports in individual cases.

In 1979, the system's second human rights supervisory body, the Inter-American Court of Human Rights, was created following the coming into force of the American Convention. As defined under Article 62 of the American Convention, the Court's "contentious" or "compulsory" jurisdiction, which involves alleged violations of the rights of persons under the Convention by states that are parties thereto, comprises all cases concerning the interpretation and application of the American Convention provisions in respect of those states that have accepted the Court's jurisdiction.⁴¹ Cases can only be referred to the Court by the Commission or the state concerned once the Commission has decided upon the admissibility and preliminary merits of the matter in accordance with Articles 48 through 50 of the American Convention.⁴² The Court's judgments are expressly binding on those states that have accepted its contentious jurisdiction.⁴³ Pursuant to Article 64 of the American Convention, the Court is also competent to issue advisory opinions at the request of Member States of the Organization as well as certain OAS organs, including the Commission, regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the American states.⁴⁴

Like the Commission, the Inter-American Court is a part-time body comprised of seven judges who are elected in their individual capacity by the OAS General Assembly, and is supported by a full-time Secretariat located at the seat of the Court in San José, Costa Rica, presently comprised of a Secretary and approximately nine staff attorneys.⁴⁵ The Court conducts much of its work through two regular sessions each year, during which time the judges convene hearings and adopt judgments in individual cases, among other responsibilities.

It may be drawn from the above that the inter-American human rights system is characterized by disparities in the nature and extent of treaty obligations

⁴⁰ See Commission's Rules of Procedure, *supra* note 28, at art. 14.

⁴¹ American Convention, *supra* note 10, at art. 62; see also *Statute of the Inter-American Court of Human Rights*, OAS G.A. Res. 448, 9th Sess. (1979) [hereinafter IACHR Statute], reprinted in BASIC DOCUMENTS, *supra* note 10, at 181 (adopted by the General Assembly of the OAS at its 9th Regular Session, held in La Paz, Bolivia). As of June 2004, twenty-one OAS Member States had accepted the contentious jurisdiction of the Inter-American Court. See BASIC DOCUMENTS, *supra* note 10, at 59.

⁴² American Convention, *supra* note 10, at art. 61.

⁴³ *Id.* at art. 68(1) ("The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.").

⁴⁴ *Id.* at art. 64; Commission's Statute, *supra* note 19, at art. 2; Rules of Procedure of the Inter-American Court of Human Rights, approved Nov. 16-25, 2000, arts. 59-64, reprinted in BASIC DOCUMENTS, *supra* note 10, at 216-19.

⁴⁵ See Inter-American Court of Human Rights, http://www.fact-index.com/i/in/inter_american_court_of_human_rights.html (last visited Dec. 6, 2004).

undertaken by OAS Member States. The human rights obligations of Member States that have ratified the American Convention, and the Commission's corresponding supervisory authority, are primarily derived from the Convention. In contrast, the human rights commitments of Member States that have not ratified the American Convention and the Commission's jurisdiction in respect of those states flow from the OAS Charter and the American Declaration. Moreover, not every Member State that has ratified the American Convention has accepted the contentious jurisdiction of the Inter-American Court of Human Rights, including, for example, Jamaica and Grenada.⁴⁶ Distinctions between OAS Member States concerning their participation in the inter-American human rights system are further defined by language — of the twenty-four states that are parties of the American Convention, eighteen are Spanish-speaking, with Barbados, Dominica, Grenada, and Jamaica being the only English-speaking state parties.⁴⁷ In addition, while the eighteen Spanish-speaking state parties have also accepted the contentious jurisdiction of the Inter-American Court, only Barbados has done so of the English-speaking state parties.⁴⁸ The lack of uniformity in obligations undertaken by governments within the inter-American human rights system has presented challenges to the Commission and the Court in attempting to recognize and promote minimum and universally-applicable human rights standards among all OAS Member States, while at the same time respecting distinctions in the treaty commitments explicitly undertaken by each individual state. The Caribbean region, having all three categories of Member States, provides a microcosm of the system's legal disparities, which in turn affects the options available to the Commission and the Court in processing complaints that may raise issues common to some or all of the countries of the region, including the mandatory death penalty, as discussed below.

Also relevant for an accurate appreciation of the mandatory death penalty litigation in the inter-American system are the financial and other resource constraints faced by the system's supervisory organs. As indicated above, both the Commission and the Court operate on a part-time basis, and neither the Commissioners nor the Judges receive remuneration for their services, with the exception of limited stipends, travel allowances, and per diem payments relating

⁴⁶ See *supra* note 7 and accompanying text.

⁴⁷ Haiti and Suriname, as non-Spanish speaking Member States, have also ratified the Convention. The Republic of Trinidad & Tobago ratified the Convention in May 1991, but subsequently denounced the Convention in May 1998, becoming the first Member State to do so since the coming into force of the Convention in 1978. See BASIC DOCUMENTS, *supra* note 10, at 59.

⁴⁸ See *Barbados Accepts Court's Jurisdiction*, OAS NEWS, July–Aug. 2000, <http://www.oas.org/oasnews/2000/English/july-august2000/Main/art6.htm> (last visited Dec. 6, 2004).

to meetings or other functions of the Commission and Court.⁴⁹ As a consequence, members of the Commission and Court usually maintain their regular careers. Moreover, the Commission and the Court have faced, and continue to face, severe budgetary limitations in fulfilling their varied and growing responsibilities. The OAS Program Budget for 2004, adopted by the OAS General Assembly on June 10, 2003, authorized a total of \$3,429,900 for the Inter-American Commission on Human Rights and \$1,391,300 for the Inter-American Court of Human Rights, or 4% and 1.6%, respectively, of the Organization's total regular budget of \$84,744,000.⁵⁰ With these limited resources, the Commission and Court are expected to fulfill their broad and demanding mandates to promote and protect the fundamental rights of the hemisphere's approximate 869 million inhabitants.⁵¹ In comparison, the funds appropriated by the Council of Europe for the work of the European Court of Human Rights for 2004 amounted to 39,190,000 Euros (approximately U.S. \$47,459,080), or 21.7% of the European Union's total ordinary budget for 2004 of 180,500,000 Euros (approximately U.S. \$218,585,455).⁵² Comparisons between the two systems must be qualified by significant structural and other distinctions, including the operation of the European Court as a full-time body with forty-five judges, a Registry staff of over 300, and an annual registration of over 14,000 applications.⁵³ Nevertheless, the disparity in funding between the inter-American and European systems is striking, particularly in light of the fact that both systems have historically encompassed comparable populations and that the functions of the Commission and Court extend beyond those of the European Court to include promotional and advisory responsibilities.

Indeed, OAS Member States have acknowledged the need to strengthen the inter-American human rights system through, inter alia, a "substantial increase in

⁴⁹ See Commission's Statute, *supra* note 19, at art. 13; IACHR Statute, *supra* note 41, at art. 17.

⁵⁰ *Program-Budget of the Organization for 2004; Quotas and Contributions to FEMCIDI for 2004*, OAS G.A. Res. 1974, 33d Sess. (2003), available at http://www.oas.org/juridico/english/ga03/agres_1974.htm.

⁵¹ U.N. DEP'T OF ECONOMIC & SOCIAL AFFAIRS, WORLD POPULATION PROSPECTS, THE 2002 REVISION 1, U.N. Doc. ESA/P/WP.180 (2003) (estimating the 2003 total population of Northern America at 326 million, and of Latin America and the Caribbean at 543 million), available at <http://www.un.org/esa/population/publications/wpp2002/WorldPop2002.PDF>.

⁵² *Resolution Res (2003)24 concerning the 2004 Ordinary Budget*, Council of Eur. Comm. of Ministers (adopted by the Committee of Ministers on Nov. 26, 2003, at the 862d meeting of the Ministers' Deputies), available at <http://wcm.coe.int/ViewDoc.jsp?id=93263&Lang=en>. Conversion was based on the June 22, 2004 exchange rate of US \$1.00 to 0.825764 Euros. See <http://www.x-rates.com>.

⁵³ See *The European Court of Human rights: Historical Background, Organisation and Procedure*, available at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm>; *Essential Guides: The European Court of Human Rights*, <http://www.bbc.co.uk/crime/law/echr.shtml>.

the budget of the Inter-American Court of Human Rights and that of the Inter-American Commission on Human Rights so that, within a reasonable time, the organs of the system may address their growing activities and responsibilities.”⁵⁴ However, little real progress has been made toward this objective. The President of the Inter-American Commission noted at the opening of the Commission’s 119th regular session in February 2004, for example, that the Commission received twelve new mandates during the General Assembly’s regular session in 2003, and yet the Commission’s regular budget had, in real terms, been reduced.⁵⁵ Notwithstanding these expressions of concern and similar statements made on behalf of the Inter-American Court of Human Rights, the political bodies of the OAS have indicated as recently as March 2004 that achieving short-term increases in the budgets of the Commission and the Court “does not appear to be a realistic goal.”⁵⁶ The source of this problem is principally a funding crisis faced by the OAS as a whole — despite a significant increase in the number of mandates given to the Organization, there has not been an increase in the Member State quotas since 1996.⁵⁷ As a consequence, the Commission and Court have had to seek and heavily rely upon external funding sources in order to function adequately.

In light of the broader context of the structural characteristics and limitations of the inter-American system outlined above, the analysis will now turn to the development of doctrine and jurisprudence within the system on the issue of capital punishment.

⁵⁴ *Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas*, OAS G.A. Res. 1925, 33d Sess., para. 2(a) (2003) [hereinafter OAS General Assembly Plan], available at <http://www.oas.org/main/main.asp?SLang=E&sLink=../documents/eng/documents.asp>.

⁵⁵ Dr. José Zalaquett, Speech of the President of the Inter-American Commission on Human Rights at the Inauguration of the 119th Regular Session (Feb. 23, 2004), available at <http://www.cidh.org/Discursos/02.23.04sp.htm>.

⁵⁶ *Report of the Chair of the Committee on Administrative and Budgetary Affairs on the Outcome of the Studies Conducted by the Committee, Pursuant to the Mandates of the General Assembly Resolutions 1917 (XXXIII-O/03), Observations and Recommendations on the Annual Report of the Inter-American Commission on Human Rights*, OAS Permanent Council, Committee on Juridical and Political Affairs, Summary of Meeting of Mar. 11, 2004, OEA/ser. G./CP/CAJP/SA.403/04, para 5 (Mar. 30, 2004).

⁵⁷ *Observations and Recommendations on the Annual Report of the Inter-American Commission on Human Rights*, OAS G.A. Res. 1917, 33d Sess., para. 5 (2003), available at <http://www.oas.org/main/main.asp?sLang=E&sLink=../documents/eng/documents.asp>. See also OAS General Assembly Plan, *supra* note 54, at para. 4(a).

B. The Inter-American System and the Death Penalty

As with the extent of treaty obligations assumed by OAS Member States, the treatment of the death penalty in the inter-American human rights system reflects a division between the practices of Spanish and English-speaking countries in the hemisphere. Only two Spanish-speaking states retain the death penalty as part of their laws for ordinary crimes: Cuba and Guatemala.⁵⁸ In contrast, a majority of the English-speaking states maintain the death penalty in their laws, including Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and the United States of America.⁵⁹ Partly as a consequence of this distinction in approach, the human rights instruments of the system and the jurisprudence of the Commission and Court have reflected both retentionist and abolitionist tendencies in the hemisphere.

The American Convention, like the International Covenant on Civil and Political Rights, does not prohibit the use of the death penalty by states that retain capital punishment.⁶⁰ Rather, Article 4 of the Convention permits the application of capital punishment by states that have not abolished the death penalty, but subjects the use of the penalty to certain restrictions and prohibitions:

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

⁵⁸ See Amnesty International, *Facts and Statistics on the Death Penalty, Retentionist Countries*, <http://web.amnesty.org/pages/deathpenalty-countries-eng> (last visited Dec. 6, 2004).

⁵⁹ *Id.*

⁶⁰ American Convention, *supra* note 10.

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.⁶¹

In its seminal Advisory Opinion OC-3/83 on Restrictions to the Death Penalty under Articles 4(2) and 4(4) of the Convention,⁶² the Inter-American Court of Human Rights adopted a restrictive approach to Article 4 of the Convention. The opinion stated that "without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance."⁶³ Additionally, the Court noted the following restrictions prescribed in the Article:

Thus, 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.⁶⁴

The Commission has interpreted the right to life protected under Article I of the American Declaration in a similar manner. Article I, unlike Article 4 of the American Convention, does not explicitly mention the death penalty, providing simply that "[e]very human being has the right to life, liberty and the security of

⁶¹ *Id.* at art. 4. *See also* Protocol to Abolish the Death Penalty, *supra* note 10, at art. 4. In accordance with Article 4, the Protocol enters "into force among the States that ratify or accede to it when they deposit their respective instruments of ratification or accession with the General Secretariat of the Organization of American States." As of June 2004, eight OAS Member States were parties to the treaty.

⁶² Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3 (1983) [hereinafter Restrictions to the Death Penalty].

⁶³ *Id.* at para. 57.

⁶⁴ *Id.* at para. 55.

his person.”⁶⁵ Based in part upon the drafting history for the Declaration, however, the Commission has interpreted Article I as neither prohibiting use of the death penalty per se, nor exempting capital punishment from the Declaration’s standards and protections altogether.⁶⁶ Rather, the Commission has found that Article I of the Declaration prohibits the application of the death penalty when doing so would result in an arbitrary deprivation of life, and has referred to the provisions of Article 4 of the American Convention as embodying guidelines as to when the use of capital punishment may be considered arbitrary.⁶⁷

The Commission has in turn identified several deficiencies that will render an execution arbitrary, and thus contrary to Article I of the Declaration. These include failing to limit the death penalty to crimes of exceptional gravity prescribed by pre-existing law,⁶⁸ denying a defendant strict and rigorous judicial guarantees of a fair trial,⁶⁹ and exhibiting a notorious and demonstrable diversity of practice within a Member State that results in inconsistent application of the death penalty for the same crimes.⁷⁰

A closer analysis of the Inter-American Commission’s doctrine on capital punishment reveals two historical lines of development. The first involves interpretations of Article 4 of the Convention in respect of Member States of the Caribbean, which, until the mandatory death penalty cases of the mid to late 1990s, did not give rise to a particularly deep or insightful body of case law.⁷¹ The second line of death penalty cases addressed by the Commission involves complaints filed

⁶⁵ American Declaration, *supra* note 16, at art. I.

⁶⁶ See *Garza v. United States*, Case 12.243, Inter-Am. C.H.R. 52, OEA/ser. L./V./II.111, doc. 20 rev., paras. 90–91 (2001), available at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm>.

⁶⁷ See e.g., *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R. 3, OEA/ser. L./V./II.71, doc. 9 rev. 1, paras. 46–49 (1987); *Andrews v. United States*, Case 11.139, Inter-Am. C.H.R. 57, OEA/ser. L./V./II.98, doc. 6 rev., paras. 175–77 (1996), available at <http://www.cidh.org/annualrep/97eng/usa11139.htm>.

⁶⁸ See *Andrews v. United States*, Case 11.139, Inter-Am. C.H.R. 57, OEA/ser. L./V./II.98, doc. 6 rev., paras. 175–77 (1996), available at <http://www.cidh.org/annualrep/97eng/usa11139.htm>.

⁶⁹ See, e.g., *id.* at para. 172 (finding that in capital punishment cases, states have an “obligation to observe rigorously all the guarantees for an impartial trial”); *Thomas v. Jamaica*, Case 12.183, Inter-Am. C.H.R. 127, OEA/ser. L./V./II.114, doc. 5 rev., paras. 137–46 (2001), available at <http://www.cidh.org/annualrep/2001eng/jamaica12183.htm>.

⁷⁰ See e.g., *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R. 3, OEA/ser. L./V./II.71, doc. 9 rev. 1, para. 61 (1987).

⁷¹ For example, between 1980 and 1996, only eight reports were published by the Commission in respect of English-speaking Caribbean countries, which were comprised almost entirely of complaints concerning due process protections in death penalty proceedings in Jamaica. For a more detailed discussion of the pre-mandatory death penalty cases arising in the Caribbean in the mid- to late-1980’s, see *infra* notes 106–14 and accompanying text.

against the United States under the American Declaration. These complaints have raised a variety of discrete issues, including the execution of juvenile offenders,⁷² racial discrimination in the capital prosecution process,⁷³ and, more recently, due process issues pertaining to non-compliance with the Vienna Convention on Consular Relations on the execution of foreign nationals⁷⁴ and the introduction of evidence of unadjudicated crimes at the sentencing phase of criminal proceedings.⁷⁵

In addition to its merits decisions on death penalty petitions arising out of the United States and the Caribbean, the Commission has also developed a practice of adopting "precautionary measures" pursuant to Article 25 of its Rules of Procedure. These measures favor the capital petitioner whose complaints meet the requirements of the Rules of Procedure and are transmitted to the Member State concerned, in effect acting as an injunction to avoid frustrating the *restitutio in integrum* of the condemned prisoner and thereby preventing irreparable harm.⁷⁶

⁷² Domingues v. United States, Case 12.285, Inter-Am. C.H.R. 62, OEA/ser. L./V./II.117, doc. 1 rev. 1 (2002), available at <http://www.cidh.org/annualrep/2002eng/usa.12285.htm>; Beazley v. United States, Case 12.412, Inter-Am. C.H.R. 101, OEA/ser. L./V./II.118, doc. 5 rev. 2 (2003), available at <http://www.cidh.org/annualrep/2003eng/usa.12.412.htm>; Thomas v. United States, Case 12.240, Inter-Am. C.H.R. 100, OEA/ser. L./V./II.118, doc. 5 rev. 2 (2003), available at <http://www.cidh.org/annualrep/2003eng/usa.12240.htm>; Roach & Pinkerton v. United States, Case 9647, Inter-Am. C.H.R. 3, OEA/ser. L./V./II.71, doc. 9 rev. 1 (1987), available at <http://www.cidh.org/annualrep/86.87eng/EUU9647.htm>.

⁷³ See, e.g., Andrews v. United States, Case 11.139, Inter-Am. C.H.R. 57, OEA/ser. L./V./II.98, doc. 6 rev., paras. 175–77 (1996), available at <http://www.cidh.org/annualrep/97eng/usa11139.htm>; Celestine v. United States, Case 10.031 Inter-Am. C.H.R. 23, OEA/ser. L./V./II.77, doc. 7 rev. 1 (1989), available at <http://www.cidh.org/annualrep/89.90eng/usa10.031.htm>.

⁷⁴ See, e.g., Fierro v. United States, Case. 11.331, Inter-Am. C.H.R. 99, OEA/ser. L./V./II.118, doc. 5 rev. 2 (2003) available at <http://www.cidh.org/annualrep/2003eng/usa.11331.htm>; Villareal v. United States, Case 11.753, Inter-Am. C.H.R. 108, OEA/ser. L./V./II.111 (2000), available at <http://www.cidh.org/annualrep/2000eng/chapteriii/admissible/usa11.753.htm>.

⁷⁵ See Garza, Case 12.243, Inter-Am. C.H.R. 52, at paras. 90–91.

⁷⁶ Commission's Rules of Procedure, *supra* note 28, art. 25. Providing that:

1. In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.

2. If the Commission is not in session, the President, or, in his or her absence, one of the Vice-Presidents, shall consult with the other members, through the Executive Secretariat, on the application of the provision in the previous paragraph. If it is not possible to consult within a reasonable period of time under the circumstances, the President or, where appropriate, one of the Vice-President [sic] shall take the decision on behalf of the Commission and shall so inform its

Through these precautionary measures, the Commission requests that the State concerned stay the execution of a petitioner until the Commission has an opportunity to investigate his or her complaints.⁷⁷ Indeed, the Commission, similar to other international adjudicative bodies, has held that OAS Member States are subject to an international legal obligation to comply with requests for precautionary measures where, as in capital cases, the measures are considered essential to preserving the Commission's mandate under the OAS Charter.⁷⁸

These developments in the case law of the Inter-American Commission have been accompanied by several significant decisions of the Inter-American Court of Human Rights in connection with the use of capital punishment. Advisory opinions issued by the Court concerning the death penalty include Advisory Opinion OC-3/83,⁷⁹ in which the Court addressed the permissibility of extending the death penalty to new crimes that had not been subject to that punishment when the Convention entered into force for a particular state. Additionally, in Advisory Opinion OC-14/94,⁸⁰ the Commission asked the Court to address the international legal implications for a state that reintroduces the death penalty after it has been abolished in contravention of Article 4(3) of the Convention. In Advisory Opinion OC-16/99,⁸¹ the Court analyzed the due process implications of a state's failure

members.

3. The Commission may request information from the interested parties on any matter related to the adoption and observance of the precautionary measures.

4. The granting of such measures and their adoption by the State shall not constitute a prejudgment on the merits of a case.

Id.

⁷⁷ For a yearly summary of the precautionary measures adopted by the Commission between 1996–2002, including measures in death penalty cases in the United States, the Caribbean region, and Guatemala, see chapter III in each of the Commission's Annual Reports for the years 1996–2003.

⁷⁸ See, e.g., *Garza*, Case 12.243, Inter-Am. C.H.R. 52, paras. 90–91 (citing *James v. Trinidad & Tobago*, Order for Provisional Measures of Aug. 29, 1998, Inter-Am. Ct. H.R. (ser. E) No. 2 (1998)); Inter-Am. C.H.R., at 317 (1998); Case Concerning the Vienna Convention on Consular Relations (*F.R.G. v. U.S.*), 1999 I.C.J. 104 (Mar. 3), paras. 22–28 (order granting provisional measures); *Öcalan v. Turkey*, No. 46221/99, 125 Eur. Ct. H.R. (2003) (order granting interim measures pursuant to rule 39 of the European Court of Human Rights); *Piandiong v. Philippines*, Case 869/1999, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/70/D/869/1999, paras. 5.1–5.4 (2000), available at <http://www.unhchr.ch/tbs/doc.nsf/0/8498694e4ee98082ac12569eb0034f1bb?OpenDocument>.

⁷⁹ Restrictions to the Death Penalty, *supra* note 62.

⁸⁰ International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14 (1994).

⁸¹ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (1999).

to comply with Article 36 of the Vienna Convention on Consular Relations in respect of a foreign national who has been tried and convicted of a capital crime and sentenced to death. Additionally, on June 21, 2002, the Court issued its first judgment on merits and reparations in a contentious proceeding in the case of *Hilaire, Constantine & Benjamin v. Trinidad & Tobago*.⁸² This case addressed the compatibility of the mandatory death penalty with the American Convention, among other issues connected with capital proceedings, and is the subject of further discussion below.

Historically, therefore, the inter-American human rights supervisory bodies have been active in grappling with the issue of the death penalty in an international context. It was not until the mid-1990s, however, that the issue of capital punishment became a critical challenge to the inter-American system in the Caribbean region.

II. THE DEATH PENALTY IN THE CARIBBEAN REGION – CRISIS IN THE 1990s

Commonwealth Caribbean Member States of the OAS have played a longstanding but relatively uncontroversial role in the inter-American human rights system in comparison with the struggles against military dictatorships, armed conflicts, and other deep-seated problems that the Inter-American Commission and Court have historically faced in other parts of the hemisphere. Beginning in the mid-1990s, this situation changed when the death penalty issue in the Caribbean became a matter of enhanced scrutiny and debate on several fronts: in the discourse of local politics; in litigation before domestic courts; in foreign relations, particularly between Caribbean states and Great Britain; and in the international organizations of which the states are members.⁸³ The convergence of these developments set the stage for an unprecedented political and juridical struggle over the conditions under which capital punishment would continue to be utilized in the Caribbean region. It also resulted in an urgent situation for the inter-American human rights system, which became a central arena for this struggle.

A. Increased Use of the Death Penalty and Significant Decisions of the Judicial Committee of the Privy Council

Beginning in the 1990s, the Caribbean region called for a more aggressive use of the death penalty, following a period in which the punishment was applied relatively infrequently. This increased endorsement of capital punishment was

⁸² *Hilaire, Constantine & Benjamin v. Trinidad & Tobago*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002).

⁸³ *Pratt & Morgan v. Attorney Gen. for Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993) (appeal taken from Jam.), available at <http://www.privacy-council.org.uk/output/Page171.asp>.

associated with the social and economic effects of rising crime rates throughout the Caribbean region and the adoption of more aggressive anti-crime programs.⁸⁴

Countering this upsurge in the invocation of the death penalty was a coordinated strategy developed by barristers and solicitors in London, together with associates in some Caribbean states, to challenge aspects of the penalty through litigation at the domestic and international levels. Among the challenges raised by London firms was the “death row phenomenon” — concerning the effects of prolonged incarceration on death row, as well as the mandatory nature of the death penalty under the legislation of most Caribbean jurisdictions.⁸⁵ In some instances, judicial challenges to the death penalty were complicated by the existence of “saving clauses” in the constitutions of most Commonwealth Caribbean states, which were designed to exempt pre-independence laws, including those governing capital punishment, from challenge for being contrary to provisions of the new Bills of Rights in those countries.⁸⁶

The efforts of the London attorneys resulted in a series of Judicial Committee of the Privy Council decisions that had a profound impact upon the standards and procedures for applying the death penalty in the region, including the role of international human rights instruments and supervisory bodies. The most salient of these decisions, which are reviewed briefly below, include *Pratt & Morgan v.*

⁸⁴ See David A. C. Simmons, *Conflicts of Law and Policy in the Caribbean – Human Rights and the Enforcement of the Death Penalty – Between a Rock and a Hard Place*, 9 J. TRANSNAT'L L. & POL'Y 263, 266 (2000). See also Amnesty International, *The Death Penalty Worldwide: Developments in 1999*, AI Index: ACT50/004/2000 (Apr. 2000) (noting that in June 1999 Trinidad & Tobago executed nine people in the first executions in that country in five years); Amnesty International, *Death Penalty News: December 1996*, AI Index: ACT53/001/1997 (Jan. 1997) (indicating that Jamaica was expected to resume executions after a gap of eight years, based upon comments by the Minister of National Security of that country to Parliament on October 29, 1996, and that a new crime-fighting plan would be implemented due to the high level of crime and violence in the country).

⁸⁵ See Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 EUR. J. OF INT'L L. 433 (2000), available at <http://ejil.oupjournals.org/cgi/content/abstract/11/4/833>.

⁸⁶ See NEWTON, *supra* note 1, at 37–38 (Newton notes that the constitutions of Barbados, the Bahamas, Belize, Guyana, Jamaica, and Trinidad & Tobago contain “savings clauses,” and that the Judicial Committee of the Privy Council, still the highest court of appeal for all such jurisdictions except Guyana, has demonstrated a mixed willingness to limit the extent to which pre-independence laws can be shielded from review under the Bills of Rights. In a series of recent cases, the Judicial Committee of the Privy Council has had occasion to consider the constitutional validity of these savings clauses.); see *infra* note 276 and accompanying text; Saul Lehrfreund, *International Trends and the “Mandatory Death Penalty” in the Commonwealth Caribbean*, 1 OXFORD U. COMMONWEALTH L. J. 1171 (2001).

Attorney General for Jamaica,⁸⁷ *Thomas & Hilaire v. Baptiste*,⁸⁸ and *Lewis v. Attorney General of Jamaica*.⁸⁹

Among the most controversial decisions of the Judicial Committee of the Privy Council concerning the application of the death penalty in the Caribbean region was its 1993 judgment in *Pratt & Morgan v. Attorney General for Jamaica*.⁹⁰ In *Pratt & Morgan*, a majority of the Lords hearing the case accepted the doctrine of the "death row phenomenon,"⁹¹ finding that the execution of the death sentence after an unconscionable delay would constitute a contravention of a constitutional provision protecting the right to humane treatment except where the delay had resulted from the fault of the defendant.⁹² According to the Privy Council, capital punishment can only be retained if it is carried out with all possible expedition. Moreover, the Council specifically opined that if an execution takes place more than five years after sentencing, there will be "strong grounds for believing that the delay is such as to constitute inhuman degrading punishment or other treatment."⁹³ Of particular relevance to the inter-American human rights system, the Privy Council held that where defendants pursue claims before international bodies such as the UN Human Rights Committee ("UNHRC") or the Inter-American Commission, the five-year time period suggested by the court included a period of eighteen months in which those claims are to be determined.⁹⁴ In reaching this conclusion, the Privy Council observed that the UNHRC and, by implication, the Inter-American Commission, did not consider its role to be that of a further appellate court:

It therefore appears to their Lordships that provided there is in [the] future no unacceptable delay in the domestic proceedings[,] complaints to the UNHRC from Jamaica should be infrequent and when they do occur it should be possible for the Committee to dispose of them with reasonable dispatch and at most within eighteen months.⁹⁵

⁸⁷ *Pratt & Morgan v. Attorney Gen. for Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993), available at <http://www.privacy-council.org.uk/output/Page171.asp>.

⁸⁸ *Thomas & Hilaire v. Baptiste*, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1 (P.C.) (appeal taken from Trin. & Tobago), available at <http://www.privacy-council.org.uk/output/Page170.asp>.

⁸⁹ *Lewis v. Attorney Gen. of Jamaica*, [2000] 3 W.L.R. 1785, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.), available at <http://www.privacy-council.org.uk/output/Page169.asp>.

⁹⁰ *Pratt & Morgan*, [1994] 2 A.C. 1, 4 All E.R. 769.

⁹¹ See also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), para. 92 (1989).

⁹² *Pratt & Morgan*, [1994] 2 A.C. 1, 4 All E.R. 769.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

As discussed below, this decision drastically affected relations between the Caribbean States and both the UNHRC and the Inter-American Commission by pressing these bodies to accelerate their determination of cases, notwithstanding their increasing case loads and limited resources.

The next Privy Council judgment having a significant impact upon the processing of capital proceedings before both the domestic courts and international human rights bodies was its January 27, 1999 order in the Trinidadian case of *Thomas & Hilaire v. Baptiste*, the reasons for which were subsequently issued on March 17, 1999.⁹⁶ In this decision, the Privy Council augmented the links between the inter-American human rights system and domestic legal restraints upon Caribbean Member States in implementing the death penalty by precluding the Republic of Trinidad and Tobago from executing condemned prisoners until their complaints had been determined before the inter-American system. According to the Council, “[f]or the Government to carry out the sentences of death before the [inter-American] petitions have been heard would deny the appellants their constitutional right to due process.”⁹⁷ As a consequence, the Privy Council ordered that the carrying out of the said death sentences be stayed, until the applicants’ petitions to the Commission had been determined and any Commission report or Inter-American Court ruling had been considered by the authorities in Trinidad and Tobago. The Privy Council also indicated that the stay would apply to other prisoners under sentence of death in Trinidad and Tobago who had lodged petitions under the American Convention, which at the time included six other condemned prisoners, and eventually expanded to encompass thirty-eight death row inmates in that State.⁹⁸

In its reasons for judgment, the Privy Council acknowledged arguments proffered by the State that in common law systems derived from the British model, international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation.⁹⁹ The Council found,

⁹⁶ *Thomas & Hilaire*, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1.

⁹⁷ *Id.*

⁹⁸ See *James v. Trinidad & Tobago*, Order for Provisional Measures, Inter-Am. Ct. H.R. (ser. E) Nos. 1–3 (1998).

⁹⁹ *Thomas & Hilaire*, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1. Stating that:

Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty, in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the Courts give effect to the domestic legislation, not

however, that this principle did not preclude giving effect to the inter-American petition system by way of the act of the Executive Branch in ratifying the American Convention. In the Privy Council's view, the ratification of the American Convention by the Executive extended the due process protections under the Trinidad and Tobago Constitution and common law to condemned inmates' proceedings before the inter-American system. Therefore, the stays were grounded in the enforcement of domestic law. The Privy Council explained that:

the appellant's claim does not infringe the principle which the Government invokes. The right for which [the appellants] contend is not the particular right to petition the Commission or even to complete the particular process which they initiated when they lodged their petitions. It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(a) of the Constitution.¹⁰⁰ The appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution.¹⁰¹

With these words, the Privy Council articulated an innovative approach to the interconnection between international human rights mechanisms and the domestic criminal processes of states having a common law tradition, which afforded

to the terms of the treaty. The many authoritative statements to this effect are too well known to need citation.

Id.

¹⁰⁰ TRIN. & TOBAGO CONST. § 4(a). The constitution provides:

It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely-(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law.

Id., available at <http://www.ttparliament.org/docs/constitution/ttconst.pdf>.

¹⁰¹ *Thomas & Hilaire*, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1.

domestic constitutional protection to the procedures before the supervisory mechanisms created under the human rights instruments to which the state was subject.

The Privy Council also rejected the government's contention that the process before the inter-American system was not a legal process and therefore not subject to the constitutional requirement of due process. In so finding, the Privy Council recognized that, as Trinidad and Tobago had accepted the contentious jurisdiction of the Inter-American Court of Human Rights, a defendant's petitions might be referred to the Inter-American Court, and noted that the Inter-American Court's rulings are "binding" upon Trinidad and Tobago according to the terms of the American Convention.¹⁰²

In *Thomas & Hilaire*, the Privy Council also revisited its pronouncement in *Pratt & Morgan* of a "five-year" maximum period. Apparently recognizing the limited capacity of international human rights systems, the Privy Council concluded that, in hindsight, it may have been "unduly optimistic"¹⁰³ in prescribing an eighteen-month period inclusive of proceedings before the UNHRC and the Inter-American Commission. As a consequence, the Council held that if more than eighteen months elapse between the date that a condemned prisoner lodges a petition to the Commission and its final determination, an appropriate remedy would be to add the excess time to the eighteen-month period allowed for the completion of the international processes in death penalty cases. In effect, the Privy Council considered that the delay before the international process, while it may be taken into account by the Advisory Committee on the Power of Pardon, should not prevent the death sentence from being carried out.¹⁰⁴ The change in the Privy Council's approach also appears to have been prompted by a reevaluation of the legal basis for state responsibility in cases of delay, with the Law Lords observing:

[T]he ratio of *Pratt*, that a state which wishes to retain capital punishment must accept responsibility of ensuring that the appellate system is not productive of excessive delay, is not

¹⁰² *Id.* It is notable, however, that the Privy Council subsequently granted stays in favor of condemned prisoners in states that had not accepted the Court's contentious jurisdiction. In *Lewis*, for example, the Privy Council extended the reasoning of *Thomas & Hilaire* to Jamaica, by concluding that the "protection of the law" clause under the Jamaican Constitution, like the "due process of law" clause under the Trinidad & Tobago Constitution, required the Jamaican government to stay a condemned prisoner's execution until the reports of the human rights bodies to which the prisoner had petitioned have been received and considered; see *Lewis*, [2000] 3 W.L.R. 1785, [2001] 2 A.C. 50. It therefore appears that access to the Court's contentious procedure is not considered a condition precedent to the availability of injunctive relief for defendants who petition the inter-American system.

¹⁰³ *Thomas & Hilaire*, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1.

¹⁰⁴ *Id.*

appropriate to international legal processes which are beyond the control of the state concerned. Prompt determination by human rights bodies of applications from men condemned to death is more likely to be achieved if delay in dealing with them does not automatically lead to commutation of the sentence.¹⁰⁵

The third significant Judicial Committee of the Privy Council decision addressing the implementation of capital punishment in light of applicable human rights standards and mechanisms was *Lewis v. Attorney General of Jamaica*.¹⁰⁶ In this case, a majority of the judges considering the matter concluded that the executive's authority to grant the Prerogative of Mercy, exercised in Jamaica by the Privy Council of Jamaica, must operate under "fair and proper" procedures.¹⁰⁷ In reaching this conclusion, the Board diverted from its previous case law according to which the exercise of the Prerogative of Mercy was considered purely discretionary and therefore not subject to judicial review.¹⁰⁸

The Privy Council found that fair and proper procedures in the mercy process require, inter alia, that a condemned individual be given sufficient notice of the date on which the competent authorities will consider his or her case, be afforded the opportunity to make representations in support of his or her case, and receive copies of the documents that will be considered by the competent authorities in making a decision on whether to exercise the Prerogative of Mercy in favor of the individual.¹⁰⁹ Moreover, the Judicial Committee held that when the report of the international human rights bodies is available it should be considered, and if the Jamaican Privy Council does not accept the report an explanation why should be given.¹¹⁰ Further, the Privy Council required Jamaica, like Trinidad, to stay the execution of condemned prisoners until the reports of the human rights bodies to which the prisoner has petitioned have been received and considered.¹¹¹ Concerning the role of international processes vis-à-vis the time limit in *Pratt & Morgan*, the Privy Council appeared to revert to its previous position that both domestic and international procedures must be completed within five years of sentencing, but conditioned this standard by acknowledging that the international bodies concerned "meet infrequently and are undermanned"¹¹² and accordingly that "it may be that

¹⁰⁵ *Id.* (emphasis omitted).

¹⁰⁶ *Lewis*, [2000] 3 W.L.R. 1785, [2001] 2 A.C. 50.

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., *de Freitas v. Benny*, [1975] 3 W.L.R. 388, [1976] A.C. 239 (P.C. 1975) (appeal taken from Trin. & Tobago); *Reckley v. Minister of Pub. Safety & Immigration*, [1996] 2 W.L.R. 281, [1996] U.K.P.C. 1, [1996] A.C. 517 (appeal taken from Bah.).

¹⁰⁹ *Lewis*, [2000] 3 W.L.R. 1785, [2001] 2 A.C. 50.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

a few months over the eighteen months will have to be accepted.”¹¹³ The Council ultimately determined that the death sentences of the six appellants should be set aside; in four of the cases, the five-year period had already expired, in the remaining two cases, it was inevitable that the five years would be surpassed by the time the appropriate remedial steps were taken through the domestic mercy process in accordance with the Council’s decision.¹¹⁴

Therefore, beginning with the *Pratt & Morgan* decision, the Judicial Committee of the Privy Council issued a series of judgments over a seven-year period that radically changed the conditions governing the application of the death penalty in the Caribbean by requiring that executions be carried out, in general, within five years of sentencing. This five-year period is inclusive of the time needed for pursuing procedures before international bodies such as the Commission. The Council, in addition, prohibited the execution of condemned inmates while their complaints were pending before pertinent international human rights bodies such as the Commission, and mandated that the Prerogative of Mercy be regulated through procedures that are fair and proper.¹¹⁵

The decisions of the Privy Council in *Pratt & Morgan* and subsequent death penalty cases were met with intense condemnation on the part of Caribbean governments. Critics contended that the decisions illustrated the Privy Council’s lack of appreciation of the criminal justice challenges faced by governments in the Caribbean region, and that the combined effect of the judgments amounted to the *de facto* abolition of the death penalty.¹¹⁶ The frustration of Caribbean governments was exacerbated by the contemporaneous increase in the number of death penalty petitions lodged against them with the inter-American system, as discussed below, which have placed additional pressure on the Commission and the Court to develop expeditious strategies for managing the complaints.¹¹⁷

B. Impact of Domestic Developments Concerning the Death Penalty upon the Inter-American Human Rights System

Commonwealth Caribbean Member States have played a long-standing role in the inter-American system. Caribbean states were among the first to ratify the American Convention, with Jamaica and Grenada ratifying in 1978 and Barbados in 1981.¹¹⁸ Indeed, Grenada’s ratification brought the American Convention into force. Caribbean representatives have also participated in the membership of

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Simmons, *supra* note 84, at 266.

¹¹⁷ See *infra* notes 123–24 and accompanying text.

¹¹⁸ American Convention, *supra* note 10.

the Inter-American Commission and Court for many years. At present, the Commission's composition includes Clare K. Roberts from Antigua and Barbuda, who commenced his term in 2002. Commissioner Roberts was preceded by Peter Laurie of Barbados, who served from 2000 to 2002, completing the term of Sir Henry Forde, another Barbadian, who commenced his term in 1998. Commissioner Forde in turn was preceded by John S. Donaldson of Trinidad and Tobago, who served from 1994 to 1997, Patrick Lipton Robinson of Jamaica, who served from 1988 to 1995, and Oliver Jackman of Barbados, who served on the Commission from 1986 until 1993 when he was elected a Judge of the Inter-American Court of Human Rights.¹¹⁹

At the same time, the Member States of the Caribbean region have not, historically, been the source of voluminous litigation before the Commission. Between 1980 and 1996, for example, only eight reports were published by the Commission in respect of English-speaking Caribbean countries, which were comprised almost entirely of complaints concerning due process protections in death penalty proceedings in Jamaica.¹²⁰ The Commission found violations of the American Convention in only one of these cases, that of Clifton Wright.¹²¹ In the remaining cases, the Commission found that the petitioners' complaints of due process were not well-founded, while at the same time recommending that the state suspend the executions and commute the death sentences of the defendants concerned.¹²²

¹¹⁹ See *Previous Members of the IACHR*, <http://www.cidh.org/Previous%20members.htm> (last visited Dec. 6, 2004).

¹²⁰ *Riley v. Jamaica*, Case 3102, Inter-Am. C.H.R. 25, OEA/ser. L./V./II.57, doc. 6 rev. 1 (1981); *Thomas v. Jamaica*, Case 3115, Inter-Am. C.H.R. 24, OEA/ser. L./V./II.57, doc. 6 rev. 1 (1981); *Morris v. Jamaica*, Case 3552, Inter-Am. C.H.R. 60, OEA/ser. L./V./II.61, doc. 22 rev. 1 (1982) (referencing identical unreported resolutions in 8 additional cases, 3553, 3554, 7500, 7503, 7506, 7507, 7509, and 7514); *Edwards v. Jamaica*, Case 7604, Inter-Am. C.H.R. 7, OEA/ser. L./V./II.63, doc. 10 (1984); *Pratt v. Jamaica*, Case 9054, Inter-Am. C.H.R. 13, OEA/ser. L./V./II.66, doc. 10 rev. 1 (1984); *Champagne v. Jamaica*, Case 7505, Inter-Am. C.H.R. 27, OEA/ser. L./V./II.68, doc. 8 rev. 1 (1986); *Cuthbert v. Jamaica*, Case 9190, Inter-Am. C.H.R. 28, OEA/ser. L./V./II.68, doc. 8 rev. 1 (1986); *Wright v. Jamaica*, Case 9260, Inter-Am. C.H.R. 29, OEA/ser. L./V./II.74, doc. 10 rev. 1 (1988).

¹²¹ *Wright*, Case 9260, Inter-Am. C.H.R. 29 (1988) (The Commission found violations of the right to judicial protection under Article 25 of the Convention because evidence as to the physical impossibility of the petitioner having committed the crime, namely the fact that he was in custody at the time the murder was committed, was discovered before the appeal to the Privy Council but was not considered by any courts. The Commission recommended Jamaica investigate and provide the victim with a judicial remedy to correct the inconsistency.).

¹²² See, e.g., *Morris*, Case 3552, Inter-Am. C.H.R. 60 (1982). The Commission resolved:

1. A study of the notes of evidence of the Jamaican Courts and the conduct of the trial of Davlin Morris show that the rules of criminal procedure of Jamaica were observed and that the plaintiff received a

This state of affairs began to change dramatically in 1996 when advocates based in London began lodging petitions that addressed, among other issues, the mandatory nature of the death penalty in many of the English-speaking Caribbean states. Between 1996 and 2001, the Commission received approximately ninety-seven petitions concerning the death penalty in the Caribbean, which amounted to approximately ten percent of the Commission's average backlog of 950 active petitions and cases.¹²³ Of these, the largest number was filed against Jamaica and the Republic of Trinidad and Tobago.¹²⁴ The exceptional volume of death penalty cases was accompanied by a particular situation of urgency, stemming from the fact that the petitions involved imminent threats to the lives of the petitioners.

At the same time, governments in the region began pressing the Commission and the UNHRC to process the petitions as expeditiously as possible so as not to exacerbate the condemned prisoners' post-conviction delay in light of the *Pratt & Morgan* decision.¹²⁵ Some governments also attempted to mitigate the

fair trial.

2. The plaintiff was assisted by defense counsel;

3. The plaintiff, Davlin Morris, lost his appeal on his conviction and sentence on May 21, 1975; therefore it is apparent that all legal remedies have been exhausted.

Id. The Commission further resolved:

1. To declare that there exists no evidence of the violation of any of the rights set forth in the American Convention on Human Rights.

2. To communicate this resolution to the Government of Jamaica and to the plaintiff, and

3. To recommend that the Government of Jamaica suspend the execution of those persons sentenced to death and consider the abolition of the death penalty.

Id.

¹²³ See, e.g., 1999–2001 Annual Reports of the Inter. Am. C.H.R., ch. III.B.

¹²⁴ The mandatory death penalty petitions lodged with the Commission between 1994 and 2001 were distributed among Caribbean Member States as follows: Trinidad & Tobago: 51; Jamaica: 26; The Bahamas: 10; Barbados: 5; Grenada: 4; Belize: 1. These figures included petitions in which the death sentences of the defendants concerned were commuted after complaints had been filed with the inter-American system. *Id.*

¹²⁵ On February 20, 1998, for example, then-Attorney General of Trinidad & Tobago, Ramesh Maharaj, appeared before the Commission to explain the impact of *Pratt & Morgan* on the implementation of the death penalty in that state and to request that the Commission guarantee the expeditious consideration of Trinidadian capital cases before it by complying with certain time limits prescribed by the State itself. In his statement to the Commission, the Attorney General contended that by failing to expedite capital cases and thereby further delaying the prisoners' time on death row, the Commission itself was contributing to the perpetration of cruel and inhuman treatment as defined by the Privy Council under Trinidad's domestic law. Moreover, the Attorney General asserted that the Commission had no jurisdiction to interfere in the implementation of a sentence of death imposed by a court of competent jurisdiction in Trinidad & Tobago. Thus, according to the Attorney General, it

implications of the Privy Council's rulings through legislative measures, including in particular the promulgation of "Governor General's Instructions,"¹²⁶ which purported to prescribe an eighteen-month limit within which the UNHRC, Commission, and Court would have to finally decide petitions submitted to them.¹²⁷ The Privy Council subsequently found these instructions to be unlawful and therefore of no effect.¹²⁸

In perhaps the most dramatic turn of events during this period, the Republic of Trinidad and Tobago on May 26, 1998, delivered to the Secretary General of the OAS its notice denouncing the American Convention,¹²⁹ the first state to do so

would be open for the Government of Trinidad & Tobago, while a petition is pending before the Commission, to carry out a sentence of death once the five-year time limit had expired. In that circumstance the Commission might recommend the award of compensation to a victim. See Hon. Ramesh L. Maharaj, Attorney General of Trinidad & Tobago, Statement to the Inter-American Commission on Human Rights Concerning Compliance with TimeFrames for the Consideration of Petitions in Capital Cases (Feb. 20, 1988).

¹²⁶ See, e.g., A. Leung Woo-Gabriel, *Instructions Relating to Applications from Persons Under Sentence of Death*, 36 TRIN. & TOBAGO GAZETTE (EXTRAORDINARY) 855-56 (Oct. 13, 1997).

¹²⁷ *Id.*

¹²⁸ In *Thomas & Hilaire*, the Judicial Committee of the Privy Council addressed the legality of "Instructions" promulgated by the Executive in Trinidad & Tobago, which purported to establish time limits within which the Commission and the UNHRC were obliged to issue determinations on the merits of complaints concerning the death penalty. The Privy Council concluded that these Instructions were unlawful because they were disproportionate in that they contemplated the possibility of successive applications to the Commission and the UNHRC and laid down a series of successive and unnecessarily curtailed time limits for the taking of the several steps involved in the making of successive applications to both international bodies. See *Thomas & Hilaire v. Baptiste*, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1 (P.C.) (appeal taken from Trin. & Tobago), available at <http://www.privacy-council.org.uk/output/Page170.asp>.

¹²⁹ See Ministry of Foreign Affairs, Trinidad & Tobago, Notice to Denounce the American Convention of Human Rights (May 26, 1998). Article 78 of the Convention permits a State Party to denounce the Convention in the following terms:

1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

American Convention, *supra* note 10, at art. 10.

It is notable that by the terms of this provision, Trinidad remains bound by its obligations under the Convention in respect of any act that is taken by the state prior to the

since the Convention entered into force in 1978. In its instrument of denunciation, the government indicated that its decision had resulted from the Commission's failure to guarantee compliance with the time frames proposed by Trinidad in its Governor General's Instructions.¹³⁰ Trinidad's denunciation starkly illustrated the

effective date of the denunciation, May 26, 1999. The Commission has interpreted this provision as preserving the Commission's jurisdiction to receive and process alleged violations of the Convention as against Trinidad after May 26, 1999, provided that those violations relate to acts alleged to have taken place prior to that date, and the Commission has in fact continued to receive such petitions. *See Roodal v. Trinidad & Tobago*, Case 12.342, Inter-Am. C.H.R. 89, OEA/ser. L./V./II.114, doc 5. rev., para. 23 (2001), available at <http://cidh.org/annualrep/2001eng/TT12342.htm>. The Commission held:

By the plain terms of Article 78(2), states parties to the American Convention have agreed that a denunciation taken by any of them will not release the denouncing state from its obligations under the Convention with respect to acts taken by that state prior to the effective date of the denunciation that may constitute a violation of those obligations. A state party's obligations under the Convention encompass not only those provisions of the Convention relating to the substantive rights and freedoms guaranteed thereunder. They also encompass provisions relating to the supervisory mechanisms under the Convention, including those under Chapter VII of the Convention relating to the jurisdiction, functions and powers of the Inter-American Commission on Human Rights. Notwithstanding Trinidad and Tobago's denunciation of the Convention, therefore, the Commission will retain jurisdiction over complaints of violations of the Convention by Trinidad and Tobago in respect of acts taken by that State prior to May 26, 1999. Consistent with established jurisprudence, this includes acts taken by the State prior to May 26, 1999, even if the effects of those acts continue or are not manifested until after that date.

Id. (citations omitted).

The Inter-American Court of Human Rights appears to have shared the Commission's interpretation of Article 78 by explicitly considering in its Judgments on Preliminary Objections and Merits in *Hilaire, Constantine & Benjamin*, that Trinidad's denunciation could not have the effect of releasing it from its obligations with respect to the facts presented by the Petitioners, notwithstanding that many of the petitions were lodged with the Commission after the effective date of Trinidad's denunciation. *See, e.g., Hilaire v. Trinidad & Tobago*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 80, para. 28 (2001); *Hilaire, Constantine & Benjamin v. Trinidad & Tobago*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, paras. 12–20 (2002).

¹³⁰ Ministry of Foreign Affairs, Trinidad & Tobago, Notice to Denounce the American Convention of Human Rights (May 26, 1998); *see also* Press Release No. 10/98, Inter-Am. C.H.R. (May 28, 1998) (expressing the view that Trinidad & Tobago's denunciation represented "a serious step backwards in the hemispheric attempt to strengthen the inter-American human rights system," but noting that Trinidad as a Member State of the OAS would continue to be subject to the Commission's jurisdiction and be bound by the OAS Charter, the American Declaration, and the Statute of the Commission).

At the same time, Trinidad, together with Jamaica, withdrew from the Optional Protocol

serious legal and political consequences for the inter-American human rights system of the domestic developments on the death penalty in the Caribbean region.

III. PROCESSING OF THE MANDATORY DEATH PENALTY COMPLAINTS WITHIN THE INTER-AMERICAN SYSTEM

The developments concerning the mandatory death penalty in the Commonwealth Caribbean resulted in a series of individual cases and associated precautionary measures before the Inter-American Commission against several Caribbean Member States. In addition, the complaints filed against the Republic of Trinidad and Tobago gave rise to proceedings before the Inter-American Court involving both provisional measures and contentious cases, which ultimately resulted in the Court's June 21, 2002 judgment in the consolidated case of *Hilaire, Constantine & Benjamin*.¹³¹

A. Processing of Cases Before the Inter-American Commission

The mandatory death penalty litigation in the Caribbean region significantly impacted various aspects of the work of the inter-American human rights system. As indicated above, the mandatory death penalty cases resulted in a dramatic increase in the volume of petitions from that region, which rose to roughly ten percent of the Commission's caseload by 2001.¹³² In addition, the complaints raised legally and factually complicated issues, including the novel question of

to the International Covenant on Civil and Political Rights. See Amnesty International, *Death Penalty News*, AI Index: 53/003/1998 (June 1, 1998) (reporting that on May 26, 1998, the Republic of Trinidad & Tobago similarly withdrew as a State Party to the Optional Protocol to the ICCPR and on the same date notified the OAS Secretary General of its withdrawal as a State Party to the American Convention, and that Jamaica had likewise previously deposited an instrument with the U.N. Secretary General withdrawing as a State Party to the Optional Protocol to the ICCPR). While Trinidad & Tobago simultaneously re-acceded to the Optional Protocol, it did so subject to a reservation that purported to preclude the UNHRC from considering "communications from prisoners sentenced to death." *Id.* A majority of the UNHRC subsequently determined this reservation to be invalid as contrary to the object and purpose of the Optional Protocol. The Committee found that it sought to exclude the application of the entire Covenant for one particular group of complainants, namely prisoners under sentence of death, and thereby single out a certain group of individuals for lesser procedural protection than the protection enjoyed by the rest of the population. Therefore, the reservation constituted a discrimination that ran counter to some of the most basic principles embodied in the Covenant and its Protocols. See *Kennedy v. Trinidad & Tobago*, Case 845/1999, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/67/D/845/1999, para. 6.7 (1999). Following this decision, Trinidad again denounced the Optional Protocol on March 27, 2000 with effect from June 27, 2000.

¹³¹ *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94.

¹³² See *supra* notes 123-24 and accompanying text.

the compatibility of mandatory death sentences with international human rights standards, as well as questions relating to pre-trial and post-conviction delay, conditions of detention, and the adequacy of legal representation. The Commission's ability to respond to these developments was complicated by the part-time status of its Members as well as its limited resources, and the situation was further exacerbated by the pressure placed upon the Commission by Caribbean governments to determine the petitions in accordance with the time periods prescribed in *Pratt & Morgan*.¹³³

While the efforts by governments to compel the Commission to comply with the terms of judgments of their domestic courts may have been misplaced as a matter of international law,¹³⁴ the Commission nevertheless acknowledged the need to respond to the complaints expeditiously. Through a variety of initiatives, the Commission succeeded in processing the significant volume of capital petitions from the Caribbean region within a time period shorter than that envisioned in *Pratt & Morgan*.

In particular, the Commission dedicated additional professional and administrative resources to processing the Caribbean capital petitions, and employed several procedures aimed at minimizing the time required to decide the complaints. For example, the Commission articulated and applied its doctrine on duplication, as provided for in the American Convention and the Commission's Rules,¹³⁵ in determining that nine capital petitions against Jamaica were inadmissible on the basis that they had also been presented to the UNHRC.¹³⁶ In addition, the Commission prepared reports that joined individual petitions involving death row inmates from the same state, on the premise that the petitions essentially raised the same issues as contemplated in Article 40(2) of the Commission's former

¹³³ See *supra* notes 90–95 and accompanying text.

¹³⁴ As the Inter-American Court observed in its order for provisional measures in *James*:

The function of the supervisory organs of the American Convention is to ensure that the provisions of the American Convention are observed and adequately applied by States in their domestic laws, and not, as Trinidad and Tobago has argued, to ensure that State Parties comply with their own domestic laws.

James v. Trinidad & Tobago, Order for Provisional Measures of Aug. 29, 1998, Inter-Am. Ct. H.R. (ser. E) No. 2, para. 10 (1998).

¹³⁵ See American Convention, *supra* note 10, at art. 46(1)(c) ("1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: . . . c. that the subject of the petition or communication is not pending in another international proceeding for settlement . . .").

¹³⁶ See *Blaine v. Jamaica*, Case 11.827, Inter-Am. C.H.R. 96, OEA/ser. L./V./II.102, doc. 6 rev. (1998); *Lewis v. Attorney Gen. of Jamaica*, [2000] 3 W.L.R. 1785, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.), available at <http://www.privacy-council.org.uk/output/Page169.asp>; *Shaw v. Jamaica*, Case 12.018, Inter-Am. C.H.R. 2/99, OEA/ser. L./V./II.102, doc.6 rev (1999).

Regulations,¹³⁷ and decided the admissibility and the merits of the petitions contemporaneously rather than in two separate stages as was the normal practice.¹³⁸ Through these procedural measures, between 1998 and 2002 the Commission approved and published a total of forty-one admissibility and merits reports in Caribbean death penalty cases. Also during this time, the Commission approved three consolidated merits decisions in thirty-two mandatory death penalty cases against the Republic of Trinidad and Tobago, each of which was subsequently referred to, litigated before, and decided upon by the Inter-American Court.¹³⁹ Moreover, through these efforts, the Commission succeeded in reducing the average time for processing non-commuted capital petitions, from the date the case is opened to the date of the Commission's merits decision, from approximately twenty-four months for cases opened in 1997 to fewer than twelve months for cases opened in 1999.¹⁴⁰

The Commission considered and determined a variety of issues in respect of merits of the petitions and the complaints raised. These issues included the mandatory nature of the death penalty, the fairness requirements for application

¹³⁷ See, e.g., *McKenzie v. Jamaica*, Case 12.023, Inter-Am. C.H.R. 41, OEA/ser. L./V./II.106, doc. 6 (1999), available at <http://www.cidh.org/annualrep/99eng/merits/jamaica12.023.htm> (consolidation of five Jamaican cases involving six petitioners); *Lamey v. Jamaica*, Case 11.826, Inter-Am. C.H.R. 49, OEA/ser. L./V./II.111, doc. 20 rev. (2001) (consolidation of four Jamaican cases involving four petitioners); *Constantine v. Trinidad & Tobago*, Case 11.787, Inter-Am. C.H.R. 128 (unpublished 1999) (referred to the Inter-American Court of Human Rights on Feb. 22, 2000) (consolidation of twenty-three Trinidad & Tobago cases involving twenty-four petitioners); *Benjamin v. Trinidad & Tobago*, Case 12.148, Inter-Am. C.H.R. 53 (unpublished 2000) (referred to the Inter-American Court of Human Rights on Oct. 5, 2000) (consolidation of seven Trinidad & Tobago cases involving seven petitioners); *Edwards v. The Bahamas*, Case 12.067, Inter-Am. C.H.R. 48, OEA/ser. L./V./II.111, doc. 20 rev. (2001), available at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm> (2000) (consolidation of three Bahamian cases involving four petitioners).

¹³⁸ See, e.g., *Constantine*, Case 11.787, Inter-Am. C.H.R. 128 (unpublished 1999).

¹³⁹ The forty-one reports adopted and published by the Commission between 1998 and 2002 in Caribbean death penalty cases included: one admissibility report in 1996; fourteen admissibility reports, nine inadmissibility reports, and one merit report in 1998; four admissibility reports, one published merit report, and one joint admissibility and merit report in 1999; two merit reports and one joint admissibility and merit report in 2000; one admissibility report and one joint admissibility report in 2001; and four admissibility reports and two joint admissibility and merit reports in 2002. See 1998–2002 Annual Reports of the Inter-Am. C.H.R., available at <http://www.cidh.org>.

¹⁴⁰ For example, according to calculations prepared by the Commission Secretariat, the average processing time for non-commuted capital cases opened in 1997 for the states with the greatest volume of cases was twenty-seven and one-half months for Jamaica and twenty-three months for Trinidad & Tobago. These figures were reduced to, respectively, ten and one-half months and fourteen months for cases opened in 1998, and, for cases opened in 1999, seven and one-half months for Jamaica and ten months for Trinidad & Tobago.

of the Prerogative of Mercy, the right to trial within a reasonable time, the treatment and conditions of detention, the fairness of the petitioners' criminal proceedings, and the unavailability of legal assistance to pursue constitutional motions before domestic courts.¹⁴¹

Cases raising issues of the nature described above were considered by the Commission in connection with four Caribbean Member States: Trinidad and Tobago,¹⁴² Jamaica,¹⁴³ Grenada,¹⁴⁴ and the Bahamas.¹⁴⁵ Although the Bahamas, unlike the other three states, had not ratified the American Convention and therefore was subject only to the American Declaration, the Commission ultimately interpreted the terms of the Convention and the Declaration in the same manner in disposing of the various issues raised in the complaints. Among the most significant findings rendered by the Commission were the following:

1. The mandatory nature of the death penalty under the criminal law of the states concerned, whereby death is the automatic penalty once a defendant is found guilty of murder or, in the case of Jamaica, capital murder, resulted in the arbitrary deprivation of life contrary to Article 4(1) of the Convention and Article I of the Declaration, constituted inhumane treatment contrary to Articles 5(1) and 5(2) of the Convention and Article XXVI of the Declaration, and violated the right to a fair trial under Article 8(1) of the Convention and Articles XVIII and XXVI of the Declaration, by failing to permit consideration of the personal circumstances of an individual offender in determining whether the death penalty

¹⁴¹ At the same time, the Commission declined to address several ancillary issues raised by certain petitioners, such as the permissibility of hanging as a form of execution, while reserving its competence to address those matters in future cases. *See, e.g., McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 239, 269 (1999); *Aitken v. Jamaica*, Case 12.275, Inter-Am. C.H.R. 58, OEA/ser L./V./II.117, doc. 1 rev. 1, para. 138 (2002) (reserving the Commission's competence "to determine in an appropriate case in the future whether hanging is a particularly cruel, inhuman or degrading punishment or treatment in comparison with other methods of execution").

¹⁴² *See, e.g., Constantine*, Case 11.787, Inter-Am. C.H.R. 128 (unpublished 1999); *Benjamin*, Case 12.148, Inter-Am. C.H.R. 53 (unpublished 2000).

¹⁴³ *See, e.g., McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 239, 269 (1999); *Lamey*, Case 11.826, Inter-Am. C.H.R. 49 (2001) (consolidation of four Jamaican cases involving four petitioners).

¹⁴⁴ *See, e.g., Baptiste v. Grenada*, Case 11.743, Inter-Am. C.H.R. 38, OEA/ser. L./V./II.106, doc. 6 rev. (2000); *Knights v. Grenada*, Case 12.028, Inter-Am. C.H.R. 47, OEA/ser. L./V./II.111, doc. 20 rev. (2001).

¹⁴⁵ *See, e.g., Edwards*, Case 12.067, Inter-Am. C.H.R. 48 (2001).

is an appropriate punishment in the circumstances of his or her case.¹⁴⁶

2. The process applied for giving effect to the prerogative or mercy in the states concerned, by which a condemned prisoner is afforded no legally-protected right to apply for mercy, to submit supporting information, to receive material submitted by the State, or to receive a timely decision, was found not to provide condemned prisoners with an effective right to seek amnesty, pardon or commutation of sentence and is therefore incompatible with Article 4(6) of the Convention and Article XXIV of the Declaration.¹⁴⁷

3. Many of the petitioners were found not to have been tried within a reasonable time contrary to Articles 7(5) and 8(1) of the Convention and Articles XVIII, XXV and XXVI of the Declaration. In seventeen of the cases under consideration in the *Constantine v. Trinidad & Tobago* matter, for example, the pre-trial delays were in excess of two years and none of the cases had been disposed of between arrest and final appeal in less than four years, with some having taken more than eleven years to be finally determined. Also in this connection, the Commission found Trinidad and Tobago responsible for violations of Articles 2 and 25 of the Convention, because the right to be tried within a reasonable time is not provided for under the Constitution or other domestic law of Trinidad and Tobago.¹⁴⁸

4. Many of the petitioners in the states concerned were found to have been subjected to treatment and conditions of detention, both prior to their trials and following their convictions, which failed to satisfy the standards of humane treatment mandated by Article 5(1) and 5(2) of the American Convention and Article XXVI of the Declaration.¹⁴⁹

¹⁴⁶ See *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 198, 203–06 (1999); *Baptiste*, Case 11.743, Inter-Am. C.H.R. 38, paras. 85, 90–93 (2000); *Edwards*, Case 12.067, Inter-Am. C.H.R. 48, paras. 141, 147–50 (2001).

¹⁴⁷ See *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 228–32 (1999); *Baptiste*, Case 11.743, Inter-Am. C.H.R. 38, paras. 85, 119–25 (2000); *Edwards*, Case 12.067, Inter-Am. C.H.R. 48, paras. 168–74 (2001).

¹⁴⁸ See *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 266–69 (1999); *Edwards*, Case 12.067, Inter-Am. C.H.R. 48, paras. 218–25 (2001).

¹⁴⁹ See *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 286–94 (1999); *Baptiste*, Case 11.743, Inter-Am. C.H.R. 38, paras. 136–38 (2000); *Edwards*, Case 12.067, Inter-Am. C.H.R. 48, paras. 195–98 (2001).

5. Petitioners in several of the cases were found not to have been afforded the right to a fair trial under Articles 8(1) and 8(2) of the Convention and Articles XVIII and XXVI of the Declaration due to specific deficiencies in the criminal proceedings against them, including, for example, improper delays in permitting the defendant to contact an attorney following his arrest.¹⁵⁰

6. Those states that failed to make legal aid effectively available to several victims to pursue Constitutional Motions in the domestic courts in connection with their criminal proceedings were found to be responsible for violations of the right to a fair trial and the right to judicial protection embodied under Articles 8 and 25 of the Convention and Articles XVIII and XXVI of the Declaration.¹⁵¹

Based upon these findings, the Commission recommended to the Member States concerned, *inter alia*, that they grant the petitioners effective remedies, including commutation of sentence and compensation, and adopt such legislative or other measures as may be necessary to ensure that no person is sentenced to death pursuant to a mandatory sentencing law.

Despite the Commission's requests in each of the cases for the Member States concerned to inform it as to the measures taken to implement the Commission's recommendations, no responses were forthcoming which would indicate that the States had complied with the Commission's findings.¹⁵² As a consequence, in most instances the Commission decided to publish its decisions in accordance with Article 51 of the Convention and the corresponding provisions of its Rules of Procedure.¹⁵³ Concerning those cases against the Republic of Trinidad and Tobago, however, which constituted the majority of mandatory death penalty petitions before the Commission, one further option was available: to refer the cases to the Inter-American Court of Human Rights.¹⁵⁴

¹⁵⁰ See *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 298–306 (1999); *Edwards*, Case 12.067, Inter-Am. C.H.R. 48, paras. 210–15 (2001).

¹⁵¹ See *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 311–17 (1999); *Baptiste*, Case 11.743, Inter-Am. C.H.R. 38, paras. 141–46 (2000); *Edwards*, Case 12.067, Inter-Am. C.H.R. 48, paras. 201–07 (2001).

¹⁵² *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 318–21 (1999).

¹⁵³ *Id.* at paras. 332–33.

¹⁵⁴ American Convention, *supra* note 10, at art. 51(1) (permitting the Commission or a State Party that has accepted the Court's contentious jurisdiction to refer a case to the Court within three months from the date the Commission's merits decision in the case is transmitted to the state concerned in accordance with Article 50 of the Convention).

B. Litigation Before the Inter-American Court of Human Rights

From May 1991 until its denunciation of the Convention in 1998, Trinidad and Tobago was the only state in the Commonwealth Caribbean to accept the contentious jurisdiction of the Inter-American Court.¹⁵⁵ Accordingly, once the Commission rendered admissibility and merits decisions in respect of the capital petitions from Trinidad and Tobago, an opportunity opened to seek the Court's views on the petitions' subject matter. Even prior to this point, however, the Court played a role in preserving the petitioners' lives and personal integrity so as not to hinder the processing of their cases before the Commission and the Court by issuing provisional measures in favor of the condemned prisoners who had filed complaints with the Commission.

1. Provisional Measures

Among the most urgent tasks faced by the Commission when it began receiving capital petitions from the Caribbean region, as with those lodged from other retentionist jurisdictions, was to ensure that the petitioners were not executed before their complaints could be processed within the inter-American human rights system. Accordingly, at the time of transmitting the pertinent parts of the petitions to the Member State concerned, the Commission requested pursuant to Article 29 of the Commission's former Regulations, now Article 25 of the Commission's Rules of Procedure,¹⁵⁶ that the Member State take the urgent measures necessary to stay the petitioners' executions pending the Commission's investigation of their complaints.¹⁵⁷ In all instances, however, the Member States failed to inform the Commission of any steps they had taken to implement the Commission's requests.

With regard to complaints lodged against Trinidad and Tobago, the Commission was empowered pursuant to Article 63(2) of the American Convention¹⁵⁸ to request

¹⁵⁵ See BASIC DOCUMENTS, *supra* note 10, at 59. Non-English-speaking states from the Caribbean that have accepted the Court's contentious jurisdiction include Haiti, Suriname, and the Dominican Republic. In June 2000, Barbados accepted the Court's contentious jurisdiction. *Id.*

¹⁵⁶ For the text of Article 25 of the Commission's Rules of Procedure, see *supra* note 76.

¹⁵⁷ See, e.g., 1999–2001 Annual Reports of the Inter-Am. C.H.R., ch. III.C.1.

¹⁵⁸ Article 63(2) of the Convention provides:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Pursuant to this provision, the Court has developed a body of procedures and jurisprudence in which it has requested that states take measures to address urgent situations involving irreparable harm to persons. See Inter-Am. C.H.R., Provisional Measures – Compendium (ser. E) Nos. 1–3 (1969).

that the Inter-American Court of Human Rights issue binding orders for provisional measures requiring Trinidad and Tobago to preserve the petitioners' lives pending the outcome of their proceedings before the inter-American system. In the absence of appropriate responses from Trinidad and Tobago to the Commission's requests for precautionary measures, therefore, the Commission considered it necessary and in the best interests of human rights to seek an order for provisional measures from the Inter-American Court, even before the cases were procedurally ripe to be referred to the Court.

Provisional measures were initially requested by the Commission and granted by the Court in May 1998 in respect of five petitioners in five complaints, Wenceslaus James, Anthony Briggs, Anderson Noel, Anthony Garcia, and Christopher Bethel, which the Court consolidated as the *James Case*.¹⁵⁹ Although these complaints had not yet been submitted to the Inter-American Court, the measures were requested pursuant to Article 63(2) of the Convention, which explicitly authorizes the Court to grant provisional measures at the request of the Commission "[w]ith respect to a case not yet submitted to the Court."¹⁶⁰ These measures were requested by the Commission on May 22, 1998, granted by the President of the Court on May 27, 1998, and affirmed by the Court in plenary in an order dated June 14, 1998, in which the Court also convened a hearing at its seat in Costa Rica on August 28, 1998.¹⁶¹ One day following the hearing, the Court issued an order affirming its earlier orders and amplifying the measures to include the petitioners in three additional complaints, Darrin Roger Thomas, Haniff Hilaire, and Denny Baptiste.¹⁶² In each order, the Court included among its considerations:

That the States Parties to the Convention should fully comply in good faith (*pacta sunt servanda*) to all of the provisions of the Convention, including those relative to the operation of the two supervisory organs; and, that in view of the Convention's fundamental objective of guaranteeing the effective protection of human rights (Articles 1(1), 2, 51 and 63(2)), States Parties must refrain from taking actions that may frustrate the *restitutio in integrum* of the rights of the alleged victims.¹⁶³

¹⁵⁹ *James*, Orders for Provisional Measures, Inter-Am. Ct. H.R. (ser. E) Nos. 1-3 (1998).

¹⁶⁰ American Convention, *supra* note 10.

¹⁶¹ *James*, Order for Provisional Measures of June 14, 1998, Inter-Am. Ct. H.R. (ser. E) No. 2 (1998).

¹⁶² *James*, Order for Provisional Measures of Aug. 29, 1998, Inter-Am. Ct. H.R. (ser. E) No. 2 (1998).

¹⁶³ *Id.*

The Court continued: “[S]hould the State execute the alleged victims, it would create an irreparable situation incompatible with the object and purpose of the Convention, would amount to a disavowal of the authority of the Commission, and would adversely affect the very essence of the Inter-American system.”¹⁶⁴

Based in part upon these considerations, the Court ordered that Trinidad and Tobago “take all measures necessary to preserve the life and physical integrity of [the alleged victims] so as not to hinder the processing of their cases before the Inter-American system.”¹⁶⁵ Consistent with its provisional measures practice, the Court also provided for a reporting mechanism by which the State was required to keep the Court apprised on a regular basis of the status of the measures’ beneficiaries. However, Trinidad and Tobago has consistently failed to observe these conditions.¹⁶⁶

Since these provisional measures were first issued, the Court has, at the Commission’s request, extended the measures on five occasions to encompass thirty-five individuals in additional petitions lodged with the Commission.¹⁶⁷ The Court also rescinded the measures in respect of two of the beneficiaries, Christopher Bethel and Anderson Noel, in September 2002 after Bethel pleaded

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *James*, Order for Provisional Measures of Dec. 2, 2003, Inter-Am. Ct. H.R. (ser. E) No. 4 (2003) (finding that Trinidad “has not complied with the duty established in Article 68(1) of the American Convention on Human Rights because it has not fulfilled the obligation to report on the provisional measures ordered by the Inter-American Court of Human Rights [in the *James* matter]”).

¹⁶⁷ See *James*, Order for Provisional Measures of Aug. 29, 1998, Inter-Am. Ct. H.R. (ser. E) No. 2 (1998) (extending measures to Darrin Roger Thomas, Haniff Hilaire, and Denny Baptiste); *James*, Order for Provisional Measures of May 25, 1999, Inter-Am. Ct. H.R. (ser. E) No. 2 (1999) (extending measures to twenty victims in nineteen cases – Wilberforce Bernard, Naresh Boodram and Joey Ramiah, Clarence Charles, Philip Chotolal, George Constantine, Rodney Davis, Natasha De Leon, Mervyn Edmund, Alfred Frederick, Nigel Mark, Wayne Matthews, Steve Mungroo, Vijay Mungroo, Wilson Prince, Martin Reid, Noel Seepersad, Gangaleen Tahaloo, Keiron Thomas, and Samuel Winchester); *James*, Order for Provisional Measures of May 27, 1999, Inter-Am. Ct. H.R. (ser. E) No. 2 (1999) (extending measures to include an additional eight victims in seven cases before the Commission — Anthony Johnson, Kevin Dial and Andrew Dottin, Peter Benjamin, Krishandath Seepersad, Allan Phillip, Narine Sooklal and Amir Mowlah); *James*, Order for Provisional Measures of Sept. 25, 1999, Inter-Am. Ct. H.R. (ser. E) No. 2 (1999) (extending measures to cover two additional alleged victims in two cases before the Commission — Mervyn Parris and Francis Mansingh); *James*, Order for Provisional Measures of Nov. 26, 2001, Inter-Am. Ct. H.R. (ser. E) No. 2 (2001) (extending the measures to cover five alleged victims in five additional cases before the Commission — Balkissoon Roodal, Sheldon Roach, Arnold Ramlogan, Beemal Ramnarace and Takoor Ramcharan).

guilty to manslaughter and Noel was retried and found guilty of manslaughter. Both men were sentenced to five years imprisonment.¹⁶⁸

2. Referral of Cases to the Inter-American Court

In addition to requesting provisional measures from the Inter-American Court, the Commission decided to refer most of the cases against Trinidad and Tobago to the Inter-American Court pursuant to Articles 50 and 61(1) of the American Convention, following the Commission's determination of the admissibility and merits of the matters.¹⁶⁹ The Commission's decision to refer all matters to the Court was influenced by several factors, including in particular developments in the case of Anthony Briggs.

Mr. Briggs was among the first condemned prisoners in Trinidad and Tobago to file a petition with the Commission. The Commission processed his complaint by determining the admissibility and merits of the petition and, as provided for under Article 51 of the Convention, publishing its decision rather than referring the matter to the Inter-American Court.¹⁷⁰ In its report, the Commission found the State responsible for violations of Mr. Briggs's right to a speedy trial under Article 7(5) of the Convention and recommended commutation of his sentence.¹⁷¹ Rather than implementing the Commission's recommendation, Trinidad and Tobago moved before the Judicial Committee of the Privy Council to lift the stay of execution flowing from the *Thomas & Hilaire* judgment. Trinidad and Tobago also moved before the Inter-American Court to lift its provisional measures in Mr. Briggs's case on the ground that the process before the inter-American system was completed and, therefore, the grounds for the stay and provisional measures ceased to subsist. In response to Trinidad's request, the Inter-American Court issued an order on May 25, 1999, maintaining the measures "until such time as the Court, having previously considered the reports concerning the present status of his case, issues

¹⁶⁸ See *James*, Order for Provisional Measures of Sept. 3, 2002, Inter-Am. Ct. H.R. (ser. E) No. 4 (2002).

¹⁶⁹ Two of the complaints that remain the subject of the Court's provisional measures in the *James* cases, Anthony Johnson (Petition P11.718) and co-petitioners Kevin Dial and Andrew Dottin (Petition P12.145), have not been referred to the Court, owing to extraordinary domestic procedures that have been pursued by the alleged victims after filing their petitions with the Commission. See *James*, Order for Provisional Measures of Nov. 24, 2000, Inter-Am. Ct. H.R. (ser. E) No. 4 (2000) (requesting that the State submit information concerning the proceedings of Anthony Johnson, Kevin Dial, and Andrew Dottin before the domestic courts).

¹⁷⁰ *Briggs v. Trinidad & Tobago*, Case 11.815, Inter-Am. C.H.R. 44, OEA/ser. L./V./II.102, doc. 6 rev., para. 69 (1999), available at <http://www.cidh.org/annualrep/98eng/merits/Trinidad%2011.815.htm>.

¹⁷¹ *Id.*

a decision on this matter.”¹⁷² Notwithstanding the Inter-American Court’s determination, however, on July 22, 1999, the Judicial Committee of the Privy Council decided to lift the stay of Mr. Briggs’s execution, based upon its own interpretation of the American Convention and its conclusion that the processes before the inter-American system had, in fact, been spent.¹⁷³ On July 28, 1999, Trinidad executed Mr. Briggs.¹⁷⁴

This series of regrettable events demonstrated that Trinidad and Tobago would not respect the Commission’s decisions or implement its recommendations in death penalty cases. It was therefore apparent that to effectively preserve and protect the human rights of the alleged victims pending the outcome of the litigation before the inter-American system, all of the capital cases from Trinidad and Tobago would have to be referred to the Court. Only through this strategy could the Commission ensure each petitioner the direct benefit of a binding and final judgment of the Inter-American Court on the issues he or she had presented to the inter-American system.

Accordingly, by way of three separate applications, the Commission referred thirty-one cases involving thirty-two petitioners to the Inter-American Court following the adoption by the Commission of admissibility and preliminary merits decisions on the matters.¹⁷⁵ On May 25, 1999, the day prior to the effective date of Trinidad and Tobago’s denunciation, the Commission referred the case of Haniff Hilaire. Subsequently, in an application dated February 22, 2000, in the case of George Constantine, the Commission referred to the Inter-American Court twenty-three consolidated cases involving twenty-four petitioners.¹⁷⁶ In a further

¹⁷² *James*, Order for Provisional Measures of May 25, 1999, Inter-Am. Ct. H.R. (ser. E) No. 2 (1999).

¹⁷³ See *Briggs v. Baptiste*, [2000] 2 W.L.R. 574, [2000] 2 A.C. 40 (P.C. 1999) (appeal taken from Trin. & Tobago), available at <http://www.privacy-council.org.uk/output/Page170.asp>.

¹⁷⁴ *World: Americas Trinidad Hangs Killer*, BBC NEWS, July 28, 1999, <http://news.bbc.co.uk/2/hi/americas/405494.stm> (last visited Dec. 11, 2004).

¹⁷⁵ *Hilaire v. Trinidad & Tobago*, Case 11.816, Inter-Am. C.H.R. 66 (unpublished 1999), available at <http://www.oas.org>; *Constantine v. Trinidad & Tobago*, Case 11.787, Inter-Am. C.H.R. 128 (unpublished 1999) (referred to the Inter-American Court of Human Rights on Feb. 22, 2000); *Benjamin v. Trinidad & Tobago*, Case 12.148, Inter-Am. C.H.R. 53 (unpublished 2000) (referred to the Inter-American Court of Human Rights on Oct. 5, 2000).

¹⁷⁶ The twenty-four petitioners in the *Constantine* case were: George Constantine, Wenceslaus James, Denny Baptiste, Clarence Charles, Keiron Thomas, Anthony Garcia, Wilson Prince, Darrin Roger Thomas, Mervyn Edmund, Samuel Winchester, Martin Reid, Rodney Davis, Gangadeen Tahaloo, Noel Seepersad, Wayne Matthews, Alfred Fredrick, Natasha De Leon, Vijay Mungroo, Phillip Chotalal, Naresh Boodram, Joey Ramiah, Nigel Mark, Wilberforce Bernard, and Steve Mungroo. *Constantine v. Trinidad & Tobago*, Case 11.787, Inter-Am. Ct. H.R. (ser. C) No. 82 (2001), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_82_ing.pdf.

application dated October 5, 2000, in the case of Peter Benjamin, the Commission referred an additional seven consolidated cases involving seven petitioners to the Court.¹⁷⁷

Once these applications were filed with the Court, each was the subject of two principal phases: preliminary objections raised by Trinidad and Tobago concerning the Court's jurisdiction to entertain the cases; and, following the dismissal of the State's objections, a consolidated judgment on merits and reparations.¹⁷⁸

a. Preliminary Objections to the Inter-American Court's Jurisdiction

In all three applications, Trinidad and Tobago raised preliminary objections before the Inter-American Court, arguing that the Court lacked the jurisdiction to hear the matters. Trinidad's objections primarily relied upon the "reservation" it purported to have taken when ratifying the American Convention and accepting the contentious jurisdiction of the Inter-American Court on May 22, 1991. This qualification, which appeared in Trinidad and Tobago's May 1991 instrument of ratification, read as follows:

As regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights as stated in said article only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago, and provided that any judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.¹⁷⁹

In its objections, Trinidad and Tobago asserted that this reservation was compatible with the object and purpose of the American Convention, on the basis that Article 62 of the Convention¹⁸⁰ is a provision that states are free to accept or

¹⁷⁷ The seven victims in the *Benjamin* case were: Peter Benjamin, Krishendath Seepersad, Allan Phillip, Narine Sooklal, Amir Mowlah, Mervyn Parris, and Francis Mansingh. *Benjamin v. Trinidad & Tobago*, Case 12.148, Inter-Am. Ct. H.R. (ser. C) No. 81 (2001), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_81_ing.pdf.

¹⁷⁸ *Id.*

¹⁷⁹ BASIC DOCUMENTS, *supra* note 10, at 72.

¹⁸⁰ See American Convention, *supra* note 10, at art. 62. Article 62 of the American Convention, which prescribes the terms by which states parties may accept the Court's compulsory jurisdiction, reads as follows:

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring specific agreement, the jurisdiction of the Court on all matters relating to the

reject and, if they do accept, the acceptance can be subject to conditions.¹⁸¹ Alternatively, Trinidad argued that if its reservation was found to be incompatible with the Convention's terms, the State should be found not to have accepted the Court's jurisdiction in the first place.¹⁸²

The Commission opposed the preliminary objection on two main grounds. First, the Commission argued that the "reservation" under consideration was, properly construed, a declaration of certain conditions that the State endeavored to place on its acceptance of the Court's compulsory jurisdiction, and that these conditions were invalid as beyond the parameters of permissible conditions under Article 62 of the American Convention. Second, the Commission contended that the "reservation" was inconsistent with the object and purpose of the American Convention, and should be severed from the State's declaration of acceptance.¹⁸³

Following an August 10, 2000, hearing on the preliminary objections in *Hilaire* in which both the State and the Commission participated, the Inter-American Court rejected Trinidad and Tobago's preliminary objections in their totality in three unanimous judgments issued on September 1, 2001.¹⁸⁴ On the objections relating to the terms of Trinidad and Tobago's acceptance of the Court's compulsory jurisdiction in particular, the Court concluded that the limitation placed upon Trinidad and Tobago's acceptance of the Court's compulsory

interpretation and application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Id.

¹⁸¹ The Court summarized the positions of the State and the Commission in its judgments on the preliminary objections in the three cases rendered on September 1, 2001. *See Hilaire*, Case 11.816, Inter-Am Ct. H.R. (ser. C) No. 80; *Benjamin*, Case 12.148, Inter-Am Ct. H.R. (ser. C) No. 81; *Constantine*, Case 11.787, Inter-Am. Ct. H.R. (ser. C) No. 82.

¹⁸² *Hilaire*, Case 11.816, Inter-Am Ct. H.R. (ser. C) No. 80, para. 52; *Benjamin*, Case 12.148, Inter-Am Ct. H.R. (ser. C) No. 81, para. 51; *Constantine*, Case 11.787, Inter-Am. Ct. H.R. (ser. C) No. 82, para. 51.

¹⁸³ *Hilaire*, Case 11.816, Inter-Am Ct. H.R. (ser. C) No. 80, paras. 53–59; *Benjamin*, Case 12.148, Inter-Am Ct. H.R. (ser. C) No. 81, paras. 52–58; *Constantine*, Case 11.787, Inter-Am. Ct. H.R. (ser. C) No. 82, para. 52–58.

¹⁸⁴ *Hilaire*, Case 11.816, Inter-Am Ct. H.R. (ser. C) No. 80, para. 90, oper. para. 1; *Benjamin*, Case 12.148, Inter-Am Ct. H.R. (ser. C) No. 81, para. 90, oper. para. 1; *Constantine*, Case 11.787, Inter-Am. Ct. H.R. (ser. C) No. 82, para. 90, oper. para. 1.

jurisdiction was incompatible with the Convention's object and purpose. The Court found that the instrument of acceptance was:

not consistent with the hypothesis stipulated in Article 62(2) of the American Convention. It is general in scope, which completely subordinates the application of the American Convention to the internal legislation of Trinidad and Tobago as decided by its courts. This implies that the instrument of acceptance is manifestly incompatible with the object and purpose of the Convention. As a result, the said article does not contain a provision that allows Trinidad and Tobago to formulate the "restriction" it made.¹⁸⁵

In reaching this conclusion, the Inter-American Court reiterated its views as to the exceptional nature of human rights treaties, stating that the American Convention and other human rights treaties are:

inspired by a set of higher common values (centered around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties. The latter govern mutual interests between and among the States parties and are applied by them, with all the juridical consequences that follow therefrom for the international and domestic systems.¹⁸⁶

Insofar as Trinidad relied upon the jurisprudence of the International Court of Justice regarding permissible restrictions to that Court's jurisdiction, the Inter-American Court also reiterated its view, initially expressed in its judgments on competence in *Constitutional Court*¹⁸⁷ and *Ivcher Bronstein*¹⁸⁸ that:

No analogy can be drawn between the State practice detailed under Article 36(2) of the Statute of the International

¹⁸⁵ *Hilaire*, Case 11.816, Inter-Am Ct. H.R. (ser. C) No. 80, para. 88; *Benjamin*, Case 12.148, Inter-Am Ct. H.R. (ser. C) No. 81, para. 79; *Constantine*, Case 11.787, Inter-Am. Ct. H.R. (ser. C) No. 82, para. 79.

¹⁸⁶ *Hilaire*, Case 11.816, Inter-Am Ct. H.R. (ser. C) No. 80, para. 94; *Benjamin*, Case 12.148, Inter-Am Ct. H.R. (ser. C) No. 81, para. 85; *Constantine*, Case 11.787, Inter-Am. Ct. H.R. (ser. C) No. 82, para. 85.

¹⁸⁷ *Constitutional Court v. Peru*, Case 11.760, Inter-Am. Ct. H.R. (ser. C) No. 71 (2001), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_77_ing.pdf.

¹⁸⁸ *Ivcher Bronstein v. Peru*, Case 11.762, Inter-Am. Ct. H.R. (ser. C) No. 74 (2001), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_74_ing.pdf.

Court of Justice and acceptance of the optional clause concerning recognition of the binding jurisdiction of this Court, given the particular nature and the object and purpose of the American Convention.¹⁸⁹

Finally, the Court appeared to reject Trinidad's contention that a finding of incompatibility between its declaration and Article 62 of the Convention necessarily leads to the conclusion that Trinidad never accepted the Court's jurisdiction from the outset. The Court reasoned that:

it would be meaningless to suppose that a State which had freely decided to accept the compulsory jurisdiction of the Court had decided at the same time to restrict the exercise of its functions as foreseen in the Convention. On the contrary, the mere acceptance by the State leads to the overwhelming presumption that the State will subject itself to the compulsory jurisdiction of the Court.¹⁹⁰

With the issuance of these judgments rejecting Trinidad and Tobago's preliminary objections, the three cases moved to the merits and reparations phases of the Court's process.

b. Hearing and Judgment on the Merits

In an order issued on November 30, 2001, the Inter-American Court joined the three applications pursuant to Article 28 of its Rules of Procedure, and convened a hearing on the merits and reparations of the consolidated applications on February 20 and 21, 2002.¹⁹¹ On February 8, 2002, Trinidad and Tobago transmitted a note to the Court announcing that it would not attend the public hearing convened by the Court, apparently based upon the same preliminary objections that the Court had already rejected. The State's note read:

¹⁸⁹ *Hilaire*, Case 11.816, Inter-Am Ct. H.R. (ser. C) No. 80, para. 97 (quoting *Constitutional Court*, Case 11.760, Inter-Am. Ct. H.R. (ser. C) No. 55, para. 46 (1999) (alteration in original), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_55_ing.pdf; *Ivcher Bronstein*, Case 11.762, Inter-Am. Ct. H.R. (ser. C) No. 54, para. 47 (alteration in original), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_54_ing.pdf).

¹⁹⁰ *Hilaire*, Case 11.816, Inter-Am Ct. H.R. (ser. C) No. 80, para 90.

¹⁹¹ *Hilaire, Constantine & Benjamin v. Trinidad & Tobago*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 43 (2002) (noting the joining of the three cases by an order dated November 30, 2001), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_94_ing.pdf.

The Government of the Republic of Trinidad and Tobago must decline the invitation of the Court to participate at the public hearing and the preliminary meeting to be held on 20–21 February, 2002 [. . .] In taking this decision the Government of Trinidad and Tobago does not intend any discourtesy towards the Court or its distinguished and learned President. It reflects the belief of the State that, in the absence of any special agreement by the Republic of Trinidad and Tobago recognizing the jurisdiction of the Court in this matter, the Inter-American Court of Human Rights has no jurisdiction in respect of these cases.¹⁹²

In its final judgment in the matter, the Court indicated that it did not agree with the reason given by the State for not appearing before the Court and for not participating in the proceedings, citing the fundamental axiom *compétence de la compétence/Kompetenz-Kompetenz* — that the Court has the inherent authority to determine the scope of its own jurisdiction.¹⁹³

The merits hearing in the cases nevertheless proceeded with the representatives of the petitioners and the Commission in attendance. During the course of the hearing, the Commission, with the extensive participation and assistance of the petitioners' representatives, called three witnesses.¹⁹⁴ Desmond Allum, an attorney from Trinidad and Tobago, testified concerning pertinent domestic criminal law and the nature of legal representation available in Trinidad and Tobago.¹⁹⁵ Another Trinidadian attorney, Gaietry Pargass, gave evidence concerning prison conditions in Trinidad and Tobago and the experience of prisoners on death row in that state.¹⁹⁶ Finally, Nigel Eastman, a noted psychiatrist from the United Kingdom, provided expert evidence as to the mental condition of one of the prisoners, Amir Mowlah.¹⁹⁷ The testimony of these witnesses was supplemented by expert reports prepared by each of them and filed with the Court prior to the hearing, together with three

¹⁹² *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 16 (citing Note from the Attorney General of the Republic of Trinidad & Tobago to the Secretary of the Inter-American Court of Human Rights (Feb. 8, 2002) (alteration in original)).

¹⁹³ *Id.* at para. 17.

¹⁹⁴ During the merits hearing before the Court, the petitioners were represented by British attorneys Julian Knowles, Keir Starmer, Yasmin Waljee, Parvais Jabber, and Julie Morris. The Commission was represented by Commissioner and Rapporteur for Trinidad & Tobago Professor Robert K. Goldman, British Barrister Nicholas Blake QC, and this author as legal adviser.

¹⁹⁵ *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 77(a).

¹⁹⁶ *Id.* at para. 77(c).

¹⁹⁷ *Id.* at para. 77(b).

additional expert reports: one prepared by Thomas Alfred Warlow, a ballistics expert, concerning ballistics evidence in the case of Peter Benjamin; another by Baroness Vivian Stern, Honorary Secretary General of Penal Reform International and Honorary Fellow of the London School of Economics, and Andrew Coyle, a criminologist with twenty-five years' experience at a senior level in the prison services of the United Kingdom, concerning prison conditions in Trinidad and Tobago; and a third by Scharlette Holdman, a U.S. mitigation expert, concerning the use of mitigating evidence in capital proceedings in the United States.¹⁹⁸

Based upon this evidence and the oral and written representations made by the Commission and the petitioners' representatives during and after the hearing, the Court issued its judgment on merits and reparations in *Hilaire, Constantine & Benjamin* on June 21, 2002.¹⁹⁹ In its main judgment, which ran to over 100 pages and was accompanied by three separate concurring opinions, the Court made several key findings concerning six substantive areas in addition to reparations: the mandatory death penalty, the right to trial within a reasonable time; the right to a fair trial and judicial protection; detention conditions; amnesty, pardon, or commutation of sentence; and non-compliance with provisional measures ordered by the Court in the case of prisoner Joey Ramiah.²⁰⁰

i. Mandatory Death Penalty

The Court concluded that the State violated the right to life under Articles 4(1) and 4(2) in conjunction with Article 1(1) of the American Convention, as well as its obligations under Article 2 of the Convention, to the detriment of each of the condemned prisoners, because of the mandatory nature of the death penalty under Trinidad's Offenses Against the Person Act of 1925.²⁰¹ In particular, the Court found that the pertinent provisions of Trinidad and Tobago's Offenses Against the Person Act had two elements:

a) in the determination of criminal responsibility, [the law] only authorize[d] the competent judicial authority to find a person guilty of murder solely based on the categorization of the crime, without taking into account the personal conditions of the defendant or the individual circumstances of the crime; and

¹⁹⁸ *Id.* at para. 76 (a summary of the evidence presented to the Court can be found at paras. 61–83 of the Court's June 21, 2002 judgment).

¹⁹⁹ *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94.

²⁰⁰ *Id.* at 1–2.

²⁰¹ *Id.* at paras. 109, 118 (In particular, § 4 of the Offenses Against the Person Act renders the death penalty the required punishment for murder, providing that, "[e]very person convicted of murder shall suffer death." Offenses Against the Persons Act ch. 11:08 (1925) (Trin. and Tobago)).

b) in the determination of punishment, it mechanically and generically impose[d] the death penalty for all persons found guilty of murder and prevent[ed] the modification of the punishment through a process of judicial review.²⁰²

In finding that the Act contravened Article 4(1) and 4(2) of the American Convention, the Court noted that it “automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness.”²⁰³ The Court also noted that the law “prevent[ed] the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence.”²⁰⁴

Although the Commission did not find in its Article 50 reports or allege before the Court violations of Article 4(2) of the Convention²⁰⁵ in relation to the mandatory death penalty issue, the Court decided to examine this provision *iura novit curia*, and found the State responsible for violations of this article.²⁰⁶ Specifically, the Court found that the Offenses Against the Person Act punished by death “crimes that do not exhibit characteristics of utmost seriousness” contrary to Article 4(2) of the Convention so as also to be arbitrary under Article 4(1) of the Convention.²⁰⁷ This was in contrast to the Commission’s approach to the issue, which declined to conclude that murder might in some circumstances not constitute a “most serious” crime within the meaning of Article 4(2) of the Convention. Rather, the Commission found that the law was per se “arbitrary” within the meaning of Article 4(1) of the Convention²⁰⁸ because it applied the death penalty automatically and generically in all cases of murder notwithstanding that the crime

²⁰² *Id.* at para. 104.

²⁰³ *Id.* at para. 103.

²⁰⁴ *Id.*

²⁰⁵ Article 4(2) of the American Convention provides:

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.

American Convention, *supra* note 10, at art. 4(2).

²⁰⁶ *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, paras. 106–09.

²⁰⁷ *Id.* at para. 106.

²⁰⁸ Under Article 4(1) of the American Convention, “[e]very 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.” American Convention, *supra* note 10, at art. 4(1).

can be committed in a wide variety of aggravating and mitigating circumstances.²⁰⁹ The Commission also considered the penalty to violate the right to humane treatment and the right to a fair trial under Articles 5 and 8 of the Convention.²¹⁰ In its judgment, however, the Court did not address these provisions in the context of the mandatory death penalty issue.

With respect to Article 2 of the Convention concerning “domestic legal effects,”²¹¹ the Court confirmed that the requirement that states bring their domestic law into compliance with the terms of the Convention in order to guarantee the rights set out therein also obliges states to refrain “from promulgating laws that disregard or impede the free exercise of [those] rights.”²¹² Further, citing its judgments in *Suárez-Rosero*²¹³ and *Barrios Altos*,²¹⁴ the Court opined that a legislative act of a state can constitute a *per se* violation of the American Convention.²¹⁵ In particular, the Court considered that:

[E]ven though thirty-one of the alleged victims in this case have not yet been executed, it is appropriate to consider that there has been a violation of Article 2 of the Convention, by virtue of the fact that the mere existence of the *Offenses Against the Person Act* in itself constitutes a *per se* violation of that

²⁰⁹ See, e.g., *McKenzie v. Jamaica*, Case 12.023, Inter-Am. C.H.R. 41, OEA/Ser. L./V./II.106, doc. 6, para. 198 (1999), available at <http://www.cidh.org/annualrep/99eng/merits/jamaica12.023.htm>; *Baptiste v. Grenada*, Case 11.743, Inter-Am. C.H.R. 38, OEA/ser. L./V./II.106, doc. 6 rev., para. 85 (2000); *Edwards v. The Bahamas*, Case 12.067, Inter-Am. C.H.R. 48, OEA/ser. L./V./II.111, doc. 20 rev., para. 141 (2001), available at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm>.

²¹⁰ See, e.g., *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 203–06 (1999); *Baptiste*, Case 11.743, Inter-Am. C.H.R. 38, paras. 90–93 (2000); *Edwards*, Case 12.067, Inter-Am. C.H.R. 48, paras. 147–50 (2001).

²¹¹ Article 2 of the American Convention provides:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

American Convention, *supra* note 10, at art. 2.

²¹² *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 113.

²¹³ *Suárez-Rosero v. Ecuador*, Case 11.273, Inter-Am. Ct. H.R. (ser. C) No. 35 (1997), available at http://www.coretidh.or.cr/sereicpdf_ing/sereic_35_ing.pdf.

²¹⁴ *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75 (2001), available at http://www.corteidh.or.cr/serieicpdf_ing/serieic_75_ing.pdf.

²¹⁵ *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, paras. 114–15.

provision of the Convention. This assertion is consistent with Advisory Opinion OC-14/94, which states that, “[i]n the case of self-executing laws, [...] the violation of human rights, whether individual or collective, occurs upon their promulgation.”²¹⁶

ii. Right to Trial Within a Reasonable Time, and Right to a Fair Trial and Judicial Protection

The second principal finding by the Inter-American Court on the merits of *Hilaire, Constantine & Benjamin* was the State’s responsibility for violating the right to trial within a reasonable time under Articles 7(5) and 8(1) in conjunction with Articles 1(1) and 2 of the Convention, to the detriment of thirty of the petitioners. The Court, in addition, found the State violated the right to effective recourse established in Articles 8 and 25 in conjunction with Article 1(1) of the Convention, to the detriment of eleven of the petitioners.²¹⁷

In particular, the Court relied upon its prior jurisprudence according to which three factors are considered in determining the reasonableness of the time within which a proceeding must take place in accordance with Article 7(5) and 8(1) of the Convention: the complexity of the case, the procedural activity of the interested party, and the conduct of the judicial authorities.²¹⁸ The Court also indicated that “in certain cases a prolonged delay in itself can constitute a violation of the right to a fair trial” and that in these situations “the State must provide, according to the above criteria, . . . an explanation and proof as to why it has needed more time than normally required to issue a final judgment in a particular case.”²¹⁹ On the facts of the cases at issue, the Court noted that the total delays between arrest and final appeal experienced by thirty of the prisoners, as disclosed by the record, ranged from four years to eleven years and nine months²²⁰ and recalled that in its judgment in *Suárez-Rosero*²²¹ the Court had concluded that a delay of four years and two months between arrest and final appeal “far exceed[ed]” the time con-

²¹⁶ *Id.* at para. 116 (citing Advisory Opinion OC-14/94, *supra* note 80, at para. 43) (latter two alterations in original) (citation omitted).

²¹⁷ *Id.* at paras. 119–52.

²¹⁸ *Id.* at paras. 143–44.

²¹⁹ *Id.* at para. 145.

²²⁰ *Id.* at para. 84 n.98 (pertaining to petitioners Haniff Hilaire, George Constantine, Wenceslaus James, Denny Baptiste, Clarence Charles, Keiron Thomas, Wilson Prince, Darrin Roger Thomas, Mervyn Edmund, Martin Reid, Rodney Davis, Gangadeen Tahaloo, Noel Seepersad, Wayne Matthews, Alfred Frederick, Natasha de Leon, Vijay Mungroo, Philip Chotalal, Naresh Boodram, Joey Ramiah, Nigel Mark, Wilberforce Bernard, Steve Mungroo, Peter Benjamin, Krishendath Seepersad, Allan Phillip, Narine Sooklal, Amir Mowlah, Mervyn Parris, and Francis Mansingh).

²²¹ *Suárez-Rosero*, Case 11.273, Inter-Am. Ct. H.R. (ser. C) No. 35.

templated under the Convention.²²² Moreover, the Court concluded that “Trinidad and Tobago’s domestic law [did] not [recognize] the right to a trial within a reasonable time and therefore, [did] not conform to the dictates of the Convention.”²²³ Under these circumstances, therefore, the Court found Trinidad responsible for violations of Articles 7(5) and 8(1) in conjunction with Articles 1(1) and 2 of the Convention, in respect of the thirty prisoners.²²⁴

Regarding the allegations concerning the right to judicial protection and the petitioners’ lack of access to “constitutional motions” — the procedure by which constitutional challenges may be raised before the courts in Trinidad and Tobago²²⁵ — the Court found in respect of eleven of the prisoners that they had been denied access to legal aid to pursue constitutional motions, that the filing of such motions was complicated and difficult without the assistance of an attorney, and, therefore, that in practice “there is no effective means to present constitutional motions in Trinidad and Tobago.”²²⁶ On this basis, the Court concluded that the State was responsible for violating the rights of these prisoners under Articles 8 and 25 in conjunction with Article 1(1) of the Convention.²²⁷

Although the Commission had alleged specific violations of Article 8 in respect of the manner in which the trial or appeal proceedings of four of the victims were conducted,²²⁸ the Court declined to analyze these specific allegations, but rather held that these violations were “included within the broad nature of the violations already found of the American Convention.”²²⁹ As the Court ultimately ordered the State to re-try all of the petitioners based upon the application of the flawed Offenses Against the Person Act,²³⁰ the precise nature of the due process violations experienced by each individual appears to have had little practical effect on the outcome of the case.

²²² *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 144.

²²³ *Id.* at para. 152(a) (finding that “[t]he Constitution of the Republic of Trinidad and Tobago does not stipulate trial within a reasonable time as part of due process guarantees”); *see also id.* at para. 84(k).

²²⁴ *Id.* at para. 152(a).

²²⁵ *See* TRIN. & TOBAGO CONST. § 14(1).

²²⁶ *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 149 (pertaining to the petitioners George Constantine, Wilson Prince, Mervyn Edmund, Martin Reid, Gangadeen Tahaloo, Noel Seepersad, Natasha De Leon, Phillip Chotolal, Wilberforce Bernard, Amir Mowlah and Mervyn Parris); *see also id.* at para. 152(b).

²²⁷ *Id.* at para. 152(b).

²²⁸ For example, with respect to Peter Benjamin, Case 12.148, the Commission argued, based upon the record in his case, that the weapon allegedly used by Benjamin to commit the murder was a sixteen-gauge gun, while the weapon used to kill the murder victim was actually a twelve-gauge gun, and, therefore, that Benjamin could not have committed the murder. *Id.* at para. 131.

²²⁹ *Id.* at para. 152(d).

²³⁰ *Id.* at 70, para. 9.

iii. Detention Conditions

In its judgment, the Court also analyzed evidence presented concerning detention conditions, in light of its prior decisions on the issue as well as those of other international human rights bodies,²³¹ and made the following factual findings:

All of the victims' pre and post trial detention took place in grossly overpopulated and unhygienic conditions. As to pre-trial detention conditions, their cells, referred to as "F2" cells, lack sufficient ventilation and natural light. Along with the showers used by the victims, they are located in close proximity to the execution chamber (gallows). The prisoners do not have adequate nutrition, medical services or recreation, which only exacerbates the state of mental anguish in which they live.

....

The detention conditions described above only exacerbate the intrinsic suffering that the alleged victims already endure due to the impending imposition of their death penalty.²³²

In finding that the conditions of all thirty-two victims constituted cruel, inhuman, and degrading treatment contravening Articles 5(1) and 5(2) of the Convention,²³³ the Court held that the consolidated evidence before it was "in fact indicative of the general conditions in Trinidad and Tobago's prison system, and as such, constituted a violation of Article 5 to the detriment of all victims."²³⁴

As in the case of the fair trial allegations, the Commission had alleged specific violations of other Article 5 provisions of the Convention in respect of two of the victims,²³⁵ but the Court declined to pronounce upon these allegations for the

²³¹ *Id.* at paras. 153–72 (citing, inter alia, Judgment, Cantoral Benavides case, Inter-Am. C.H.R. (Aug. 18, 2000) (ser. C) (No. 69), available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_69_ing.pdf; Moriana Hernández Valentini de Bazzano v. Uruguay, No. 5/1977, U.N.H.R. Comm. (Aug. 15, 1979); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

²³² *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, paras. 84(m), (o) (internal citation omitted).

²³³ *Id.* at para. 169.

²³⁴ *Id.* at para. 170.

²³⁵ For example, the Commission argued that the State did not make any attempt to reform or socially readapt Haniff Hilaire (Case 11.816) or Krishendath Seepersad (Case 12.149) in accordance with Article 5(6) of the Convention, for example by teaching them to read or write or giving them training on violence prevention and control. The Commission contended that for persons sentenced to death, the possibility of the death sentence being revoked or

reason that they were "encompassed by the broad nature of those [violations] already found in the present Judgment."²³⁶

iv. Amnesty, Pardon, or Commutation of Sentence

Also included in the Court's judgment was a finding of State responsibility for violations of Article 4(6) in conjunction with Articles 8 and 1(1) of the Convention, to the detriment of all thirty-two victims.²³⁷ 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."²³⁸

In particular, the Court concluded that individual mercy petitions must be exercised through "fair and adequate procedures in conformity with Article 4(6) of the Convention and in conjunction with relevant due process guarantees established in Article 8," the latter of which the Court considered were necessary to make the right under Article 4(6) effective.²³⁹ The Court went on to find that the State was obliged to "implement a fair and transparent procedure by which an offender sentenced to death may make use of all favorable evidence deemed relevant to the granting of mercy."²⁴⁰ In so concluding, the Court appears to have accepted the Commission's submission that, under the processes in place in Trinidad and Tobago, the petitioners had no meaningful opportunity to present mercy petitions or to have them considered by the competent authorities.²⁴¹

commuted continues until all appeals have been exhausted. Therefore, during this time period there should be no discrimination in providing opportunities for reform or social re-adaptation "based solely on the fact that these prisoners were sentenced to death." *Id.* at para. 158.

²³⁶ *Id.* at para. 171.

²³⁷ *Id.* at paras. 173-89.

²³⁸ American Convention, *supra* note 10, at art. 4(6).

²³⁹ *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 186.

²⁴⁰ *Id.* at para. 188.

²⁴¹ In paragraph 84(h) and (i) of its Judgment, the Court noted the procedure for obtaining a pardon:

In accordance with the Constitution of the Republic of Trinidad and Tobago, the President of the Republic retains a discretionary power to pardon those sentenced to death.

The Constitution of the Republic of Trinidad and Tobago provides for an Advisory Committee on the Power of Pardon, which is charged with considering and making recommendations to the relevant Minister as to whether an offender sentenced to death should benefit from discretionary pardon.

Id. at para. 84(h), (i) (citation omitted).

v. Non-Compliance with Provisional Measures in the Case of Joey Ramiah

In the course of the merits proceedings before the Court, only one of the prisoners, Joey Ramiah, was executed. This occurred notwithstanding the fact that Mr. Ramiah was among the beneficiaries of the Court's provisional measures in *James* and that his case had been referred to the Court as part of the *Constantine* Application.²⁴² In this respect, the Court rejected the State's contention that it was not aware of the Court's provisional measures order, and found that Trinidad and Tobago arbitrarily deprived Mr. Ramiah of his right to life in violation of Article 4 of the Convention by executing him on June 4, 1999, pursuant to a death sentence imposed under the Offenses Against the Persons Act.²⁴³ The Court also found that the arbitrary deprivation of Mr. Ramiah's life was "aggravated" because it occurred despite the existence of provisional measures ordered by the Court in his favor while his case was pending before the inter-American system.²⁴⁴

vi. Reparations

The reparations ordered by the Court were comprised of several elements, including reforms to Trinidad and Tobago's laws and prison system, the retrial of all petitioners who remained on death row, and the payment of monetary reparations to the next of kin of Mr. Ramiah and of expenses to the prisoners' representatives.²⁴⁵

Concerning the mandatory nature of the death penalty under Trinidad's law, the Court ordered the State to abstain from applying the Offenses Against the Person Act of 1925 and, within a reasonable period of time, to modify the Act to comply with international norms of human rights protections. According to the Court:

The legislative reforms contemplated should include the introduction of different categories (criminal classes) of murder, in keeping with the wide range of differences in the gravity of the act, so as to take into account the particular circumstances of both the crime and the offender. A system of graduated levels should be introduced to ensure that the

²⁴² *Constantine v. Trinidad & Tobago*, Case 11.787, Inter-Am. Ct. H.R. (ser. C) No. 82 (2001).

²⁴³ *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 191.

²⁴⁴ *Id.* at para. 198.

²⁴⁵ *Id.* at paras. 201–22.

severity of the punishment is commensurate with the gravity of the act and the criminal culpability of the accused.²⁴⁶

Similarly, the Court required Trinidad to modify the conditions of its prison system "to conform to the relevant international norms of human rights protection on the matter."²⁴⁷

With respect to the status within the legal system of all of the prisoners with the exception of Mr. Ramiah, the Court determined that Trinidad should order retrials and apply the new criminal legislation resulting from the reforms to the Offenses Against the Person Act.²⁴⁸ The Court also ordered Trinidad and Tobago to submit before the competent authority, and by means of the Advisory Committee on the Power of Pardon, the review of the prisoners' cases.²⁴⁹ The Court further required, "on grounds of equity," that the State abstain from executing the petitioners in all cases, regardless of the result of the new trials.²⁵⁰

Concerning the execution of Mr. Ramiah, the Court ordered the State to pay for non-pecuniary damages to his wife, Carol Ramcharan, the sum of U.S. \$50,000 to support and educate their child, Joanus Ramiah.²⁵¹ The Court ordered a further indemnity of U.S. \$10,000 to Moonia Ramiah, the mother of Mr. Ramiah, to make reparations for the non-pecuniary damages that she may be presumed to have suffered as a result of the execution of her son.²⁵² Finally, the Court ordered the State to pay the legal representatives of the victims the sum of U.S. \$13,000 as reimbursement for the expenses they have incurred in bringing the case before the Inter-American Court of Human Rights.²⁵³

In accordance with its established practice, the Court included in its judgment directions concerning the monitoring of the implementation of the terms of its decision. The Court required that Trinidad and Tobago, from the date of notification of the Court's judgment, provide the Court with a report every six months regarding the measures taken to implement the judgment.²⁵⁴ The Court also provided that it would oversee the implementation of the judgment and that once

²⁴⁶ *Id.* at para. 212; *see also id.* at para. 223, oper. para. 8 (citing, inter alia, THE LAST TEMPTATION OF CHRIST v. Chile, Case 11.803, Inter-Am. Ct. H.R. (ser. C) No. 73 (2001)).

²⁴⁷ *Id.* at para. 223, oper. para. 14.

²⁴⁸ *Id.* at para. 223, oper. para. 9.

²⁴⁹ *Id.* at para. 223, oper. para. 10.

²⁵⁰ *Id.* at para. 223, oper. para. 11.

²⁵¹ *Id.* at para. 223, oper. para. 12.

²⁵² *Id.* at para. 223, oper. para. 13.

²⁵³ *Id.* at para. 223, oper. para. 15. In this regard, the petitioners' representatives did not ask for compensation for their costs in the litigation before the Court, for the reason that they had litigated the cases before the inter-American system pro bono.

²⁵⁴ *Id.* at para. 223 oper. para. 16.

Trinidad and Tobago had complied with its terms, the Court would deem the case to be closed.²⁵⁵

As of November 27, 2003, the date of the Court's last order on compliance with the judgment in *Hilaire, Constantine & Benjamin*, Trinidad and Tobago had failed to report to the Court on the measures taken to implement the Court's decision.²⁵⁶ At the same time, as of this writing, none of the prisoners in the case, with the exception of Mr. Ramiah, have been executed by Trinidad and Tobago. Further, the Judicial Committee of the Privy Council appears to have secured compliance with at least part of the Court's judgment, by ordering that the death sentences of persons awaiting execution at the time of its July 7, 2004, judgment in *Matthew v. The State*, including the prisoners in the *Hilaire, Constantine & Benjamin* litigation, be commuted to life sentences.²⁵⁷ As the following discussion will indicate, the findings from the inter-American litigation have had a direct and significant impact upon the decisions of the domestic courts on the mandatory death penalty issue and, in some Caribbean states, have led to the implementation of individualized sentencing in death penalty cases.

IV. SIGNIFICANT IMPLICATIONS OF THE MANDATORY DEATH PENALTY LITIGATION

The litigation before the Inter-American Commission and Court in the cases concerning the mandatory nature of the death penalty in the Caribbean region has made significant contributions to the development of human rights standards at the domestic and international levels in several respects. Until the Commission's initial decision in the case of *Hilaire v. Trinidad & Tobago*,²⁵⁸ no other international human rights tribunal had evaluated the implications of mandatory sentencing for the implementation of the death penalty. Relevant standards had been developed,

²⁵⁵ *Id.* at para. 223, oper. para. 17.

²⁵⁶ *Id.* (noting that to date, the State had not reported to the Court on compliance with the judgment of June 21, 2002, and specifically observing that "the State cannot elude its obligations issuing from the June 21, 2002 Judgment of the Court, despite having denounced the Convention, for which reason it must effectively comply with the Judgment pursuant to Article 78(2) of the Convention").

²⁵⁷ See *Matthew v. The State*, [2004] 3 W.L.R. 812, [2004] U.K.P.C. 33, para. 32–33 (appeal taken from Trin. & Tobago). In the same decision, however, the Privy Council held that it could not declare Trinidad & Tobago's mandatory death penalty law unconstitutional as a consequence of the "savings clause" in Trinidad's constitution, which normally prevents laws that were in existence when the constitution came into effect from being declared an infringement of the constitution's human rights provisions. *Id.* at para. 16. Accordingly, it appears that any further measures to comply with the Inter-American Court's judgment lie with the Parliament in Trinidad & Tobago.

²⁵⁸ *Hilaire v. Trinidad & Tobago*, Case 11.816, Inter-Am. C.H.R. 66 (unpublished 1999), available at www.oas.org.

however, in the domestic legal systems of certain common law jurisdictions, and the Commission and the Court drew upon these standards in interpreting and applying the American Convention and American Declaration on the issue.²⁵⁹ This exercise further defined and developed the international human rights rules, principles, and standards that must guide the application of capital punishment.²⁶⁰

The inter-American system's jurisprudence influenced the approach taken by other tribunals on the issue of mandatory sentencing for the death penalty at both the domestic and international levels. Since the Commission rendered its determinations on the mandatory death penalty and the standards of procedural fairness applicable to mercy proceedings, similar findings have been delivered by other international and domestic tribunals, including the UNHRC, the Judicial Committee of the Privy Council, and the Eastern Caribbean Court of Appeal.²⁶¹ For its part, the Judicial Committee of the Privy Council also gave unprecedented domestic legal effect to the procedures of the inter-American system by preventing states from executing condemned prisoners while their complaints were pending before the Inter-American Commission and Court.²⁶²

Taken together, these developments have demonstrated a direct and effectual interrelationship between the articulation and implementation of human rights standards at the national and international levels.

A. Developments in International Human Rights Law Governing the Death Penalty

The inter-American human rights system proceedings concerning the mandatory death penalty and related matters in Caribbean Member States have contributed to the body of international human rights standards governing the implementation of the death penalty in procedural matters as well as substantive standards. In terms of procedure, both the Inter-America Commission and Court used their procedural rules in practicable and flexible ways in order to process the voluminous Caribbean petitions as expeditiously as possible. Processes employed included determining the admissibility and merits of the petition in the same decision and joining numerous individual complaints in one proceeding, and by these means, the Commission and the Court were able to respond quickly and effectively to the death penalty complaints.²⁶³

²⁵⁹ See *infra* Part IV.B.

²⁶⁰ See *infra* Part IV.B.

²⁶¹ See *infra* Part IV.C.

²⁶² See *supra* notes 96–102 and accompanying text (discussing the findings of the Judicial Committee of the Privy Council in the *Thomas & Hilaire v. Baptiste* case).

²⁶³ See *supra* notes 134–40 and accompanying text (describing efforts by the Commission to expedite the processing of mandatory death penalty petitions against Commonwealth Caribbean states).

In addition, both the Commission and the Court vigorously employed their authority to order interim measures, not only to preserve the *status quo ante* of the parties to the litigation, but also to perform a preventative function by seeking to avoid irreparable damage to persons.²⁶⁴ In reaffirming this approach to provisional measures, the Inter-American Court emphasized in no uncertain terms that Trinidad and Tobago was under an international legal obligation, by virtue of its ratification of the American Convention and as a function of the fundamental principle *pacta sunt servanda*,²⁶⁵ to comply with the Court's provisional measures and could not refuse to fulfill their international legal responsibility for domestic reasons.²⁶⁶ The Court also clarified that the failure of a state to comply with provisional measures in a death penalty case will result in an aggravated violation of the state's obligation to respect the right to life under Article 4 of the Convention.²⁶⁷ In these respects, the Court's findings as to the grounds for and the binding nature of its interim measures complement and reinforce similar findings made by other international courts and tribunals. For example, the Commission has concluded that OAS Member States are obliged to respect the Commission's precautionary measures in death penalty cases in order to preserve the very mandate of the Commission as an organ under the OAS Charter.²⁶⁸ The UNHRC Committee,²⁶⁹ the European Court of Human Rights,²⁷⁰ and the International Court of Justice have reached similar conclusions on the legal effect of their interim measures in cases involving capital punishment.²⁷¹

²⁶⁴ See, e.g., *James v. Trinidad & Tobago*, Order for Provisional Measures of Dec. 2, 2003, Inter-Am. Ct. H.R. (ser. E) No. 4, paras. 9–10 (2003); 1999–2001 Annual Reports of the Inter-Am. C.H.R., ch. III.C.1.

²⁶⁵ Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 26, 1155 U.N.T.S. 331.

²⁶⁶ *James*, Order for Provisional Measures of Dec. 2, 2003, Inter-Am. Ct. H.R. (ser. E) No. 4, para. 6 (2003).

²⁶⁷ See *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 200 (concluding that the Trinidad & Tobago arbitrarily deprived Mr. Ramiah of the right to life, and emphasizing the "seriousness of the State's non-compliance in virtue of the execution of the victim despite the existence of Provisional Measures in his favour").

²⁶⁸ See, e.g., *Garza v. United States*, Case 12.243, Inter-Am. C.H.R. 52, OEA/ser. L./V./II.111, doc. 20 rev., para. 117 (2001), available at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm>; *Beazley v. United States*, Case 12.412, Inter-Am. C.H.R. 101, OEA/ser. L./V./II.118, doc. 5 rev. 2, paras. 51–53 (2003), available at <http://www.cidh.org/annualrep/2003eng/usa.12.412.htm>.

²⁶⁹ See, e.g., *Piandiong v. Philippines*, Case 869/1999, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/70/D/869/1999, paras. 5.1–5.4 (2000), available at <http://www.unhchr.ch/tbs/doc.nsf/0/8498694eee98082ac12569eb0034f1bb?OpenDocument>.

²⁷⁰ See, e.g., *Mamatkulov v. Turkey*, No. 46827/99, 68 Eur. Ct. H.R., paras. 104–07 (2003).

²⁷¹ See, e.g., *Case Concerning the Vienna Convention on Consular Relations (F.R.G. v. U.S.)*, 1999 I.C.J. 104, paras. 22–28 (Mar. 3) (order for the indication of provisional measures).

With respect to the substantive international human rights standards governing the application of capital punishment, the decisions emanating from the inter-American system concerning the death penalty in the Caribbean region made two particularly significant contributions. First, the Inter-American Commission and Court clarified that an arbitrary deprivation of life will occur when a death sentence is imposed on an individual pursuant to a law that permits no discretion by a court to consider whether death is an appropriate punishment in light of an offender's individual characteristics and his or her crime.²⁷² In effect, then, individualized sentencing has been recognized as a prerequisite for the lawful imposition of capital punishment in the inter-American system. This in turn may open the door to additional litigation in the Caribbean region concerning the standards applicable to the individualized sentencing process, as has been the case in capital petitions arising out of the United States.²⁷³ The mandatory death penalty decisions also illustrate the progressively exceptional and limited role that the death penalty may play as an exception to the right to life protected under inter-American human rights instruments.

The decisions resulting from the Caribbean death penalty litigation also articulated, for the first time in a contentious case before a regional human rights body, the international standards of procedural fairness applicable to the right of a condemned prisoner to seek amnesty, pardon, or commutation of sentence under Article 4(6) of the American Convention.²⁷⁴ In this respect, the Commission and the Court noted that including the ability to seek amnesty, pardon, or commutation of sentence in the Convention, made this entitlement, like other provisions, a right that must be rendered effective.²⁷⁵ When read in light of Article 8 of the Convention, the obligation under Article 4(6) was found to require a fair and transparent procedure by which an offender sentenced to death may make use of all

²⁷² See, e.g., *McKenzie v. Jamaica*, Case 12.023, Inter-Am. C.H.R. 41, OEA/ser. L./V./II.106, doc. 6, paras. 208–20 (1999), available at <http://www.cidh.org/annualrep/99eng/merits/jamaica12.023.htm>; *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, paras. 102–03.

²⁷³ See, e.g., *Garza*, Case 12.243, Inter-Am. C.H.R. 52, paras. 90–91 (addressing the use of evidence of unadjudicated crimes in the sentencing phase of capital prosecutions in the United States).

²⁷⁴ Article 4(6) of the Convention provides: “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.” American Convention, *supra* note 10, at art. 4(6); see also International Covenant on Civil and Political Rights, art. 6(4), 999 U.N.T.S. 171 (“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”).

²⁷⁵ See, e.g., *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 186.

favorable evidence deemed to be relevant to the granting of mercy. While neither the Court nor the Commission prescribed specific procedural requirements, they found that the processes in place in the Republic of Trinidad and Tobago and similar Caribbean jurisdictions failed to meet the standards under the Convention. The processes in place provided no guidelines for the exercise of the power of pardon by the executive, and a condemned prisoner had no right to be informed of the date on which his or her case was to be considered, to present oral or written arguments to the executive, or to receive the executive's decision within a reasonable time.²⁷⁶

Notably, following the Commission's first published decisions in which it found a violation of Article 4(6) of the American Convention in relation to the mercy procedure in Caribbean jurisdictions,²⁷⁷ the Judicial Committee of the Privy Council reversed its longstanding jurisprudence where the exercise of mercy was regarded as an extra-judicial remedy not subject to judicial review. Referring to the American Convention, the Privy Council found:

Whether or not the provisions of the Convention are enforceable as such in domestic courts, it seems to their Lordships that the States' obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review.

The procedures followed in the process of considering a man's petition are thus in their Lordships' view open to judicial review. . . .

In their Lordships' opinion it is necessary that the condemned man should be given notice of the date when the Jamaican Privy Council will consider his case. That notice should be adequate for him or his advisers to prepare representations before a decision is taken.²⁷⁸

The Privy Council also indicated that when a report of an international human rights body such as the Commission is available, it should be considered, and if

²⁷⁶ See, e.g., *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 230–32 (1999); *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94 (finding that the procedure for granting mercy to the thirty-two victims in the case was characterized by a “lack of transparency, lack of available information and lack of participation by the victims, resulting in a violation of Article 4(6), in conjunction with Article 8 and 1(1) of the American Convention”).

²⁷⁷ See, e.g., *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 230–32 (1999); *Baptiste v. Grenada*, Case 11.743, Inter-Am. C.H.R. 38, OEA/ser. L./V./II.106, doc. 6 rev. (2000).

²⁷⁸ *Lewis v. Attorney Gen. of Jamaica*, [2000] 3 W.L.R. 1785, [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.), available at <http://www.privacy-council.org.uk/output/Page169.asp>.

not accepted by the Executive in Jamaica, reasons should be given to explain why.²⁷⁹ Further, the Court held that it was not sufficient that the condemned prisoner be given a summary or the gist of the material available to the Jamaican Privy Council as there are "too many opportunities for misunderstanding or omissions," and that the representations made by a condemned prisoner should be in writing unless the Jamaican Privy Council adopts a practice of oral hearing.²⁸⁰

As discussed in Part C below, the Privy Council's findings concerning the Prerogative of Mercy constitutes one of several areas in which the standards and decisions of the inter-American human rights system played a role in shaping domestic jurisprudence on the use of the death penalty in the Caribbean.

B. Influence of Decisions of National Courts on the Inter-American Human Rights System

In rendering their findings on the impermissibility of mandatory sentencing for the death penalty, both the Inter-American Commission and the Inter-American Court referred to and relied on the jurisprudence of the high courts of certain common law states which have used the death penalty. In particular, the Commission and Court have looked at the United States, India, and South Africa. It is apparent that, in the views of the Commission and Court, the findings of these courts provided a useful reference in interpreting and applying pertinent articles of the American Convention and the American Declaration in relation to death penalty proceedings.²⁸¹

Specifically, both the Court and Commission referred to the reasoning of the U.S. Supreme Court in *Woodson v. North Carolina*,²⁸² which was the first high court decision to prohibit mandatory sentencing for the death penalty in the United States. In *Woodson*, the Court found a North Carolina law imposing a mandatory death sentence for first degree murder to be in violation of the right not to be subjected to cruel and unusual punishment and the right to due process under the Eighth²⁸³ and Fourteenth²⁸⁴ Amendments to the U.S. Constitution.²⁸⁵ Among the

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See *infra* note 287 and accompanying text.

²⁸² 428 U.S. 280 (1976). See also *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁸³ U.S. CONST. amend. VIII (mandating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

²⁸⁴ *Id.*, amend. XIV, § I. Declaring that:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

grounds for the Court's decision was a finding that the mandatory death penalty failed to allow for the particularized consideration of relevant aspects of the character and the defendant's conviction record before imposing a sentence of death. It was therefore inconsistent with the fundamental respect for humanity underlying the prohibition of cruel and unusual punishment under the Eighth Amendment. The Court wrote that the mandatory death penalty is a:

process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.²⁸⁶

Both the Inter-American Commission and Court referred to these observations by the U.S. Supreme Court in evaluating the mandatory death penalty in light of the requirements of the American Convention; only the Commission, however, found violations of the right to humane treatment under Article 5 of the Convention due to mandatory sentencing laws.²⁸⁷

In shaping their approach to the mandatory death penalty issue, the Court and Commission also cited decisions of the highest courts in South Africa and India, other common law jurisdictions with experience in applying constitutional human rights protections to the practice of capital punishment.²⁸⁸ In particular, reliance was placed upon the South African Constitutional Court's decision in *State v. Makwanyane*,²⁸⁹ in which the Court ultimately determined that the death penalty was per se contrary to the South African Constitution. In reaching this conclusion, however, the Constitutional Court suggested that the guided discretion provided to

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

²⁸⁵ *Woodson*, 428 U.S. at 305.

²⁸⁶ *Id.* at 304.

²⁸⁷ See, e.g., *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, para. 215 (1999); *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 105 (concurring with the view of the U.S. Supreme Court).

²⁸⁸ See, e.g., *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 216–18 (1999); *Hilaire, Constantine & Benjamin*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 103 n.110.

²⁸⁹ *State v. Makwanyane*, 1995 (3) SARL 391 (CC) (S. Afr.).

South African judges to consider the personal circumstances and subjective factors of a defendant in applying the death penalty satisfied in part the requirement that the death penalty not be imposed arbitrarily or capriciously.²⁹⁰ In a similar vein, the Commission and Court cited longstanding jurisprudence of the Supreme Court of India in cases such as *Singh v. State of Punjab*²⁹¹ according to which the scope and concept of mitigating factors in the area of the death penalty must receive a liberal and expansive construction by the courts. The Indian Supreme Court stated that this approach was justified by its view that: "A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."²⁹² Accordingly, domestic constitutional jurisprudence had a concrete impact upon the deliberations of both the Inter-American Commission and Court on the issue of the mandatory death penalty. While neither body specifically articulated the legal basis for considering these authorities, it has been recognized that decisions of national courts may serve as a subsidiary means of determining applicable rules of international law.²⁹³ It may therefore be inferred that the Commission and Court considered it appropriate and useful to consider national jurisprudence on a distinctive issue such as the mandatory death penalty. This is particularly true insofar as the jurisdictions considered were governed by constitutions that enshrined rights analogous to those under the inter-American human rights instruments, and where respect for those rights was supervised by a competent, independent, and impartial judiciary.²⁹⁴

²⁹⁰ *Id.*

²⁹¹ (1980) 2 S.C.R. 475.

²⁹² *Id.* at 534; *see also* *Mithu v. State of Punjab*, (1983) 2 S.C.R. 690, para. 12. In invalidating a provision of the Indian Criminal Code which required the sentence of death to be passed on a defendant convicted of murder committed while the offender was under sentence of imprisonment of life, the court opined:

[A] provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offense was committed and, therefore, without regard to the gravity of the offense, cannot but be regarded as harsh, unjust and unfair.

Id. at para. 12.

²⁹³ *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d) (including among the law to be applied by the Court "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"). *See also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 23 (5th ed. 1998) ("Municipal decisions have been an important source for material on recognition of belligerency, of governments and of states, state succession, sovereign immunity, diplomatic immunity, extradition, war crimes, belligerent occupation, the concept of a 'state of war', and the law of prize.").

²⁹⁴ Domestic courts have applied similar reasoning when considering the decisions of international and foreign tribunals in interpreting their state constitutions in the context of

C. Influence of Decisions of the Inter-American Human Rights System on National Courts

At the same time that the Court and the Commission drew upon the human rights jurisprudence of domestic courts in addressing the issues raised in the mandatory death penalty petitions, the jurisprudence of the Commission and Court had a significant effect on the development of human rights standards by other tribunals at the domestic and international levels.

As discussed above, the proceedings before the inter-American system began to have a perceptible impact upon domestic death penalty litigation in the Caribbean region with the decision of the Judicial Committee of the Privy Council in *Pratt*,²⁹⁵ where the time taken by the supervisory bodies of the inter-American system to decide upon petitions was included within the five-year benchmark proclaimed by the Court. This was followed by the decision in *Thomas & Hilaire*,²⁹⁶ in which the Privy Council ventured further by precluding Trinidad and Tobago and, subsequently, other Commonwealth Caribbean states from executing condemned inmates while their petitions were pending before the inter-American system. It was the Eastern Caribbean Court of Appeal,²⁹⁷ however, that first seized an opportunity

the death penalty. *See, e.g., Makwanyane*, 1995 (3) SARL 391, para. 34 (“The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention.”). However, not all high court judges share this view. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia J., dissenting) (“I agree with the Chief Justice . . . that the views of professional and religious organizations are irrelevant. Equally irrelevant are the practices of the ‘World Community’, whose notions of justice are (thankfully) not always those of our people.”).

²⁹⁵ *Pratt & Morgan v. Attorney Gen. for Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993), available at <http://www.privacy-council.org.uk/output/Page171.asp>.

²⁹⁶ *Thomas & Hilaire v. Baptiste*, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1 (P.C.) (appeal taken from Trin. & Tobago), available at <http://www.privacy-council.org.uk/output/Page170.asp>.

²⁹⁷ For information regarding the Eastern Caribbean Court system, see <http://www.esupremecourts.org.lc>.

The Eastern Caribbean Supreme Court was established in 1967 by the West Indies Associated States Supreme Court Order No. 223 of 1967 [and] is a superior court of record for nine Member States, six independent namely Antigua and Barbuda, Dominica, Grenada, St. Kitts. Nevis, St. Lucia, St. Vincent and the Grenadines and three British Overseas Territories namely Anguilla, the British Virgin Islands and Montserrat.

....

The Court sits in two divisions, the Court of Appeal and the High Court of Justice – Trial Division.

to consider and apply the substantive decisions of the inter-American system on the issue of the mandatory death penalty, in determining the permissibility of mandatory sentencing for capital punishment under the constitutions of St. Lucia and St. Vincent. In its April 2, 2001, decision in the consolidated appeal of *Spence v. The Queen*, a majority of the Eastern Caribbean Court of Appeal concluded that the mandatory death penalty in St. Vincent & the Grenadines and St. Lucia was unconstitutional as inhuman and degrading punishment under the constitutions of those countries.²⁹⁸ In his reasons for judgment, Chief Justice Byron, one of the two majority judges, explicitly referred to the Inter-American Commission's jurisprudence on the mandatory death penalty issue as articulated in such decisions as *McKenzie v. Jamaica*²⁹⁹ and *Baptiste v. Grenada*³⁰⁰ and concluded that "the principles they espouse are consistent with the provisions of section 5 of the Constitution."³⁰¹ After summarizing the Commission's analysis of the mandatory death penalty issue, the Chief Justice stated:

This rationale conforms with my understanding of a prohibition against inhuman punishment and therefore explains and gives life and meaning to the express provision of section 5 of the Constitutions of Saint Lucia and Saint Vincent. I have found the jurisprudence to be persuasive and I adopt it in defining the extent of the protection which section 5 of the Constitution has guaranteed to every citizen.³⁰²

Chief Justice Byron went on to find that "the requirement of humanity in our Constitution does impose a duty for consideration of the individual circumstances of the offense and the offender before a sentence of death could be imposed in accordance with its provisions."³⁰³

The Eastern Caribbean Court of Appeal's decision respecting Peter Hughes, together with a second Eastern Caribbean Court of Appeal decision in *Reyes v. The Queen* and a third decision from the Belize Supreme Court in *Fox v. The Queen*,

About the COA, at http://www.ecsupremecourts.org.lc/Contents/About_the_ECSC.htm (last visited Dec. 11, 2004).

²⁹⁸ *Spence v. The Queen*, Crim. App. Nos. 20 of 1998 and 14 of 1997 (Apr. 2, 2001) (E. Carib. Ct. Apps.) (appeals taken from St. Vincent & the Grenadines and St. Lucia) (judgment from a consolidated appeal including the case of *Hughes v. The Queen*).

²⁹⁹ *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41 (1999).

³⁰⁰ *Baptiste*, Case 11.743, Inter-Am. C.H.R. 38 (2000).

³⁰¹ *Spence v. The Queen*, Crim. App. Nos. 20 of 1998 and 14 of 1997, para. 41 (Apr. 2, 2001) (E. Carib. Ct. Apps.) (appeals taken from St. Vincent & the Grenadines and St. Lucia) (judgment from a consolidated appeal including the case of *Hughes v. The Queen*).

³⁰² *Id.* at para. 45.

³⁰³ *Id.* at para. 46.

were subsequently appealed to the Judicial Committee of the Privy Council, which rendered three judgments on March 11, 2002.³⁰⁴ In its judgments, the Privy Council endorsed the Eastern Caribbean Court of Appeal's findings as to the incompatibility of the mandatory death penalty with national constitutional human rights protections. In particular, in *Reyes*, the Privy Council considered pertinent domestic and international decisions relating to mandatory sentencing for the death penalty, including the Inter-American Commission's decisions in *Edwards v. The Bahamas*³⁰⁵ and *McKenzie v. Jamaica*,³⁰⁶ and stated:

The Board is however satisfied that the provision requiring sentence of death to be passed on the appellant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. . . . To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect.³⁰⁷

In more recent judgments, the Privy Council has continued to express the view, based to a large extent upon the jurisprudence of the inter-American human rights system, that the mandatory death penalty constitutes cruel and unusual punishment under the domestic constitutions of Caribbean states, including Jamaica, Barbados, and Trinidad and Tobago. For example, in *Matthew v. The State*, the majority of a nine-member Board of the Privy Council stated:

Their Lordships consider that for reasons similar to those given in *Reyes v The Queen* and *Boyce and Joseph v. The Queen* the mandatory death penalty is a cruel and unusual punishment and therefore inconsistent with sections 4(a) and 5(2)(b) of

³⁰⁴ *The Queen v. Hughes*, [2002] 2 W.L.R. 1058, [2002] U.K.P.C. 12, [2002] 2 A.C. 259 (appeal taken from St. Lucia); *Fox v. The Queen*, [2002] 2 W.L.R. 1077, [2002] U.K.P.C. 13, [2002] 2 A.C. 284 (appeal taken from St. Kitts & Nevis); *Reyes v. The Queen*, [2002] 2 W.L.R. 1034, [2002] U.K.P.C. 11, [2002] 2 A.C. 235 (appeal taken from Belize).

³⁰⁵ *Edwards v. The Bahamas*, Case 12.067, Inter-Am. C.H.R. 48, OEA/ser. L./V./II.111, doc. 20 rev. (2001).

³⁰⁶ *McKenzie*, Case 12.023, Inter-Am. C.H.R. 41, paras. 230–32 (1999).

³⁰⁷ *Reyes*, [2002] 2 W.L.R. 1034, [2002] U.K.P.C. 11, [2002] 2 A.C. 235, para. 43.

the Constitution. Their Lordships note that Trinidad and Tobago is, like Barbados, a party to the International Covenant on Civil and Political Rights and a member of the Organisation of American States and that the Human Rights Committee and Inter-American Commission have both decided that the mandatory death penalty is inconsistent with the international law obligations created by adherence to the ICCPR and membership of the OAS respectively: see *Kennedy v. Trinidad and Tobago* and *Edwards v. The Bahamas*. The principle that domestic law should so far as possible be interpreted consistently with international obligations and the weight of opinion expressed in domestic cases decided in other jurisdictions supports the conclusion that sections 4 and 5 [sic] the Constitution should be similarly interpreted. For further discussion on this point, their Lordships refer to the judgment in *Boyce and Joseph v. The Queen*.³⁰⁸

At the same time, as discussed further below, the Privy Council held that it could not declare the mandatory death penalty in Barbados and Trinidad and Tobago unconstitutional due to “savings clauses” included in those states’ constitutions that preserve pre-independence laws from scrutiny under the constitutions’ human rights provisions.³⁰⁹ In the case of Jamaica, however, the Privy Council found that its “savings clause” did not protect Jamaica’s mandatory death penalty law from constitutional challenge because Jamaica had amended its Offences Against the Person Act since independence to establish categories of capital and non-capital murder and thereby removed the amended provisions from the scope of the savings clause. Accordingly, the Privy Council declared that the death penalty in Jamaica could only be imposed through individualized sentencing. The Privy Council stated:

[B]asic humanity requires that the appellant should be given an opportunity to show why the sentence of death should not be passed on him. If he is to have that opportunity, it must be open to the judge to take into account the facts of the case and the appellant’s background and personal circumstances. The judge must also be in a position to mitigate the sentence by imposing, as an alternative, a sentence of imprisonment. The mandatory

³⁰⁸ *Matthew*, [2004] W.L.R. 812, [2004] U.K.P.C. 33, para. 12 (citations omitted).

³⁰⁹ See *infra* notes 318–22 and accompanying text.

sentence flies in the face of these requirements, as it precludes any consideration of the circumstances.³¹⁰

Finally, it is notable that the doctrine of the inter-American system concerning the mandatory death penalty has also had an influence upon other international human rights supervisory bodies. In its December 5, 2000, views in *Thompson v. St. Vincent & the Grenadines*, a majority of the UNHRC determined that the carrying out of Mr. Thompson's death sentence would, owing to its mandatory nature, constitute an arbitrary deprivation of his life contrary to Article 6(1) of the International Covenant on Civil and Political Rights.³¹¹ Among the authorities relied upon by the author of the communication in the case, and referred to by the Committee in its summary of facts, was the Commission's first merits decision on the mandatory death penalty issue in *Hilaire v. Trinidad & Tobago*.³¹² It therefore appears that the Commission's findings concerning the mandatory death penalty in the Caribbean have also had a persuasive impact upon the approach taken by other international human rights supervisory bodies on the same issue. The findings of the Eastern Caribbean Court of Appeal and the Judicial Committee of the Privy Council on the mandatory death penalty therefore provide striking and formidable confirmation that international human rights standards and jurisprudence can have a direct and authoritative impact on the manner in which constitutional rights are interpreted and applied.

D. The Challenges Continue

The developments described in this article may be acclaimed as promising movements toward the progressive integration of international human rights standards into the domestic legal systems of states. This is a trend that the terms of international treaties such as the American Convention not only envision, but require.³¹³ In particular, where the executive or legislative branches of governments have not taken measures to ensure that their practices conform with the requirements of the international human rights instruments to which they are bound, informed and coordinated litigation before domestic courts and international tribunals can provide an alternative and effective method of giving effect to international human rights standards. It is notable, for example, that as a result of the mandatory death penalty litigation in the Eastern Caribbean and Belize, the

³¹⁰ *Watson*, [2004] 3 W.L.R. 841, [2004] U.K.P.C. 34, para. 34.

³¹¹ See *Thompson v. St. Vincent & the Grenadines*, Case 806/1998, U.N. Hum. Rts. Comm., U.N. Doc.CCPR/C/70/D/806/1998 (1998).

³¹² *Id.* at para. 6.1.

³¹³ See American Convention, *supra* note 10, at arts. 1(1), 2.

courts in those jurisdictions have now instituted individualized sentencing procedures for capital punishment cases.³¹⁴

At the same time, to the extent that these developments have exerted pressure on states to amend their legislation and procedures in an area as controversial as the death penalty, it is not unexpected that some governments would resist the findings of domestic courts and international tribunals in this area. Indeed, efforts have been undertaken by some Caribbean states to counter the effects of the death

³¹⁴ See, e.g., *The Queen v. Reyes*, Judgment on Sentencing of Oct. 25 2002 (appeal taken from Belize) (unreported) (on file with author). Describing the guidelines for individualized sentencing in death penalty cases as follows:

Therefore, in order to introduce some measure of consistency and rationality and in keeping with the provisions of the Constitution of Belize, it is proposed that the following guidelines be followed in the prosecution, trial and sentencing of accused persons charged with the offence of murder:

(i) As from the time of committal, the prosecution should give notice as to whether they propose to submit that the death penalty is appropriate.

(ii) The prosecution's notice should contain the grounds on which they submit the death penalty is appropriate.

(iii) In the event of the prosecution so indicating, and the trial judge considering that the death penalty may be appropriate, the judge should, at the time of the allocutus, specify the date of the sentence hearing which provides reasonable time for the defence to prepare.

(iv) Trial judge should give directions in relation to the conduct of the sentence hearing, as well as indicating the materials that should be made available, so that the accused may have reasonable materials for the preparation and presentation of his case on sentence.

(v) At the same time the judge should specify a time for the defence to provide notice of any points or evidence it proposes to rely on in relation to the sentence.

(vi) The judge should give reasons for his decision including the statement as to the grounds on which he finds that the death penalty must be imposed in the event that he so conclude. He should also specify the reasons for rejecting any mitigating circumstances.

Id. at para. 26 (emphases omitted).

Applying these guidelines in the circumstances of Mr. Reyes's case, the Chief Justice of the Supreme Court of Belize decided that a sentence of life imprisonment, and not the death penalty, was the appropriate punishment. *Id.* at para. 35. See also *The Queen v. Hughes*, [2002] 2 W.L.R. 1058, [2002] U.K.P.C. 12, [2002] 2 A.C. 259 (appeal taken from St. Lucia) (unreported) (on file with author) (remarks of the Hon. Mr. Justice Adrian Saunders on sentencing Peter Hughes to twenty years' imprisonment for the murder of Jason Jean); *Fox v. The Queen*, [2002] 2 W.L.R. 1077, [2002] U.K.P.C. 13, [2002] 2 A.C. 284 (appeal from St. Kitts & Nevis) (unreported) (on file with author) (remarks of Justice Baptiste on sentencing Berthill Fox to life imprisonment for the murders of Leyoca Browne and Violet Browne).

penalty jurisprudence from the inter-American system as well as the Judicial Committee of the Privy Council. This has included, for example, renewed efforts to create a Caribbean Court of Justice that would replace the Privy Council as the highest appellate court for those states accepting its jurisdiction.³¹⁵ The ceremonial inauguration of the Caribbean Court of Justice ("CCJ") was to have taken place in November 2004 but, as of this writing, has been postponed to facilitate some member countries, such as Trinidad and Tobago, that have not yet enacted domestic legislation necessary to render the CCJ the court of final appeal in those countries.³¹⁶

In addition, through a series of recent appeals from Barbados, Jamaica, and Trinidad and Tobago,³¹⁷ the governments of Barbados and Trinidad and Tobago succeeded in arguing before the Judicial Committee of the Privy Council that the "savings clauses" contained in their national constitutions precluded the courts from declaring that their mandatory death penalty laws infringed the fundamental rights and freedoms protected under the same constitutions.³¹⁸ This has led to

³¹⁵ There has been a longstanding debate in the Caribbean region over the possible creation of a regional Caribbean Court of Justice that would replace the Judicial Committee of the Privy Council as the final appellate court for all participating Caribbean states. See NEWTON, *supra* note 1, at 86–88 (indicating that as early as 1972 the Organization of Commonwealth Caribbean Bar Associations "reported in favour of a regional third tier court" that would, *inter alia*, "have a permanent home and library facilities in one of the participating territories" and would "consist of a President or Chief Justice and four Justices of Appeal to be appointed by the majority vote of the Heads of Government of the participating territories"). These recommendations were not implemented, in part because the proposals were not favorably received in Trinidad & Tobago by the 1974 Trinidad & Tobago Constitution Review Commission. In 2001, however, agreement was finally reached among Caribbean states on the establishment of the Court, which will be the highest court in the region for appeal cases involving both criminal and civil matters in those countries that ratify the Court's treaty, and will also have jurisdiction over the interpretation and application of the Treaty of Chaguaramas establishing the Caribbean Community. See Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, *available at* <http://www.caricom.org>. As of this writing, preparatory work for the Court's operations remains underway. See Press Release, Caribbean Community Secretariat, Caribbean Court of Justice Final Agreement Enters into Force (Feb. 11, 2004), *at* http://www.caricom.org/pressreleases/pres17_04.htm (last visited Dec. 11, 2004).

³¹⁶ Rickey Singh, *Doubts About Readiness for CSME Deadline*, JAM. OBSERVER, Nov. 8, 2004, *available at* <http://www.jamaicaobserver.com>.

³¹⁷ See *Mathew*, [2004] 3 W.L.R. 812, [2004] U.K.P.C. 33; *Boyce*, [2004] 3 W.L.R. 786, [2004] U.K.P.C. 32; *Watson*, [2004] 3 W.L.R. 841, [2004] U.K.P.C. 34.

³¹⁸ In its judgment in *Mathew*, for example, the Judicial Committee of the Privy Council held that the language and purpose of the "savings clause" under section 6 of Trinidad's constitution, which prevents the human rights provisions under sections 4 and 5 of the constitution from invalidating, *inter alia*, any law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of the constitution, were "so clear that whatever may be their Lordships views about the morality or efficacy of the death penalty, they are bound as a court of law to give effect to it." *Mathew*, [2004] 3 W.L.R. 812, [2004] U.K.P.C. 33, para. 2.

the regressive result that the mandatory death penalty, and possibly other pre-independence legislation — the very laws that are most likely to defy evolving human rights standards — are immune from challenge under the human rights provisions of certain national constitutions. As the Inter-American Court expressly noted in respect of the savings clause in Trinidad's constitution, however, no such impediment exists concerning states' international human rights commitments, based upon the fundamental principle that a state "cannot invoke provisions of its domestic law as justification for failure to comply with its international obligations."³¹⁹ Indeed, the four-member minority in *Matthew v. The State* observed that by accepting the majority's interpretation of Trinidad's savings clause, the Privy Council itself put Trinidad in breach of its international obligations under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration, and the American Convention.³²⁰

Further, several Caribbean states have endeavored to amend their constitutions in order to neutralize the effects of the recent death penalty jurisprudence from the Privy Council and the inter-American human rights system. In particular, in September 2002, the State of Barbados, through the Barbados Constitutional (Amendment) Act,³²¹ enacted changes to its constitution that, inter alia, prevent persons sentenced to death from challenging their sanctions as being contrary to the right to humane treatment based upon the mandatory nature of the sanction imposed or the delay or conditions under which the person is held pending the execution of a sentence of death. The amendments also permit the government to prescribe time limits within which appeals or consultations by condemned prisoners to bodies outside of Barbados, such as the Inter-American Commission and Court, must be concluded, beyond which executions may be carried out notwithstanding a pending appeal or consultation.³²²

³¹⁹ *Hilaire, Constantine & Benjamin v. Trinidad & Tobago*, Case 11.816, Inter-Am. Ct. H.R. (ser. C) No. 94, para. 152(c) (2002); see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339.

³²⁰ *Matthew*, [2004] 3 W.L.R. 812, [2004] U.K.P.C. 33, para. 59 (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, and Lord Steyn and Lord Walker of Gestingthorpe, dissenting).

³²¹ BARB. CONST. (Constitutional Amendment Act, 2002), in *Supp. to Official Gazette*, No. 74 (Sept. 5, 2002).

³²² Sections 2, 4, and 5 of the Barbados Constitutional (Amendment) Act, 2002, provide as follows:

2. Subject to section 5 of this Act, section 15 of the Constitution [providing for the right to protection from inhuman treatment] is amended by adding the following subsection:

(3) The following shall not be held to be inconsistent with or in contravention of this section:

(a) the imposition of a mandatory sentence of death or the

The amendments to the Barbados Constitution came into operation on September 5, 2002, approximately two months after the Inter-American Court's June 21, 2002, judgment in the case of *Hilaire, Constantine & Benjamin*. Similar

execution of such a sentence;

- (b) any delay in executing a sentence of death imposed on a person in respect of a criminal offense under the law of Barbados of which he has been convicted;
- (c) the holding of any person who is in prison, or otherwise lawfully detained, pending execution of a sentence of death imposed on that person, in conditions, or under arrangements, which immediately before the coming into operation of the *Constitutional (Amendment) Act, 2002*
 - (i) were prescribed by or under the Prisons Act, as then in force; or
 - (ii) were otherwise practiced in Barbados in relation to persons so in prison or so detained.

4. Section 78 of the *Constitution* [addressing the prerogative of mercy] is amended by adding the following subsections:

- (5) A person has the right to submit directly or through a legal or other representative written representation in relation to the exercise by the Governor-General or the Privy Council of any of their respective functions under this section but is not entitled to an oral hearing.
- (6) The Governor-General, acting in accordance with the advice of the Privy Council, may by instrument under the Public Seal direct that there shall be time-limits within which persons referred to in subsection (1) may appeal to, or consult, any person or body of persons (other than Her Majesty in Council) outside Barbados in relation to the offense in question; and, where a time-limit that applies in the case of a person by reason of such a direction has expired, the Governor-General and the Privy Council may exercise their respective functions under this section in relation to that person, notwithstanding that such an appeal or consultation as aforesaid relating to that person has not been concluded.
- (7) Nothing contained in subsection (6) shall be construed as being inconsistent with the right referred to in paragraph (c) of section 11.

5. The amendment made by section 2 of this Act to section 15 of the Constitution does not apply in relation to a person on whom a sentence of death was pronounced before the coming into operation of this Act.

amendments have been contemplated by Belize and Jamaica, although none have been enacted in those states.³²³

It is apparent that these various and most radical efforts undertaken by states in the region are aimed at limiting or reversing the jurisprudential developments that have occurred in the national courts in the Caribbean, as well as within the inter-American system, by amending their constitutions to create exceptions to the application of fundamental rights among segments of their populations. In a series of general hearings before the Commission in 2002 and 2003, several Caribbean Member States aggressively defended their constitutional and other initiatives.³²⁴ Partly as a result, during its 119th regular period of sessions in March 2004, the Commission decided to seek an advisory opinion from the Inter-American Court of Human Rights pursuant to Article 64(1) of the American Convention, asking the Court to determine whether it is inconsistent with Articles 1(1), 2, 4, 5, 8, 25, and 44 of the American Convention, and corresponding protections under the American Declaration, for states to take legislative or other measures that deny persons sentenced to death access to judicial or other effective recourse to challenge the sanction imposed on certain grounds, namely: because it is the mandatory punishment for the person's crime; because of the delay or conditions under which the person has been detained; or because the person has a complaint pending before the inter-American human rights system. The Commission filed the request on April 20, 2004, and as of this writing the Court has established a March 31, 2005, deadline for the filing of written comments by interested parties in accordance with Article 62 of the Court's Rules of Procedure.³²⁵

³²³ See BELIZE CONST. (Fifth Amendment) Bill, 2002; Jamaica People's National Party 2002, Election Manifesto, § P56.

³²⁴ See Press Release No. 44/02, Inter-Am. C.H.R., The IACHR Closes Its 116th Ordinary Session, annex pt. III (Oct. 25, 2002); Press Release No. 04/03 Inter-Am. C.H.R., IACHR Concludes 117th Regular Session, annex pt. III (Mar. 10, 2003); Press Release 30/03, Inter-Am. C.H.R., IACHR Concludes Its 118th Regular Session, annex pt. III (Oct. 24, 2003); see also *Boyce*, [2004] 3 W.L.R. 786, [2004] U.K.P.C. 32, para. 81.

³²⁵ Article 62 of the Court's Rules of Procedure prescribes the procedure on requests for advisory opinion as follows:

1. On receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all the member states, to the Commission, to the Secretary General and to the OAS organs whose spheres of competence relate to the subject of the request, if appropriate.
2. The President shall fix the time-limits for the filing of written comments by the interested parties.
3. The President may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, he may do so after consultation with the Agent.
4. At the conclusion of the written proceedings, the Court shall

The foregoing therefore indicates that this chapter in the development of international human rights standards in the Caribbean region is not yet closed. The advances have been formidable and encouraging. At the same time, considerable resistance to these changes remains on the part of some states, and therefore further interaction between governments, the domestic courts, and international human rights supervisory bodies may well be necessary in attempting to define the standards under which the death penalty may continue to be implemented in the Commonwealth Caribbean.

CONCLUSION

The recent litigation in the Caribbean region concerning the mandatory death penalty has proven significant for the development of human rights standards at several levels. Internationally, the cases have tested the ability of human rights treaty bodies to respond to voluminous and urgent complaints in a timely and effective way and have led to material advances in the international principles and standards governing the implementation of capital punishment based in part upon national precedents. At the domestic level, courts have found value in drawing upon the terms of human rights instruments and the associated decisions of their supervisory institutions in order to give informed and progressive meaning and effect to the rights and freedoms enshrined in regional constitutions. In doing so, the judicial branches of regional governments have given meaningful effect to the principle of effectiveness, according to which the obligation to ensure the free and full exercise of human rights requires not only the existence of a legal system designed to make it possible to comply with this obligation, but also that governments conduct themselves so as to effectively ensure the free and full exercise of human rights.³²⁶ Moreover, the national courts have extended this principle beyond the substantive guarantees in the inter-American human rights instruments to encompass the international procedures by which compliance with those guarantees is supervised.

It remains to be seen whether and to what extent the other branches of government may follow the example established by the courts by giving genuine effect to their international human rights commitments through appropriate legal reforms and other internal measures. Recent developments, however, suggest

decide whether there should be oral proceedings and shall fix the date for such a hearing, unless it delegates the latter task to the President. In cases governed by Article 64(2) of the Convention, a prior consultation with the Agent is required.

Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 44, at art. 62.

³²⁶ See Velásquez Rodríguez v. Honduras, Case 7920, Inter-Am. Ct. H.R. (ser. C) No. 4, paras. 167–68 (1988), 28 I.C.M. 291 (1989); Godínez-Cruz v. Honduras, Case 8097, Inter-Am. Ct. H.R. (ser. C) No. 5, paras. 176–77 (1989).

that a conciliatory approach is unlikely to emerge in the near future, at least concerning the issue of capital punishment. Nevertheless, the mandatory death penalty litigation has set a valuable precedent for the protection of human rights in the Caribbean region, one that should be drawn upon by advocates and courts in other jurisdictions who are attempting to give full effect to states' human rights commitments.