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Decided by: Chairman: Claudio Grossman;
First Vice-Chairman: Juan Mendez;
Second Vice-Chairman: Marta Altolaguirre;
Commissioners: Helio Bicudo, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo.
Dated: 4 April 2001
Citation: Knights v. Grenada, Case 12.028, Inter-Am. C.H.R., Report No. 47/01, OEA/Ser.L/V/II.111, doc. 20, rev. (2000)
Represented by: APPLICANT: Saul Lehrfreund Esq. (Solicitor of Messrs. Simon Muirhead & Burton)
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I. SUMMARY

1. This Report concerns a capital punishment petition that was presented by letter dated May 29, 1998, to the Inter-American Commission on Human Rights (hereinafter referred to as “the Commission”) on behalf of Mr. Donnason Knights, by Saul Lehrfreund Esq., Solicitor of Messrs. Simon Muirhead & Burton, a firm of Solicitors in London, United Kingdom (hereinafter referred to as “the Petitioners”) against the State of Grenada (hereinafter referred to as “the State” or “Grenada”) for alleged violations of Mr. Knights’ human rights guaranteed under the American Convention on Human Rights (hereinafter referred to as “the Convention”).[FN1]

[FN1] The State of Grenada ratified the American Convention on July 18, 1978.

2. The Petitioners claim that on August 2, 1995, Donnason Knights was convicted of the murder of Cherrie Ann Matthew (which was committed on 9 September, 1993), (hereinafter referred to as “the deceased”) pursuant to Section 234 of the Criminal Code of Grenada.[FN2] Mr. Knights was sentenced to death by hanging, and is awaiting execution at Richmond Hill Prison, in Grenada. The Petitioners claim that Mr. Knights appealed his conviction to the Eastern Court of Appeal in Grenada and his appeal was dismissed by the Court on 16 September, 1996. The Petitioners indicate that Mr. Knights’ applied to the Judicial Committee of the Privy Council (hereinafter referred to as “the Privy Council”) for Special Leave to Appeal as a Poor Person,

and was granted the same on April 10, 1997. However, the Privy Council dismissed his appeal on 21 May 1998.

[FN2] (Cap. 76) of the 1958 Revised Laws of Grenada.

3. The Petitioners argue that the State has violated Mr. Knights' human rights guaranteed under Articles 4(1), 4(6), 5(1), 5(2), 5(6), 8, and 24 of the American Convention, and request that the Commission recommend to the State that it quash Mr. Knights death sentence and release him from detention.

4. The Petitioners contend that if Mr. Knights is executed while this petition is pending determination by the Commission, it would result in irreparable damage to him. Therefore, the Petitioners request that the Commission issue Precautionary Measures pursuant to Article 29(2) of its Regulations against the State and ask the State to suspend Mr. Knights' execution pending the determination of his petition by the Commission.

5. To date, the State has not responded to any of the Commission's communications, nor has it presented any information to the Commission pertaining to the admissibility and merits of the petition.

6. The Commission finds that the petition is admissible pursuant to Articles 46 of the American Convention, and finds that the State violated Donnason Knights human rights guaranteed by Articles 4(1), 4 (6), 5(1), 5(2) 8 and 25 of the American Convention in conjunction with Article 1(1) of the Convention. In addition, the Commission requested that the State take all the appropriate measures necessary to stay the execution of Mr. Knights to avoid irreparable harm to him, and ensure that he is not arbitrarily deprived of his life.

II. PROCEEDINGS BEFORE THE COMMISSION

7. Upon receipt of the petition dated May 29, 1998, the Commission complied with the requirements of its Regulations. The Commission studied the petition, requested information from the parties, and forwarded the pertinent parts of each party's submission to the other party.

8. The Commission opened case N° 12.028 in the matter and the pertinent parts of the petition were forwarded to the State on July 2, 1998 pursuant to Article 34 of its Regulations. The Commission requested that the State provide it with information within 90 days that would permit the Commission to process and study the petition, including determining whether domestic remedies had been exhausted. The Commission also requested that the State stay Mr. Knights' execution pending an investigation by it of the alleged facts.

9. By letters dated August 18, 1999, and May 4, 2000 the Commission reiterated its request to the State to provide the Commission with information that it deemed appropriate within 30 days to determine the facts alleged in the case. By letter dated September 13, 2000, the Commission reiterated its request to the State for information in relation to the petition that the

State deemed appropriate, within 7 days of receipt. In addition, on September 13, 2000, the Commission wrote to the State and Petitioners informing them that the Commission places itself at their disposal with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the Convention pursuant to Article 48(1)(f) of the Convention.

10. October 13, 2000, the Petitioner wrote to the Commission and informed it, that the Petitioner “would not be willing to enter into a friendly settlement in view of the fact that the State Party itself concerned has shown no willingness to actively participate in this matter and is not prepared to be engaged in the friendly settlement process.”

11. To date, the State has not responded to any of the Commission’s communications, nor has it presented any information to the Commission pertaining to the admissibility and merits of the petition.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

1. Background of the Case

12. The Petitioners claim that the evidence produced by Mr. Knights and his witnesses at trial appear to suggest that Mr. Knights himself was attacked by the deceased’s killer and suffered injuries in the process. Mr. Knights’ unsworn testimony was that after spending the night of September 8, 1993, with the deceased, both him and deceased were attacked by a man in black with a weapon in his hand and a mask on his face. Mr. Knights also testified that he and the deceased ran from the man, became separated, and later he was attacked by a man with a mask who stabbed him with a knife. In addition, Mr. Knights testified that after being stabbed, he could not remember what transpired afterwards, and that he woke up in the General Hospital.

13. In addition, the Petitioners claim that at trial, Dr. Mary Courtenay, Mr. Knights’ witness testified under oath that she is a registered medical practitioner in Grenada, attached to the Princess Alice Hospital. Dr. Courtenay testified that upon examination of Mr. Knights, she determined that he suffered three stab wounds 3 cms long and one 2 cms long, and that those wounds could have been caused by a sharp instrument with a point such as a knife. Dr. Courtenay also testified that Mr. Knights suffered a small abrasion to the left cheek, and that the measure of force would have been moderate to inflict those wounds. On cross examination, Dr. Courtenay stated that there was a possibility that the wounds could have been self inflicted.[FN3] Mr. Knights also called Evelyn Peters as a witness, who testified under oath that she is a “blood banker” at the General Hospital, and she usually tests blood. Ms. Peters testified that she tested Mr. Knights blood and that his blood type is “Group ORH positive and tendered a certificate into evidence depicting the same.” The Petitioners maintain that the blood type which was found on the knife at the scene of the crime was that of “Group AB.”[FN4]

[FN3] Trial Transcript, pages 78-79.

[FN4] Trial Transcript, Judge's summing up, pages 24-25.

2. Position of the Petitioners on Admissibility

14. The Petitioners argue that Mr. Knights has exhausted the domestic remedies in Grenada because he appealed his August 2, 1995 conviction for capital murder to the Eastern Caribbean Court of Appeal, and the Court dismissed his appeal on September 16, 1996. The Petitioners maintain that Mr. Knights Petition for Special Leave to Appeal as a Poor Person was dismissed by the Privy Council on May 21, 1998.

15. The Petitioners contend that Mr. Knights has a Constitutional remedy in theory, but that the State's failure to provide legal aid for Constitutional Motions denies Mr. Knights access to a court and hence to an effective remedy for violations of the American Convention. The Petitioners indicate that Section 16(1) of Grenada's Constitution[FN5] gives an individual the right to apply to the High Court for redress in respect of alleged Constitutional violations by way of a Constitutional Motion. The Petitioners argue that Mr. Knights is unable to pursue a Constitutional Motion in the High Court of Grenada because the practical barriers render such a remedy illusory. In particular, the Petitioners contend that the Constitution is a complex legal document, and therefore a Constitutional Motion clearly requires expert legal representation to establish a reasonable prospect of success. The Petitioners also maintain that Mr. Knights does not have private funding to pursue a Constitutional Motion. Further, the Petitioners indicate that there is a dearth of Grenadian lawyers who are prepared to represent Mr. Knights without payment. Consequently, according to the Petitioners, a Constitutional Motion is not an available remedy for Mr. Knights.

[FN5] Section 16(1) of the Constitution of Grenada states: "if any person alleges that any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or other person) may apply to the High Court for redress."

16. In addition, the Petitioners argue that the absence of Legal Aid for an impecunious individual to pursue a Constitutional Motion is sufficient failure on the part of the State to satisfy the Commission that the remedy is not available. In support of their position, the Petitioners cite the decisions of the United Nations Human Rights Committee (HRC) in *Champagnie, Palmer & Chisolm v. Jamaica*, in which the HRC stated as follows:

With respect to the authors' possibility of filing a Constitutional Motion, the Committee considers that, in the absence of Legal Aid, a Constitutional Motion does not constitute an available remedy in the case. In light of the above, the Committee finds that it is not precluded by Article 5(2)(b) of the Optional Protocol from considering the communication.[FN6]

[FN6] U.N.H.R.C., *Champagnie, Palmer & Chisolm v. Jamaica*, Communication N° 445/1991. Article 5(2) of the United Nations Optional Protocol provides in part: "The Committee shall not consider any communication from an individual unless it has ascertained that: (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged."

3. Position of the Petitioners on the Merits

a. Articles 4, 5, 8 and 24 of the Convention - The Mandatory Nature of the Death Penalty and The Prerogative of Mercy

i. The Mandatory Death Penalty

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

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

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

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

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

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

21. In light of the terms of Article 5 of the Constitution, the Petitioners indicate that they accept that the sentence of death for murder does not violate the Constitution of Grenada, and that Article 5(2) of Grenada's Constitution precludes the Courts of Grenada or the Privy Council from interpreting the right to freedom from inhuman or degrading punishment under the Constitution as prohibiting the administration of the death penalty in every case upon a conviction for murder.[FN7] At the same time, the Petitioners argue that imposing a mandatory death sentence on Mr. Knights, without providing him with an opportunity to present evidence of mitigating circumstances relating to him or his offense, violates Mr. Knights' rights under Articles 4, 5, 8 and 24 of the Convention.

[FN7] In this regard, see *Guerra v. Baptiste and others* [1995] 4 All E.R. 583 (P.C.). In this case, the appellant, who had been convicted of murder in Trinidad and Tobago and sentenced to death, argued, inter alia, that to execute him after the period of time that he spent on death row would constitute a breach of his rights under the Constitution of Trinidad and Tobago and the principles established by the Privy Council in the case of *Pratt and Morgan v. A.G. for Jamaica*. In finding that the Court had jurisdiction to entertain the appellant's constitutional argument, the Judicial Committee of the Privy Council relied upon its determination in *Pratt and Morgan* and found that judges in Trinidad and Tobago would as a matter of common law have the power to stay a long delayed execution as not being in accordance with the due process of law, and therefore that a long delayed execution was not barred from challenge as cruel and unusual punishment under the Constitution. At the same time, the Court confirmed that the death penalty itself could not be challenged under the Constitution of Trinidad and Tobago:

Before the coming into force of the Constitution of Trinidad and Tobago 1976 (and indeed the 1982 Constitution) capital punishment was accepted as a punishment which could lawfully be imposed, so that execution pursuant to a lawful sentence of death could amount to depriving a person of his life by due process of law, and could not itself amount to cruel and unusual punishment contrary to s. 5(2)(b).

22. In support of their position, the Petitioners refer to the practice in other states. They argue, for example, that in the case of *Woodson v. North Carolina*[FN8] the United States Supreme Court held that the automatic imposition of the death sentence on all those convicted of a specific offence is inconsistent with "the evolving standards of decency that are the hallmark of a maturing society." The Petitioners argue that the Supreme Court made it plain that the application of the mandatory death sentence imposed in all cases of murder without objective criteria for its application in particular cases after a fair hearing was unconstitutional. In addition, the Petitioners indicate that the Supreme Court held further that:

[FN8] Woodson v. North Carolina, 49 L Ed 2d 944(1976).

[i]n capital cases the fundamental respect for humanity underlying the eight amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[FN9]

[FN9] Id., at 961.

23. In addition, the Petitioners contend that the South African Constitutional Court has gone further and followed the Hungarian Constitutional Court in declaring the death penalty to be unconstitutional per se in Decision 23/1990(X.31). Conversely, in the case of Bachan Singh v. The State of the Punjab, the Supreme Court of India determined that the death penalty is not unconstitutional per se,[FN10] in part because there was a judicial discretion as to whether it should be imposed. Based upon these domestic authorities, the Petitioners argue that states retaining the death penalty must distinguish between capital and non-capital murder, and must provide a proper sentencing procedure for considering whether the death penalty should be imposed in capital cases.

[FN10] Bachan Singh v. the State of the Punjab, (1980) 2 SCC 684).

24. In this connection, the Petitioners make reference to a 1992 amendment to Jamaica's Offences Against the Person Act 1861, which distinguishes capital from non- capital murder. They contend that if Mr. Knights was tried in the United Kingdom or Jamaica, he would have been tried on a charge of "non capital murder," as his offence was not a murder of such special or heinous character as to merit the death penalty. Finally, the Petitioners claim that the law of Belize has introduced judicial discretion in the application of the death penalty.

25. The Petitioners argue that the American Convention is a living, breathing and developing instrument reflecting contemporary standards of morality justice and decency and that it shares this quality with other international instruments such as the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR") and the European Convention For the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "European Convention").[FN11] The Petitioners state that they accept that Article 4 of the American Convention does not render the death penalty per se unlawful. They add, however, that according to commentators,[FN12] Article 4 of the Convention is more restrictive of the circumstances under which the death penalty can be imposed than the comparable provisions of the ICCPR and the European Convention.

[FN11] See e.g. *Soering v. UK* (1989) 11 EHHR 439.

[FN12] See William Schabas, *Abolition of the Death Penalty in International Law* (1993), pp. 263-279.

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

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

28. The Petitioners argue that similar conclusions can be reached with reference to Article 5 of the American Convention. According to the Petitioners, it has long been recognized by judicial authorities that the death penalty has features that prompt the description cruel and inhuman, but that this does not make it unlawfully carried out in conformity with a state's international obligations.[FN13] At the same time, the Petitioners argue that the death penalty can be rendered illegal because of the manner in which it is imposed. In this regard, the Petitioners submit that certain factors pertaining to the manner in which Mr. Knights' death sentence has been imposed can be considered to violate Article 5 of the Convention, and to render his execution unlawful under Article 4 of the Convention. These factors include the lapse of time since Mr. Knights' sentence was imposed, the conditions of his detention on death row, and the cruelty of sentencing people to death, when there has been a moratorium on the application of the death sentence in Grenada for 20 years.

[FN13] See *State v. Makwanyane and McHunu*, Judgment, Case N° CCT/3/94 (6 June 1995)(Constitutional Court of South Africa). See also U.N.H.R.C., *Ng v. Canada*, Communication N° 469/1991, at p. 21 (suggesting that every execution of a sentence of death may be considered to be cruel and inhuman treatment within Article 7 of the ICCPR).

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

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

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

ii. The Prerogative of Mercy

32. The Petitioners argue that insofar as the rigors of the mandatory death penalty are mitigated by the power of pardon and commutation exercised by the Advisory Committee on the Prerogative of Mercy, as prescribed under Articles 72, 73 and 74[FN14] of the Constitution of Grenada, there are no criteria for the exercise of such discretion, and no information as to whether such discretion is exercised on an accurate account of the admissible evidence as to the facts relating to the circumstances of the offence. They also claim that there is no right on the part of an offender to make either written or oral comments on the question of pardon, to see or comment on the report of the trial Judge which the Advisory Committee must consider under

Article 74(1) of the Grenadian Constitution, or to comment on any reasons identified by the trial judge or others as to whether the sentence of death should be carried out.

[FN14] Articles 72, 73 and 74 of the Constitution of Grenada read as follows:

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

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

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

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

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

(4) The Committee may regulate its own procedure.

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

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

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

33. The Petitioners indicate in this regard that in the case of *Reckley v. Minister of Public Safety No.2*,^[FN15] the Privy Council specifically held that a condemned man has no right to make representations or attend a hearing before the Advisory Committee on the Prerogative of Mercy established pursuant to Articles 73 and 74 of Grenada's Constitution. Rather, the Privy Council held that the power of pardon is personal to the responsible Minister and is not subject to judicial review, stating as follows:

[FN15] *Reckley v. Minister of Public Safety (N° 2)* (1996) 2 WLR 281.

The actual exercise by this designated Minister of his discretion in a death penalty case is different. To concern with a regime, automatically applicable under the designated Minister, having consulted with the Advisory Committee, decides, in the exercise of his own personal discretion, whether to advise the Governor General that the law should or should not take its course. Of its very nature, the Minister's discretion, if exercised in favor of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or as it used to be said as an act of grace.^[FN16]

[FN16] *Id.*, pp. 290 d- f.

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

b. Article 5 - Conditions of Detention

35. The Petitioners claim that the State has violated Mr. Knights' rights under Articles 5(1) and 5(2) of the Convention, because of his conditions of detention, which they describe as follows:

He is locked in his cell measuring 9'x6' on his own for 23 hours a day; he is provided with a bed and mattress, but there is no other furniture whatsoever in his cell; the cell has no windows and no natural lighting, and no ventilation; the only lighting in his cell is provided by a single naked

bulb situated in the corridor in front of his cell; he is deprived of adequate sanitation and therefore has to use a bucket; he is allowed one opportunity a day to slop out; he is allowed one hour exercise per day which is taken in a small exercise yard; food provided is inadequate and he is made to eat alone; he is allowed one visitor a month for a duration of 15 minutes and he is allowed to write one letter a month; all prisoners on death row at Richmond Hill Prison are not permitted access to prison services; he is not allowed to use the prison library and he is also denied access to the Chaplin and religious services; there is inadequate medical care and no psychiatric care is provided to prisoners under sentence of death; and there is no adequate complaints mechanism for dealing with prisoners' complaints.

36. According to the Petitioners, since his incarceration in Richmond Hill Prison, Mr. Knights has been detained in conditions that have been condemned by international human rights organizations as being in violation of internationally recognized standards. The Petitioners argue that non-governmental organizations have concluded that the State is in breach of a number of international instruments designed to give those detained a minimum level of protection, because of inadequate accommodations, sanitation, diet and health care. In support of their allegations, the Petitioners submitted a notarized Affidavit from Mr. Knights dated April 11th 1997, in which Mr. Knights describes his treatment and conditions of his confinement since his arrest and subsequent conviction for murder on July 11th, 1995.

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

In most of the Caribbean prisons visited, prisoners had to use a bucket in front of others and were locked in with the bucket for many hours, often for 15 or 16 hours a day. This was the case in the men's prison in St. Vincent, Grenada, Trinidad and South Camp Rehabilitation Centre and St. Catherine District Prison in Jamaica.[FN17]

[FN17] Caribbean Rights Report 1990, p. 40.

In both St. Vincent and Grenada the men's prison uniform was a blue top and shorts, decent but not very conducive to dignity.

In Grenada, there were no separate punishment cells. Prisoners on punishment were put in the special security blocks. Corporal punishment was not available, but punishment were of two types, restricted diet and loss of remission up to 90 days, though it was reported that it was rare for a prisoner to lose that much remission. There is no appeal machinery against the imposition of punishment.[FN18]

[FN18] Id., pp.62-63.

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

The prisoners under sentence of death were kept in special security blocks attended by prison officers wearing a different uniform from the prison officers in the rest of the prison, a green combat-type uniform. There were three such blocks, each with a corridor down the middle and 8 to 10 cells on each side of the door. The cell doors are solid with a rectangular aperture at eye level. The prisoners in the blocks wore the same clothes as the other prisoners, that is a blue shirt and blue shorts. Upon the arrival of the visiting party, the prison officers in the special security blocks opened the outer door, salute to the senior officer present and recited a military style statement about the numbers locked up and everything being in order. Then the officer walked down the row shouting the name of each prisoner as he passed. The prisoner then stood to attention in the middle of the cell, hands behind his back and replied, "Sir." ... The prisoners in the special security blocks are reported to get one hour of exercise a day if possible, sometimes more." [FN19]

[FN19] Id. p. 80.

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

The treatment of death row prisoners exacerbates a punishment that is already completely unacceptable. The exceptional inhumanity of the physical conditions as reported in Guyana and Trinidad and seen in St. Vincent and Grenada constitute an intolerable imposition of cruelty. It is understandable that high security must be imposed and some surveillance is necessary. But keeping death sentenced prisoners, sometimes for years, in conditions equivalent to or worse than those of punishment cells, intolerable. [FN20]

[FN20] Id. p. 81.

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

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

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

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

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

In Grenada, the official visiting allowance is 15 minutes a month for convicted prisoners. It is 15 minutes a week for unconvicted prisoners. Normal civilised contact was impossible. The visit took place through grilles with a gap between the two grilles of about 18 inches, through which the visitor and the prisoner had to communicate. Probably the best they can do in these circumstances is to shout at each other. Writing letters is another way of keeping contact. Here too there were severe restrictions. In Grenada, prisoners can write and receive one letter a month. All ingoing and outgoing mail was read by censors, even for the most minor offenders.[FN21]

[FN21] Caribbean Rights Report 1991, p.30.

41. In support of their contention that Mr. Knights' conditions of detention violate Article 5(1) and 5(2) of the Convention, the Petitioners refer to several decisions of the U.N. Human Rights Committee (hereinafter "HRC"), in which the HRC determined that conditions of detention violated Articles 7[FN22] and 10(1)[FN23] of the International Covenant on Civil and Political Rights (ICCPR). These cases include *Antonaccio v. Uruguay*, [FN24] in which the HRC held that detention in solitary confinement for three months and denial of medical treatment constituted a violation of the Covenant, and *De Voituret v. Uruguay*,[FN25] in which the HRC held that solitary confinement for three months in a cell with almost no natural light violated the applicant's rights under the Covenant. The Petitioners also rely upon the decision in the case of *Mukong v. Cameroon*,[FN26] in which the HRC suggested that conditions of detention which do not meet the United Nations Standard Minimum Rules for the Treatment of Prisoners violate Articles 7 and 10(1) of the ICCPR, and that minimum standards of humane treatment of prisoners apply regardless of a state's level of development:

[FN22] Article 7 of the ICCPR provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[FN23] Article 10(1) of the ICCPR provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

[FN24] U.N.H.R.C., *Antonaccio v. Uruguay*, U.N. Doc. A/37/40.

[FN25] U.N.H.R.C., *De Voituret v. Uruguay*, U.N. Doc. A/39/40.

[FN26] U.N.H.R.C., *Mukong v. Cameroon*, Communication N° 458/1991.

As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of the State party's level of development [i.e. the UN Standard Minimum Rules for the Treatment of Prisoners]. It should be noted that these are minimum requirements, which the committee consider should always be observed, even if economic or budgetary conditions may make compliance with these obligations difficult.[FN27]

[FN27] *Id.*

42. The Petitioners similarly argue that the European Court's jurisprudence in respect of Article 3[FN28] of the European Convention support their contention that Mr. Knights' conditions of detention violate his rights under Article 5 of the American Convention. In particular, the Petitioners rely upon the Greek Case,[FN29] in which the Court found conditions of detention amounting to inhumane treatment to include overcrowding, poor hygiene and sleeping arrangements, and inadequate recreation and contact with the outside world. Likewise, in the case of *Cyprus v. Turkey*,[FN30] the Court found that conditions in which food, water, and medical treatment were withheld from detainees constituted inhuman treatment. The Petitioners also argue that these cases recognized that a failure to provide adequate medical care may constitute inhuman treatment, even in the absence of any other ill treatment.

[FN28] Article 3 of the European Convention provides: "No one shall be subjected to torture or to inhuman and degrading treatment or punishment."

[FN29] *Eur. Court H.R., Greek Case*, 12 YB 1 (1969);

[FN30] *Eur. Court H.R., Cyprus v. Turkey*, Application nos. 6780/74 and 6950/75.

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

44. Finally, the Petitioners observe that Grenada failed to respond to questionnaires sent to OAS Member-States in connection with the Commission's efforts in 1995 to establish a working group to conduct studies of prison conditions in the Americas.

45. With respect to Article 4 of the Convention, the Petitioners argue that Mr. Knights' detention in inhuman and degrading conditions renders unlawful the carrying out of his death sentence, and that to carry out his execution in such circumstances would constitute a violation of his rights under Articles 4 and 5 of the American Convention. In support of their position, the

Petitioners refer to the case of Pratt and Morgan –v- The Attorney General of Jamaica,[FN31] in which the Privy Council held that prolonged detention under sentence of death would violate the right under the Constitution of Jamaica not to be subjected to inhuman and degrading treatment. The Petitioners argue similarly that the lawfulness of Mr. Knights’ execution cannot be considered in isolation from the detention that preceded it, and that his conditions of detention should be considered to render his execution unlawful in the same manner as prolonged detention on death row.

[FN31] Pratt and Morgan –v- The Attorney General of Jamaica [1994] 2 AC 1.

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

46. The Petitioners claim that the State has violated Mr. Knights’ rights under Article 8 of the Convention, because legal aid is not available to enable him to pursue a Constitutional Motion in the domestic courts in Grenada. The Petitioners maintain that Mr. Knights is indigent and therefore lacks the private resources to bring a Constitutional Motion to challenge violations of his Constitutional rights. The Petitioners also contend that there are a dearth of Grenadian lawyers who are willing to represent Mr. Knights on a pro bono basis. The Petitioners therefore claim that the failure of the State to provide Legal Aid for Mr. Knights to pursue a Constitutional Motion denies Mr. Knights an effective remedy, which includes access to the Courts in fact as well as in law. In support of this contention, the Petitioners rely upon the decisions of the European Court of Human Rights in the cases of Golder v. UK,[FN32] and Airey v. Ireland,[FN33] in which the European Court held that Article 6 of the European Convention[FN34] imposed positive obligations on the States concerned to provide legal aid in the interests of justice.

[FN32] Golder v. UK (1975) Series A N° 18.

[FN33] Airey v. Ireland (1979) Series A N° 32.

[FN34] Article 6(3) of the European Convention provides: “Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

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

48. The State has not presented any information or arguments to the Commission on the issues of the admissibility and merits of the petition, despite the Commission's communications to it dated 2nd July 1998, August 18, 1999, May 4, and September 13, 2000. Nor has the State responded to the Commission's offer of September 13, 2000, to facilitate a friendly settlement.

IV. ANALYSIS ON ADMISSIBILITY

A. Competence of the Commission

49. The Convention entered into force for the State of Grenada on July 18, 1978 upon deposit of its instrument of Ratification. The Petitioners allege violations of Articles 4, 5, 7, 8 and 24 of the Convention with respect to acts or omissions which transpired in Grenada after the Convention came into effect for Grenada. In addition, the petition in this case was lodged by the Petitioners, Solicitors from London, United Kingdom, on behalf of Donnason Knights, a national of the State of Grenada. Consequently, the Commission has jurisdiction *ratione temporis*, *ratione materiae*, and *ratione personae* to consider the violations of the Convention alleged in this case. Therefore, the Commission declares that it is competent to address the Petitioner's claims relating to violations of the Convention.

B. Other Grounds of Admissibility

a. Exhaustion of Domestic Remedies

50. Article 46 (1) of the American Convention provides that: "Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: (a) that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The Petitioners argue that Mr. Knights exhausted the domestic remedies of Grenada on May 21, 1998, when the Privy Council dismissed his appeal against conviction and sentence. The State has failed to provide any observations with respect to the admissibility or merits of the Petitioners' petition. Therefore, the Commission finds that the State tacitly waived its right to object to the exhaustion of domestic remedies.[FN35] The Commission therefore does not find the Petitioners' case to be inadmissible by reason of Article 46(1)(a) of the Convention.

[FN35] I/A Court H.R., Viviana Gallardo et al. Judgment of November 13, 1981, N° G 101/81. Series A, para. 26).

b. Timeliness of Petition

51. As concluded above in accordance with Article 46(1)(b) of the Convention, a petition must be presented within a period of six months from the date on which the complaining party was notified of the final judgment at the domestic level. Where no such judgment has been issued because it has not been possible to exhaust domestic remedies, Article 46(2) of the

Convention provides that the 6-month requirement does not apply. In the present case, the Petitioners argue that the Privy Council delivered its final judgment dismissing Mr. Knights' appeal on the 21st May 1998. This petition was filed on the 29th May 1998 and was therefore presented within the required timeframe.

52. In the present case, the State has failed to provide any observations in respect of the admissibility or merits of the petition and has failed to demonstrate to the Commission that the petition has not been timely filed.[FN36]

[FN36] I/A Court H.R., Neira Alegria Case, Preliminary Objections, Judgment, 11 December 1991 pp. 44-45, at paras. 25-31.

c. Duplication of Procedures

53. The Petitioners have indicated that the subject of Mr. Knights' petition has not been submitted for examination under any other procedure of international investigation. The State has failed to provide any observations regarding the admissibility or merits of the Petitioners' petition, and has therefore not contested the issue of duplication. The Commission therefore finds that the Petitioners' case is not inadmissible under Articles 46(1)(c) or Article 47(d) of the Convention.

d. Colorable Claim

54. Articles 47(b) and 47(c) state that the Commission shall consider inadmissible any petition or communication submitted under Articles 44 and 45 if the petition does not state facts that tend to establish a violation of the rights guaranteed by the Convention, and that the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order. The Petitioners have alleged that the state has violated Mr. Knights' rights under Article 4, 5, 8 and 24 of the Convention. In addition, the Petitioners have provided factual allegations that tend to establish that the alleged violations may be well founded. The Commission therefore concludes, without prejudging the merits of the case, that the Petitioners' case is not barred from consideration under Articles 47(b) or 47(c) of the Convention.

e. Conclusions on Admissibility

55. As noted previously, the State has not replied to the Commission's communications to it of July 2, 1998, August 18, 1999, May 4, and September 13, 2000, to provide the Commission with information that the State deemed relevant pertaining to the exhaustion of domestic remedies and the claims raised in the petition, nor has the State responded to the Commission's communication to it of September 13, 2000, with respect of the possibility of a friendly settlement in the case pursuant to Article 48(1) (f) of the Convention. As a consequence, in determining the admissibility of this case, the Commission has presumed the facts as reported in

the petition to be true, provided that the evidence does not lead to a different conclusion, in accordance with Article 42 of the Commission's Regulations.

56. In accordance with the foregoing analysis of the requirements of Article 46 and 47 of the Convention and the applicable provisions of the Commission's Regulations, the Commission decides to declare Mr. Knights' petition admissible.

C. The merits of the petition

1. Standard of review

57. Before addressing the merits of this case, the Commission deems it advisable to articulate its standard of review in capital punishment cases. In this regard, the Commission is of the view that it must apply a heightened level of scrutiny in such cases. The right to life is widely recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights.[FN37] The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life perpetrated by a State Party through the death penalty complies strictly with the provisions of the Convention, including in particular the right to life provisions of Article 4, the guarantees of humane treatment under Article 5, and the due process and judicial protections guaranteed under Articles 8 and 25 of the Convention. This "heightened scrutiny [test is consistent with the restrictive approach to the death penalty provisions of human rights treaties advocated by other international authorities.]"[FN38] In particular, the Inter-American Court has concluded that the American Convention has adopted an approach in respect of the death penalty that is "incremental" in character, whereby, "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."[FN39]

[FN37] See U.N.H.R.C., *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, Adopted 4 April 1985, para. 14.3 (observing that the right to life under Article 6(1) of the International Covenant on Civil and Political Rights is the "supreme right of the human being").

[FN38] *Id.*, para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 378 (commenting upon fair trial standards relating to capital punishment as follows:

While in many countries the law in force takes account of the standards of fair trials as contained in the pertinent international instruments, this alone does not exclude that a death sentence may constitute an extra-judicial, summary or arbitrary execution. It is the application of these standards to each and every case that needs to be ensured and, in case of indications to the

contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.).

[FN39] I/A Court H.R., Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, (8 September 1983), Annual Report 1984, p. 31, para. 57.

58. The Commission also notes that the heightened scrutiny test is not precluded by the fourth instance formula adopted by the Commission. Pursuant to the “fourth instance formula,” the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees.[FN40] The fourth instance formula does not, however, preclude the Commission from considering a case where the petitioner’s allegations entail a possible violation of any of the rights set forth in the American Convention. In the case of Clifton Wright, for example, a Jamaican citizen who alleged that a judicial error resulted in a death sentence against him, the Commission concluded that the conviction and sentence were undermined by the record in the case, but that the appeals process in Jamaica did not permit for a correction of the situation. Consequently, the Commission found that Jamaica had violated the petitioner’s right to judicial protection under Article 25 of the Convention, and recommended that the Government of Jamaica order an investigation of the matter and afford Mr. Wright a judicial remedy to have the inconsistency corrected. Because Mr. Wright had been denied effective domestic judicial protection, and was the victim of a discrete human rights violation under the American Convention, the fourth instance formula did not apply in his case.[FN41]

[FN40] I/A Comm. H.R., Santiago Marzioni, Report N° 39/96, Case N° 11.673 (Argentina), 15 October 1996, Annual Report 1996, p. 76.

[FN41] See also William Andrews, 1997 Annual Report p. 614.

59. The Commission will therefore review Mr. Knights' allegations pertaining to the imposition of capital punishment with a heightened level of scrutiny, to ensure that the right to life as prescribed under the American Convention is properly respected. In addition, the fourth instance formula will not preclude the Commission from adjudicating Mr. Knights’ rights insofar as those claims disclose possible violations of the Convention.

2. Alleged Violations of the American Convention

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

61. As noted previously, the State has not replied to the Commission's communications to it of 2nd July, 1998, August 18, 1999, May 4 and September 13, 2000, to provide the Commission with information that the State deemed relevant pertaining to the exhaustion of domestic remedies and the claims raised in the petition, nor has the State responded to the Commission's communication of September 13, 2000 regarding the possibility of a friendly settlement in the case. As a consequence, in determining the merits of the Petitioners' allegations, the Commission will presume the facts as reported in the petition to be true, provided that the evidence does not lead to a different conclusion, in accordance with Article 42 of the Commission's Regulations.

a. Articles 4, 5, 8 and 24 - The Mandatory Death Penalty

i. Mr. Knights was sentenced to a Mandatory Death Penalty

62. Mr. Knights was convicted of murder pursuant to Section 234 of the Criminal Code of Grenada, which provides that "[w]hoever commits murder shall be liable to suffer death and sentenced to death." [FN42] The crime of murder in Grenada can therefore be regarded as subject to a "mandatory death penalty," namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of murder, the death penalty must be imposed. Accordingly, a court in imposing the death sentence cannot take mitigating circumstances into account.

[FN42] Section 234 of the Criminal Code, Title XVIII, Cap. 76 , p. 790, contains a proviso to the death penalty for a crime of murder. The proviso states:

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

63. The Commission will first analyze the compatibility of the mandatory death sentence for the crime of murder with Articles 4, 5 and 8 of the Convention, in light of the terms of those provisions, their underlying principles, and relevant international and domestic precedents. The Commission will then determine whether the State has violated Mr. Knights' rights under the Convention, because of the manner in which Mr. Knights was sentenced to death.

ii. Articles 4, 5, and 8 of the American Convention and the Mandatory Death Penalty

64. In light of the allegations raised by Mr. Knights, the Commission must first ascertain whether the practice of imposing the death penalty for the crime of murder through mandatory sentencing is compatible with Article 4 (right to life), Article 5 (right to humane treatment), and

Article 8 (right to a fair trial) of the American Convention and the principles underlying those provisions:

Article 4 of the American Convention provides as follows:

Article 4. Right to Life

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

65. Article 4 of the Convention permits States Parties that have not abolished the death penalty to continue to impose it. At the same time, the Convention strictly regulates the manner in which States Parties may impose the death penalty in their respective States. This restrictive approach under the Convention to the perpetuation of the death penalty mirrors the treatment of the death penalty generally under contemporary international and, as Part IV of this Report will indicate, domestic practice.

66. More particularly, drawing in part upon the past experience of international human rights bodies, several general principles of interpretation can be identified in respect of the death penalty provisions of international human rights instruments in general, and Article 4 of the Convention in particular. First, the supervisory bodies of international human rights instruments have subjected the death penalty provisions of their governing instruments to a rule of restrictive interpretation. In its Advisory Opinion on Restrictions to the Death Penalty under Articles 4(1) and 4(4) of the Convention, for example, the Inter-American Court of Human Rights adopted a restrictive approach to Article 4 of the Convention, finding that “the text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned”.^[FN43]

[FN43] Advisory Opinion OC-3/83, *supra*, at 31, para. 52.

67. Other international human rights supervisory bodies have similarly afforded a strict interpretation of the death penalty provisions in human rights treaties. The U.N. Human Rights Committee has held in the context of Article 6 of the ICCPR, which parallels Article 4 of the Convention in certain respects,[FN44] that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.[FN45] The Committee has accordingly determined that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of Article 6 of the Covenant. Its recommended remedies in such cases have included release,[FN46] and commutation of the death sentence.[FN47] The U.N. Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions has likewise emphasized that proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries and other strict requirements of due process.[FN48] This Commission has similarly closely scrutinized the circumstances of death penalty cases to ensure strict compliance with the requirements of due process and judicial protection.[FN49]

[FN44] Article 6 of the ICCPR provides as follows:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Convention to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. 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.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

[FN45] See e.g. *Baboheram-Adhin et al. v. Suriname*, supra, para. 14.3.

[FN46] See e.g. U.N.H.R.C., *Anthony McLeod v. Jamaica*, Communication N° 734/1997, U.N. Doc. N° CCPR/C/62/734/1997.

[FN47] See e.g. U.N.H.R.C., *Patrick Taylor v. Jamaica*, Communication N° 707/1996, U.N. Doc. N° CCPR/C/60/D/707/1996.

[FN48] Ndiaye Report, supra, para. 377. With respect to international sentencing standards more generally, the International Criminal Tribunal for the Former Yugoslavia provides one of the few modern examples of an international tribunal adjudicating serious violations of international humanitarian law, including genocide. While the penalty imposed by the Tribunal is limited to imprisonment, the Tribunal's governing statute specifically provides that that "[i]n imposing the

sentences, the Trial Chambers should take into account such matters as the gravity of the offence and the individual circumstances of the convicted person.” Statute for the International Criminal Tribunal for the former Yugoslavia, Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N., Doc. S/25704/Add.1/Corr.1 (1993), Art. 24. See similarly Statute for the International Criminal Tribunal for Rwanda, Annex to Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994), Art. 23.

[FN49] See e.g. Clifton Wright *supra*..

68. It is also generally recognized that the death penalty is a form of punishment that differs in substance as well as in degree in comparison to other forms of punishment. It is the absolute form of punishment that results in the forfeiture of the most valuable of rights, the right to life, and once implemented, is irrevocable and irreparable. As the United States Supreme Court has observed, “the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”[FN50] In the Commission's view, the fact that the death penalty is an exceptional form of punishment must also be considered in interpreting Article 4 of the Convention.

[FN50] *Woodson v. North Carolina* 49 L Ed 2d 944 (U.S.S.C.).

69. Finally, with respect to the restrictions prescribed in Article 4 of the American Convention in particular, the Inter-American Court has identified three principal limitations explicitly prescribed in Article 4 on the ability of States Parties to the Convention to impose the death penalty:

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.[FN51] [emphasis added]

[FN51] *Id.* at 31, para. 55.

70. The Court’s observations therefore accentuate the significance of strict adherence to and review of due process guarantees in implementing the death penalty in accordance with Article 4 of the Convention. Moreover, as part of that process, the Court suggests that certain

circumstances of individual offenses and individual defendants may bar the imposition or application of the death penalty altogether, and therefore must be taken into account in sentencing an individual to death.

71. It is in light of the foregoing interpretive rules and principles that the Commission must determine whether the practice of imposing the death penalty through mandatory sentencing is compatible with the terms of Articles 4, 5 and 8 of the Convention and the principles underlying those provisions.

72. In the Commission's view, several aspects of imposing mandatory death penalties for the crime of murder are problematic in the context of a proper interpretation and application of the Convention. First, it is well-recognized that the crime of murder can be perpetrated in the context of a wide variety of mitigating and aggravating circumstances, with varying degrees of gravity and culpability.[FN52] This conclusion is illustrated by the broad definition of murder under Grenada's law, as the unlawful killing of another person with the intent to kill or to cause unlawful harm or injury.[FN53] It is also illustrated by the circumstances of Mr. Knights' case. Notwithstanding the existence of such disparities, however, the mandatory death penalty, seeks to impose capital punishment in all cases of murder, without distinction. It subjects an individual who, for example, commits a murder in a spontaneous act of passion or anger, to the equivalent and exceptional punishment as an individual who executes a murder after carefully planning and premeditation.

[FN52] In 1953, the British Commission on Capital Punishment noted that "there is perhaps no single class of offenses that varies so widely both in character and culpability as the class comprising those which may fall within the comprehensive common law definition of murder...no one would now dispute that for many of these crimes it would be monstrous to inflict the death penalty. The view is widely accepted that this penalty should be reserved for the more heinous offenses of murder." Royal Commission on Capital Punishment, September 1953 Cmnd 8932, Exh. 20. Even in those jurisdictions in which a distinction has been drawn between capital and non-capital murder, experience indicates that varying degrees of culpability exist within categories of capital murder which may warrant discriminate application of the death penalty. See e.g. *Woodson v. North Carolina*, 49 L ED 2d 944, 956, n. 31 (indicating that data compiled on discretionary jury sentencing of persons convicted of capital murder in the United States reveal that the penalty of death is generally imposed in less than 20% of the cases.).

[FN53] See e.g. *R. v. Cunningham* [1982] A.C. 566 (P.C.).

73. Mandatory sentencing by its very nature precludes consideration by a court of whether the death penalty is an appropriate, or indeed permissible, form of punishment in the circumstances of a particular offender or offense. Moreover, by reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of a crime for which the sentence was mandated.

74. In the Commission's view, these aspects of mandatory death sentences cannot be reconciled with Article 4 of the Convention, in several respects. As noted above, the mandatory death penalty in Grenada imposes the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability. Not only does this practice fail to reflect the exceptional nature of the death penalty as a form of punishment, but, in the view of the Commission, it results in the arbitrary deprivation of life, contrary to Article 4(1) of the Convention.

75. More particularly, imposing a mandatory penalty of death for all crimes of murder prohibits a reasoned consideration of each individual case to determine the propriety of the punishment in the circumstances, despite the fact that murder can be committed under widely-differing circumstances. By its nature, then, this process eliminates any reasoned basis, for sentencing a particular individual to death and fails to allow for a rational and proportionate connection between individual offenders, their offenses, and the punishment imposed on them. Implementing the death penalty in this manner therefore results in the arbitrary deprivation of life, within the ordinary meaning of that term and in the context of the object and purpose of Article 4(1) of the Convention.

76. Accepted principles of treaty interpretation suggest that sentencing individuals to the death penalty through mandatory sentencing and absent consideration of the individual circumstances of each offender and offense leads to the arbitrary deprivation of life within the meaning of Article 4(1) of the Convention. Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The ordinary meaning of the term "arbitrary" connotes an action or decision that is based on random or convenient selection or choice rather than on reason or nature.[FN54] The U.N. Human Rights Committee suggested a similar meaning for the term arbitrary in the context of Article 6(1) of the ICCPR, in the case of *Kindler v. Canada*.^[FN55] In that case, the complainant, a citizen of the United States, was ordered extradited from Canada to face a possible death sentence in the State of Pennsylvania for a conviction of murder. The Committee found that Canada did not violate the complainant's right under Article 6(1) of the ICCPR not to be arbitrarily deprived of his life, by extraditing him to the United States without seeking assurances from the United States' Government that the death penalty would not be imposed. At the same time, the Committee suggested that the decision not to refuse extradition or to seek assurances must be shown to have been based upon a reasoned consideration of the circumstances of Mr. Kindler's case:

[FN54] Webster's Third International Dictionary.

[FN55] U.N.H.R.C., *Kindler v. Canada*, Communication N° 470/1991, U.N. Doc. CPR/C/48/D/470/1991 (1993).

While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances.

The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances had been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.[FN56]

[FN56] Id., para. 14.6.

77. The Committee has therefore suggested that an arbitrary decision includes one that is taken in the absence of a reasoned consideration of the circumstances of the case in respect of which the decision is made. In this respect, the mandatory death penalty can be regarded as arbitrary within the ordinary meaning of that term. The decision to sentence a person to death is not based upon a reasoned consideration of a particular defendant's case, or upon objective standards that guide courts in identifying circumstances in which the death penalty may or may not be an appropriate punishment. Rather, the penalty flows automatically once the elements of the offense of murder have been established, regardless of the relative degree of gravity of the offense or culpability of the offender.

78. The mandatory death penalty cannot be reconciled with Article 4 of the Convention in another significant respect. As noted previously, the Inter-American Court has emphasized several restrictions upon the implementation of the death penalty that flow directly from the terms of Article 4 of the Convention. These include considerations relating to the nature of a particular offense, for example whether it can be considered a political or related common offense, as well as factors relating to the circumstances of an individual offender, for example whether the offender was under the age of 18 or pregnant at the time he or she committed the crime for which the death penalty may be imposed. Article 4 of the Convention itself presumes that before capital punishment may be lawfully imposed, there must be an opportunity to consider certain of the individual circumstances of an offender or an offense. By its very nature, however, mandatory sentencing imposes the death penalty for all crimes of murder and thereby precludes consideration of these or any other circumstances of a particular offender or offense in sentencing the individual to death.

79. Similarly, by reason of its compulsory nature, the imposition of a mandatory death sentence precludes any effective review by a higher court as to the propriety of a sentence of death in the circumstances of a particular case. As indicated previously, once a mandatory death sentence is imposed, all that remains for a higher court to review is whether the defendant was properly found guilty of a crime for which the sentence of death was mandated. There is no opportunity for a reviewing tribunal to consider whether the death penalty was an appropriate punishment in the circumstances of the particular offense or offender. This consequence cannot be reconciled with the fundamental principles of due process under Articles 4 and 8 of the Convention that govern the imposition of the death penalty, which, as the Inter-American Court

has recognized, include strict observance and review of the procedural requirements governing the imposition or application of the death penalty. The absence of effective review further illustrates the arbitrary nature of implementing the death penalty through mandatory sentencing, and leads the Commission to conclude that this practice cannot be reconciled with the terms of Article 4 of the Convention and its underlying principles.

80. The Commission is also of the view that imposing the death penalty in all cases of murder is not consistent with the terms of Article 5 of the Convention or its underlying principles. Article 5 of the Convention provides as follows:

Article 5 – Right to Humane Treatment

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

81. Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of their human personality.^[FN57] From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect. Accordingly, Article 5(1) guarantees to each person the right to have his or her physical, mental, and moral integrity respected, and Article 5(2) requires all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. These guarantees presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty. In the Commission's view, consideration of respect for the inherent dignity and value of individuals is especially crucial in determining whether a person should be deprived of his or her life.

[FN57] The Preamble to the Convention recognizes that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon the attributes of the human personality."

82. The mandatory imposition of the death sentence, however, has both the intention and the effect of depriving a person of their right to life based solely upon the category of crime for which an offender is found guilty, without regard for the offender's personal circumstances or the circumstances of the particular offense. The Commission cannot reconcile the essential respect for the dignity of the individual that underlies Article 5(1) and (2) of the Convention, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual's case.

83. Finally, the Commission considers that the imposition of mandatory death sentences cannot be reconciled with an offender's right to due process, as contemplated in and as provided for in Articles 4 and 8 of the Convention. It is well established that proceedings leading to the imposition of capital punishment must conform to the highest standards of due process. The due process standards governing accusations of a criminal nature against an individual are prescribed in Articles 8(1) and 8(2) of the Convention, which include the right to a hearing before a competent, independent and impartial tribunal, the right of the accused to defend himself or herself, personally or by counsel, and the right to appeal the judgment to a higher court. In addition, as noted previously, Article 4 of the Convention provides that the death penalty should be imposed only for the most serious offenses, and contemplates that certain factors attributable to a particular offender or offense may bar the imposition of the death penalty altogether in the circumstances of a particular case.

84. In the Commission's view, therefore, the due process guarantees under Article 8 of the Convention, when read in conjunction with the requirements of Article 4 of the Convention, presuppose as part of an individual's defense to a capital charge an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of his or her case. This may be on the basis, for example, that the crime for which they have been convicted should be considered a political or related common crime within the meaning of the Convention. The due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case.

85. The mandatory imposition of the death sentence is inherently antithetical to these prerequisites. By its nature, it precludes any opportunity on the part of the offender to make, or for the Court to consider, representations or evidence as to whether the death penalty is a permissible or appropriate form of punishment, based upon the considerations in Article 4 of the Convention or otherwise. Also, as noted previously, it precludes any effective review by a higher court of a decision to sentence an individual to death.

86. Contrary to the current practice in Grenada, the Commission considers that imposing the death penalty in a manner which conforms with Articles 4, 5, and 8 of the Convention requires an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is a permissible or an appropriate form of punishment in the circumstances of their case. In the Commission's view, this includes, but is not limited to, representations and evidence as to whether any of the factors incorporated in Article 4 of the Convention may prohibit the imposition of the death penalty.

87. In this regard, as the following discussion of international and domestic jurisdictions will indicate, a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through “individualized” sentencing. Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to himself and his or her offense, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment.[FN58]

[FN58] The Commission refers in this regard to the interpretative approach advocated by the European Court of Human Rights, that its governing Convention is “a living instrument which...must be interpreted in light of present-day conditions.” See Eur. Court H.R., *Tyrer v. United Kingdom* (1978) 3 E.H.R.R. 1 at para. 31.

88. Mitigating factors may relate to the gravity of the particular offense or the degree of culpability of the particular offender, and may include such factors as the offender’s character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender. Consistent with the foregoing discussion, the Commission considers that the high standards of due process and humane treatment under Articles 4, 5 and 8 of the Convention governing the lawful imposition of the death penalty should be interpreted to require individualized sentencing in death penalty cases. In the Commission’s view, this is consistent with the restrictive interpretation to be afforded to Article 4 of the Convention, and in particular the Inter-American Court’s view that Article 4 of the Convention should be interpreted “as imposing restrictions designed to delimit strictly the scope and application of the death penalty, in order to reduce the application of the penalty to bring about its gradual disappearance.”[FN59]

[FN59] Advisory Opinion on the Death Penalty, *supra*, at para. 57.

89. In light of the foregoing analysis, the Commission considers that the imposition of a mandatory death sentence by the State for the crime of murder, is not consistent with the terms of Article 4(1), 5(1), 5(2), 8(1) and 8(2) of the Convention and the principles underlying those Articles.

iii. Individualized Sentencing in Other International and Domestic Jurisdictions

90. The experience of other international human rights authorities, as well as the high courts of various common law jurisdictions that have, at least until recently, retained the death penalty, substantiates and reinforces an interpretation of Articles 4, 5, and 8 of the Convention that prohibits the mandatory imposition of the death sentence. In this connection, it is the Commission’s view, based upon a study of these various international and domestic jurisdictions,

that a common precept has developed whereby the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offenses is considered to be a condition sine qua non to the rational, humane and fair imposition of capital punishment. Mitigating circumstances requiring consideration have been determined to include, inter alia, the character and record of the offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.

91. In the case of *Lubuto v. Zambia*,^[FN60] for example, the complainant had received a mandatory death sentence for armed robbery. The United Nations Human Rights Committee did not address the question of whether mandatory death penalties per se contravened the International Covenant on Civil and Political Rights ("ICCPR"). The Committee found, however, that the absence of discretion on the part of a sentencing authority to consider the particular circumstances of an offense in determining whether the death penalty is an appropriate punishment may, in certain circumstances, contravene internationally prescribed conditions for implementing capital punishment. In this case, the Committee found that the absence of discretion contravened the requirement under Article 6(2) of the ICCPR^[FN61] that the death penalty be imposed "only for the most serious crimes". The Committee concluded:

[FN60] U.N.H.R.C., *Lubuto v. Zambia*, Communication N° 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev. 1, para. 7.2.

[FN61] ICCPR, Article 6, supra.

Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2 of the Covenant.

92. The United Nations Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions has suggested more generally that the due process standards applicable in death penalty proceedings require, inter alia, that all mitigating factors be taken into account in imposing sentence:

Proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries. All defendants in capital cases must benefit from the full guarantees for an adequate defence at all stages of the proceedings, including adequate provision for State-funded legal aid by competent defence lawyers. Defendants must be presumed innocent until their guilt has been proven without leaving any room for reasonable doubt, in application of the highest standards for the gathering and assessment of evidence. All mitigating factors must be taken into account. A procedure must be guaranteed in which both factual and legal aspects of the case may be reviewed by a higher tribunal composed of judges other than those who dealt with the case at the first instance. In addition, the defendant's right to seek pardon, commutation of sentence or clemency must be guaranteed.^[FN62] [emphasis added]

[FN62] Ndiaye Report, *supra*, para. 377. With respect to international sentencing standards more generally, the International Criminal Tribunal for the Former Yugoslavia provides one of the few modern examples of an international tribunal adjudicating serious violations of international humanitarian law. While the penalty imposed by the Tribunal is limited to imprisonment, the Tribunal's governing statute specifically provides that "[i]n imposing the sentences, the Trial Chambers should take into account such matters as the gravity of the offence and the individual circumstances of the convicted person." Statute for the International Criminal Tribunal for the former Yugoslavia, Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N., Doc. S/25704/Add.1/Corr.1 (1993), Art. 24. See similarly Statute for the International Criminal Tribunal for Rwanda, Annex to Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994), Art. 23.

93. The highest courts of various common law jurisdictions in which the death penalty has, at least until recently, been retained have similarly considered the rational, humane and fair imposition of the death penalty to require guided discretion on the part of the sentencing authority to consider mitigating circumstances of individual offenders and offenses. The United States Supreme Court in the case of *Woodson v. State of North Carolina*[FN63] found that a mandatory death sentence for first degree murder under the law of North Carolina violated the Eighth[FN64] and Fourteenth[FN65] Amendments to the U.S. Constitution. Among the grounds for the Court's decision was a finding that the mandatory death penalty did not satisfy a basic constitutional requirement, and that the process for imposing a death sentence should not be arbitrary, but rather incorporate "objective standards" that guide and regularize the process and make it amenable to judicial review.[FN66]

[FN63] *Woodson v. North Carolina* 49 L Ed 2d. 944.

[FN64] The Constitution of the United States, Amendment VIII (1791) (providing "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[FN65] *Id.* Amendment XIV, Section I (providing "[a]ll 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 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.").

[FN66] *Id.* at 960. In its decision in the case of *Furman v. Georgia*, 408 U.S. 238, the Supreme Court declared the vesting of standardless sentencing discretion in the jury in imposing capital sentences as contrary to the Eighth and Fourteenth Amendments. In rejecting North Carolina's contention in *Woodson* that the inadequacies identified in *Furman* were remedied by withdrawing all sentencing discretion from juries in capital cases, the Court suggested that the mandatory sentencing scheme was no more rational, as the statute provided "no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers

shall live and which shall die,” and provided no way for the judiciary to “check arbitrary and capricious exercise of that power through a review of death sentences.”

94. The Court also found that the mandatory death penalty failed to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before imposing a death sentence upon him, and was therefore inconsistent with the fundamental respect for humanity underlying the prohibition of cruel and unusual punishment under the Eighth Amendment. In respect of the latter ground, the Court made the following compelling observations:

In *Furman*, members of the Court acknowledged what cannot be fairly denied – that death is a punishment different from all other sanctions in kind rather than degree.[FN67] 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.

[FN67] See 408 US, at 286-291, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan J. concurring); *id.*, at 306, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring).

This Court has previously recognized that “[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender[FN68]Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development.[FN69] While the prevailing practice of individualizing sentencing determinations generally reflects simply an enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment,[FN70] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

[FN68] *Pennsylvania ex rel. Sullivan v. Ashe*, 302 US 51, 55, 82 L Ed43, 58 S Ct 59 (1937).

[FN69] See *Williams v. New York*, 337 US, at 247-249, 93 L Ed 1337, 69 S Ct 1079; *Furman v. Georgia*, 408 US, at 402-3, 33 L Ed 2d 346, 92 S Ct 2726 (Burger C.J., dissenting).

[FN70] See *Trop v. Dulles*, 356 US, at 100, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion).

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life

imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[FN71]

[FN71] Id. at 961. See also Roberts (Stanislaus) v. Louisiana, 428 U.S., 325, 333, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

95. In the case of *The State v. Makwanyane and McHunu*,[FN72] the Constitutional Court of South Africa struck down the death penalty provision of the Criminal Procedure Act N° 51[FN73] as inconsistent with South Africa's 1993 Constitution. As part of its analysis, that Court also suggested that the guided discretion provided to 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, the Court reasoned as follows [footnotes included]:

[FN72] *The State v. Makwanyane and McHunu*, Judgment, Case N° CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa).

[FN73] Section 277 of the Criminal Procedure Act N° 51 provided:

Sentence of Death

(1) The sentence of death may be passed by a superior court only and only in the case of a conviction for:

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery or attempted robbery, if the court finds aggravating circumstances to have been present;
- (d) kidnapping;
- (e) child-stealing;
- (f) rape.

(2) The sentence of death shall be imposed

(a) after the presiding judge conjointly with the assessors (if any), subject to the provisions of s. 145(4)(a), or, in the case of a trial by a special superior court, that court, with due regard to any evidence and argument on sentence in terms of section 274, has made a finding on the presence or absence of any mitigating or aggravating factors; and

(b) if the presiding judge or court, as the case may be, with due regard to that finding, is satisfied that the sentence of death is the proper sentence.

Basing his argument on the reasons which found favour with the majority of the United States Supreme Court in *Furman v. Georgia*, Mr. Trengove contended on behalf of the accused that the imprecise language of section 277, and the unbounded discretion vested by it in the Courts, make its provisions unconstitutional. [FN74]

[FN74] Id. pp. 32-36. The Court went on to conclude that additional factors such as discrimination and the “imperfection” inherent in criminal trials may also lead to arbitrary results in the imposition of the death penalty, and determined further that such arbitrary results could not be appropriately remedied through strict due process, as had been endeavored in the United States. Id. at 36-43.

[...]

Under our court system questions of guilt and innocence, and the proper sentence to be imposed on those found guilty of crimes, are not decided by juries. In capital cases, where it is likely that the death sentence may be imposed, judges sit with two assessors who have an equal vote with the judge on the issue of guilt and on any mitigating or aggravating factors relevant to sentence; but sentencing is the prerogative of the judge alone. The Criminal Procedure Act allows a full right of appeal of persons sentenced to death, including a right to dispute the sentence without having to establish an irregularity or misdirection on the part of the trial judge. The Appellate Division is empowered to set the sentence aside if it would not have imposed such a sentence itself, and it has laid down criteria for the exercise of this power by itself and other courts.[FN75] If the person sentenced to death does not appeal, the Appellate Division is nevertheless required to review the case and to set aside the death sentence if it is of the opinion that it is not a proper sentence.[FN76]

[FN75] Criminal Procedure Act N° 51 of 1977, section 322(2A) (as amended by section 13 of Act N° 107 of 1990).

[FN76] Id. section 316A(4)(a).

Mitigating and aggravating factors must be identified by the Court, bearing in mind that the onus is on the State to prove beyond a reasonable doubt the existence of aggravating factors, and to negate beyond a reasonable doubt the presence of any mitigating factors relied upon by the accused.[FN77] Due regard must be paid to personal circumstances and subjective factors which might have influenced the accused person’s conduct,[FN78] and these factors must then be weighed with the main objects of punishment, which have been held to be: deterrence, prevention, reformation, and retribution.[FN79] In this process “[e]very relevant consideration should receive the most scrupulous care and attention,”[FN80] and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence. [FN81]

[FN77] S. v Nkwanyana and Others 1990 (4) SA 735 (A) at 743E-745A.

[FN78] S v. Masina and Others 1990 (4) SA 709 (A) at 718G-H.

[FN79] S v. J 1989 (1) SA 669 (A) at 682G. “Generally speaking, however, retribution has tended to yield ground to the aspects of correction and prevention, and it is deterrence (including prevention) which has been described as the ‘essential’, ‘all important’, ‘paramount’, and

‘universally admitted’ object of punishment.” Id. at 682I-J (cited with approval in *S v P* 1991 (1) SA 517 (A) at 523G-H. Cf. *R. v Swanepoel* 1945 AD 444 at 453-455.

[FN80] Per Holmes JA in *S v Letsolo* 1970 (3) SA 476 (A) at 477B (cited with approval by Nicholas AJA in *S v Dlamini* 1992 (1) SA 18 (A) at 31I-32A in the context of the approach to sentencing under section 322(2A)(b) of the Criminal Procedure Act N° 51 of 1977).

[FN81] *S v Senonohi* 1990 (4) SA 727 (A) at 734F-G; *S v Nkwanyana*, supra at 749A-D.

There seems to me to be little difference between the guided discretion required for the death sentence in the United States, and the criteria laid down by the Appellate Division for the imposition of the death sentence. The fact that the Appellate Division, a court of experienced judges, takes the final decision in all cases is, in my view, more likely to result in consistency of sentencing, than will be the case where sentencing is in the hands of jurors who are offered statutory guidance as to how that discretion should be exercised.[FN82]

[FN82] Id. at 35-36.

96. Similarly, in the case of *Bachan Singh v. State of Punjab*,[FN83] the appellant argued before the Supreme Court of India that section 354(3) of the Indian Criminal Procedure Code, 1973 contravened the requirement under Article 21 of the Indian Constitution that “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law,” because the provision provided judges with too much discretion in determining whether offenders should be sentenced to death.[FN84] The Indian Supreme Court rejected the appellant’s contention, because in the Court’s view, it was consistent with the requirements of Article 21 for the legislation to leave the imposition of the death penalty to “the judicial discretion of the Courts which are manned by persons of reason, experience and standing in the profession” who exercise their sentencing discretion “judicially in accordance with well-recognized principles crystallised by judicial decisions directed along the broad contours of legislative policy towards the signposts enacted in section 354(3).”[FN85] In reaching this conclusion, the Court articulated the following propositions intended to guide Indian judges in exercising their sentencing discretion relating to the death penalty:

[FN83] *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 475.

[FN84] Id. at 509-510.

[FN85] Id. at 516.

(a) the normal rule is that the offense of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) while considering the question of sentence to be imposed for the offense of murder under section 302 of the Penal Code, the Court must have regard to every relevant circumstance

relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offense is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence.[FN86]

[FN86] Id. at 515.

97. The Court also emphasized the crucial role that mitigating factors play in the humane imposition of capital punishment. The Court stated that the “scope and concept of mitigating factors in the area of the death penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy written in section 354(3),” and opined that:

[a] real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That should not be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.[FN87]

[FN87] Id. at 534.

98. The experience in other international and domestic jurisdictions therefore suggests that a Court must have the discretion to take into account the individual circumstances of an individual offender and offense by a court in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process. The individual circumstances to be considered have been determined to include the character and record of the offender, the subjective factors that might have influenced the offender’s conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.

99. Authorities in these jurisdictions have also suggested that, in order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. The Commission considers that these principles should also be considered in interpreting and applying Articles 4, 5 and 8 of the Convention, so as to require individualized sentencing in implementing the death penalty. To accept any lesser standard would, in the Commission’s view, fail to afford sufficient protection to the most fundamental of rights under the American Convention.

iv. The Case before the Commission

a. Mandatory Death Penalty

100. As indicated previously, Mr. Knights was found guilty of murder pursuant to Section 234 of the Criminal Code of Grenada and was sentenced to a mandatory death sentence by hanging. Section 234 of the Criminal Code specifically states that “whoever commits murder shall be liable to suffer death.” With respect to the elements of the crime of murder in Grenada, the Trial Judge instructed the Jury “that the prosecution have to prove beyond a reasonable doubt that Donnason Knights and no one else intentionally caused the death of Cherrie-Ann Matthew by unlawful harm without justification or excuse”. [FN88]

[FN88] Id. Trial Transcript p. 2 (20).

101. The evidence produced by Mr. Knights and his witnesses at trial appear to suggest that Mr. Knights himself was attacked by the deceased’s killer and suffered injuries in the process. Mr. Knights’ unsworn testimony was that after spending the night of September 8, 1993, with the deceased, both him and the deceased were attacked by a man in black with a weapon in his hand and a mask on his face. Mr. Knights also testified that he and the deceased ran from the man, became separated, and later he was attacked by a man with a mask who stabbed him with a knife. In addition, Mr. Knights testified that after being stabbed, he could not remember what transpired afterwards, and that he woke up in the General Hospital.

102. At trial, Dr. Mary Courtenay, Mr. Knights’ witness testified under oath that she is a registered medical practitioner in Grenada, attached to the Princess Alice Hospital. Dr. Courtenay testified that upon examination of Mr. Knights she determined that he suffered three stab wounds 3 cms long and one 2 cms long, and that those wounds could have been caused by a sharp instrument with a point such as a knife. Dr. Courtenay also testified that Mr. Knights suffered a small abrasion to the left cheek, and that the measure of force would have been moderate to inflict those wounds. On cross examination, Dr. Courtenay stated that there was a possibility that the wounds could have been self inflicted. [FN89] Mr. Knights also called Evelyn Peters as a witness, who testified under oath that she is a “blood banker” at the General Hospital, and she usually tests blood. Ms. Peters testified that she tested Mr. Knights blood and that his blood type is “Group ORH positive and tendered a certificate into evidence depicting the same.” The Petitioner maintains that the blood type found which was found on the knife at the scene of the crime was that of “Group AB.” [FN90]

[FN89] Trial Transcript, pages 78-79.

[FN90] Trial Transcript, Judge’s summing up, pages 24-25.

103. Consequently, the Commission concludes that once Mr. Knights was found guilty of the crime of murder, the law in Grenada did not permit a hearing by the courts as to whether the death penalty was a permissible or appropriate penalty for Mr. Knights. There was no opportunity for the trial judge or the jury to consider such factors as Mr. Knights’ character or record, the nature or gravity of the offense, or any other relevant factors. Mr. Knights was

likewise precluded from making representations on these matters. The Court sentenced Mr. Knights based solely upon the category of crime for which he had been found responsible.

104. As the foregoing analysis indicates, however, the law in Grenada does not permit mitigating circumstances to be considered by a court in sentencing an individual to death. The Commission recognizes that, had the court in this case been provided with the discretion under law to consider factors of this nature in determining an appropriate sentence, it may well have still imposed the death penalty. The Commission cannot, and indeed should not, speculate as to what the outcome may have been. This determination properly falls to the domestic court. What is crucial to the Commission's determination that Mr. Knights' death sentence contravenes the Convention, however, is the fact that Mr. Knights was not provided with an opportunity to present mitigating factors in the context of sentencing, nor was the Court permitted to consider evidence of this nature in determining whether the death penalty was an appropriate punishment in the circumstances of Mr. Knights' case.

b. Advisory Committee on the Prerogative of Mercy

105. The Commission does not consider that the State's Advisory Committee on the Prerogative of Mercy, which was established pursuant to Articles 73 and 74 of Grenada's Constitution, can provide an adequate opportunity consistent with the requirements of the Articles 4, 5, and 8 of the American Convention for the proper implementation of the death penalty through individualized sentencing. The authority of the Executive in Grenada to exercise the Prerogative of Mercy is prescribed in Sections 72, 73 and 74 of the Constitution of Grenada, which provide as follows:

72(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf.-

- (a) grant a pardon, either free or subject to lawful conditions, to any person convicted of any offence;
- (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
- (c) substitute a less severe form of punishment for any punishment imposed on a person for any offence; or
- (d) remit the whole or any part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Crown on account of any offence.

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

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

- (a) the Minister for the time being designated under Section 72(2) of this Constitution who shall be the Chairman;
- (b) the Attorney General;

- (c) the chief medical officer of the Government of Grenada; and
- (d) three other members appointed by the Governor-General, by instrument in writing under his hand.

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

- (a) in the case of a person who, at the date of his appointment was a Minister, if he ceases to be a Minister; or
- (b) if the Governor-General by instrument in writing under his hand, so directs.

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

(4) The Committee may regulate its own procedure.

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

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

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

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

Petitioners confirm that the exercise of the power of pardon in Grenada involves an act of mercy that is not the subject of legal rights and therefore is not subject to judicial review.[FN91]

[FN91] See *Reckley v. Minister of Public Safety (N° 2)* [1996] 2 W.L.R. 281 at 289-291 (finding that the exercise of the Prerogative of Mercy by the Minister of Public Safety in The Bahamas involved an act of mercy that was not the subject of legal rights and was therefore not justiciable.); *de Freitas v. Benny* [1976] 2 A.C. 239.

107. In this regard, however, the Commission has received information that in a September 12, 2000 judgment in the case of *Neville Lewis et al. v. The Attorney General of Jamaica*, the Judicial Committee of the Privy Council, the highest Court of Appeal of Grenada, found that an individual's petition for mercy under the Jamaican Constitution is open to judicial review.[FN92] The Privy Council also found that the procedure for mercy must be exercised by procedures that are fair and proper, which require, for example, that a condemned individual be given sufficient notice of the date on which the Jamaican Privy Council will consider his or her case, to be afforded an opportunity to make representations in support of his or her case, and to receive copies of the documents that will be considered by the Jamaican Privy Council in making its decision.[FN93]

[FN92] *Neville Lewis et al. v. The Attorney General of Jamaica and The Superintendent of St. Catherine District Prison*, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (12 September 2000)(J.C.P.C.), at p. 23.

[FN93] *Id.*, at 23-24.

108. The Commission considers that the process for granting mercy in Grenada is not consistent with the standards prescribed under Articles 4, 5 and 8 of the Convention that are applicable to the imposition of mandatory death sentences. As outlined previously, these standards include legislative or judicially-prescribed principles and standards to guide courts in determining the propriety of death penalties in individual cases, and an effective right of appeal or judicial review in respect of the sentence imposed. The Prerogative of Mercy process in Grenada even as informed by the judgment in the *Neville et al.* case, does not satisfy these standards, and therefore cannot serve as a substitute for individualized sentencing in death penalty prosecutions.

109. Moreover, to the extent that Mr. Knights' case which is presently being considered by the Commission has not been afforded the procedural protections discussed by the Privy Council in the *Neville et al.* case, the Commission finds, as it had prior to the *Neville et al.* judgment,[FN94] that the procedure for granting the Prerogative of Mercy in Grenada does not guarantee condemned prisoners an effective or adequate opportunity to participate in the mercy process, and therefore does not properly ensure the protection of Mr. Knights' right under Article 4(6) of the Convention to apply for amnesty, pardon or commutation of sentence.

[FN94] See e.g. Report N° 38/00, (Baptiste), Annual Report of the IACHR 1999, p. 721, paras. 120-125; Report N° 41/00 (McKenzie et al.), Annual Report of the IACHR 1999,p. 918, paras. 227-232.

110. In the Commission's view, the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention, when read together with the State's obligations under Article 1(1) of the Convention, must be read to encompass certain minimum procedural protections for condemned prisoners, if the right is to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners to apply for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution. It also entails the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. In order to provide condemned prisoners with an effective opportunity to exercise this right, a procedure should be prescribed and made available by the State through which prisoners may file an application for amnesty, pardon or commutation of sentence, and submit representations in support of his or her application. In the absence of minimal protections and procedures of this nature, Article 4(6) of the American Convention is rendered meaningless, a right without a remedy. Such an interpretation cannot be sustained in light of the object and purpose of the American Convention.

111. In this respect, the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention may be regarded as similar to the right under Article XXVII of the American Declaration of every person "to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements," and the corresponding Article 22(7) of the Convention, which provides for the right to "seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes." [FN95] The Commission has interpreted the former provision, in conjunction with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, as giving rise to a right under international law of a person seeking refuge to a hearing in order to determine whether that person qualifies for refugee status. [FN96] Other internationally articulated requirements governing the right to seek asylum reflect similar minimum standards, namely the right of an individual to apply to appropriate authorities for asylum, to make representations in support of their application, and to receive a decision. [FN97]

[FN95] See similarly Universal Declaration on Human Rights, Article 14 (providing for the right of every individual to "seek and to enjoy in other countries asylum from persecution.").

[FN96] I/A. Comm. H.R., Haitian Center for Human Rights and others (United States), Case N° 10.675 (March 13 1997), Annual Report 1996, para. 155.

[FN97] See e.g. Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 189-219 (prescribing basic requirements

for the procedures for determining refugee status, including the right of an applicant to be given the necessary facilities for submitting his case to the authorities concerned, and that the applicant be permitted to remain in the country pending a decision on his initial request for refugee status); Council of Europe, Resolution on minimum guarantees for asylum procedures, Brussels, 21 June 1995, Articles 10, 12, 14, 15, 23 (prescribing common procedural guarantees to be provided by Member States of the European Union in processing asylum application, including the right of an asylum-seeker, at the border or otherwise, to have an opportunity to lodge his asylum application as early as possible, to remain in the territory of the state in which his application has been lodged or is being examined as long as the application has not been decided upon, to be given the opportunity of a personal interview with an official qualified under national law before a final decision is taken on the asylum application, and to have the decision on the asylum application communicated to the asylum-seeker in writing.).

112. Consistent with the interpretation of the right to seek asylum by the Commission and other international authorities, the Commission finds that Article 4(6) of the Convention must be interpreted to encompass certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. The Commission notes in this regard that some common law jurisdictions retaining the death penalty have prescribed procedures through which condemned prisoners can engage and participate in the amnesty, pardon or commutation process.[FN98]

[FN98] In the State of Ohio, for example, clemency review has been delegated in large part to the Ohio Adult Parole Authority (OAPA). In the case of an inmate under sentence of death, the OAPA must conduct a clemency hearing within 45 days of the scheduled date of execution. Prior to the hearing, the inmate may request an interview with one or more parole board members. The OAPA holds a hearing, completes its clemency review, and makes a recommendation to the Governor. If additional information later becomes available, the OAPA may in its discretion hold another hearing or alter its recommendation. See Ohio Constitution, Art. III, s. 2, Ohio Revised Code Ann., s. 2967.07 (1993). See also *Ohio Adult Parole Authority v. Woodward*, Court File N° 96-1769 (25 March 1998)(U.S.S.C.) (finding that Ohio's clemency procedures do not violate the U.S. Constitution's Due Process Clause).

113. The information before the Commission indicates that the process in Grenada for granting amnesty, pardon or commutation of sentence does not guarantee Mr. Knights, any procedural protections. By its terms, Section 74 of Grenada's Constitution does not provide condemned prisoners with any role in the mercy process.

114. The Petitioners have claimed that Mr. Knights has no right to make submissions to the Advisory Committee. Whether and to what extent prisoners may apply for amnesty, pardon or commutation of sentence remains entirely at the discretion of the Advisory Committee, and no procedure or mechanism is provided for that specifies the manner in which prisoners may file an application for amnesty, pardon or commutation of sentence, submit representations in support of his or her application, or receive a decision. Consequently, the Commission finds that the State

has failed to respect the right of Mr. Knights under Article 4(6) of the American Convention to apply for amnesty, pardon or commutation of sentence.

115. Based upon the foregoing facts and the interpretive principles outlined above, the Commission finds that by imposing a mandatory death sentence on Mr. Knights, the State violated his rights pursuant to Articles 4(1), 5(1), 5(2), and 8(1) of the Convention.

116. More particularly, the Commission concludes that the trial judge imposed the mandatory death penalty on Mr. Knights, in the absence of any guided discretion to consider his personal characteristics and the particular circumstances of his offense to determine whether death was an appropriate punishment which violated his rights as established by Articles 4(1), 5(1), 5(2), and 8(1) of the American Convention. Mr. Knights was also not provided with an opportunity to present representations and evidence as to whether the death penalty was an appropriate punishment in the circumstances of his case. Rather, the death penalty was imposed upon him based upon the category of crime for which he was convicted and without any principled distinction or rationalization based upon the particular circumstances of his personality or his crime. Moreover, the propriety of the sentence imposed was not susceptible to any effective form of judicial review, and his execution is now imminent, his conviction for murder having been upheld on appeal by the Appellate Court in Grenada. The Commission therefore concludes that the State has violated Mr. Knights' rights under Article 4(1) of the Convention not to be arbitrarily deprived of his life, and therefore, his mandatory death sentence is unlawful.

117. The Commission further concludes that the State, by sentencing Mr. Knights to a mandatory penalty of death absent consideration of his individual circumstances, has failed to respect his right to physical, mental and moral integrity contrary to Article 5(1) of the American Convention, and has subjected him to cruel, inhuman, or degrading punishment or treatment in violation of Article 5(2). The State sentenced Mr. Knights to death solely because he was convicted of a predetermined category of crime. Accordingly, the process to which he has been subjected, would deprive him of his most fundamental right, his right to life, without consideration of his personal circumstances and his offense. Treating Mr. Knights in this manner abrogates the fundamental respect for humanity that underlies the rights protected under the Convention, and Articles 5(1) and 5(2) in particular.

118. The Commission also concludes that the State has violated Mr. Knights' right pursuant to Article 4(6) of the American Convention by failing to guarantee him an effective right to apply for amnesty, pardon or commutation of sentence, to make representations, in person or by counsel, to the Advisory Committee on the Prerogative of Mercy, and to receive a decision from the Advisory Committee within a reasonable time prior to his execution.

119. Finally, the Commission concludes that the State has violated Mr. Knights' right to a hearing with due guarantees by a competent, independent and impartial tribunal, as established under Article 8 of the American Convention. Mr. Knights was not provided with an opportunity to make representations and present evidence to the trial judge as to whether his crime warranted the ultimate penalty of death, and was therefore denied the right to fully answer and defend the criminal accusation against him.

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

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

c. Articles 4 and 5 – Conditions of Detention

122. The Petitioners allege that the State has violated Mr. Knights' right to have his physical, mental and moral integrity respected, as well as his right not to be subjected to cruel, unusual or degrading punishment or treatment pursuant to Article 5(1) and 5(2) of the American Convention, because of the conditions of detention to which he has been subjected. They argue further that these conditions render his execution unlawful under Article 4 of the Convention.

123. In support of their allegations, the Petitioners have provided the Commission with an affidavit sworn by Mr. Knights on June 9th 1998, in which he describes his conditions of detention since his arrest and subsequent to his conviction for murder on August 2nd , 1995, as follows:

I am presently incarcerated on death row which consists of a number of cells each containing one inmate. The cells on death row are situated underneath the main prison building in an area called "Jonestown" (named after the Jonestown Massacre in Guyana in South America some years ago.)

My cell is approximately 9 feet by 6 feet (9ft. x 6ft.) and I spend approximately 23 hours a day in my cell alone. I am provided with a bed and mattress to sleep on, but there is no other furniture in my cell. I am provided with a bucket which I use as a toilet. I am permitted to slop out the contents of the bucket once a day. Once it has been used, I am forced to endure the smell and unhygienic conditions until I am able to empty it.

The lighting in my cell is insufficient. The cell has no windows and no natural lighting, and accordingly has no ventilation. The only lighting in my cell is provided by a single bulb situated in the corridor in front of my cell.

I am provided with three meals a day. Sometimes food is brought to me in my cell where I am made to eat alone. The food is generally of a poor quality. I am provided with drinking water.

I am allowed one hour of exercise per day. There are no exercise facilities and my hour is usually spent standing in the yard.

I am allowed one visitor per month for a period of 15 minutes. I am allowed to write and receive one letter a month.

As a prisoner on death row, I am not permitted access to the prison services. I am not allowed to use the prison library, nor am I allowed access to the chaplain and religious services.

I receive inadequate medical care. Visits by the doctor are not regular and it is not always clear whether I will be able to see a doctor when necessary.

There are no adequate complaints mechanism or procedure for dealing with any complaints I may have concerning my treatment and condition of confinement.

124. As described in Part III of this Report, the Petitioners also rely upon general sources of information regarding prison conditions in Grenada and other Caribbean countries. These include reports prepared in 1990 and 1991 by the non-governmental organization “Caribbean Rights.” While somewhat outdated, the Reports tend to support Mr. Knights’ allegations in respect of the conditions in which he has been incarcerated since his arrest.

125. In the Commission’s view, these conditions of detention, fail to satisfy the standard of humane treatment prescribed under Article 5(1) and 5(2) of the Convention. In this regard, the Inter-American Court considered similar conditions of detention in the Suarez-Rosero Case.[FN99] In that case, the victim alleged, inter alia, that he was held incommunicado for over one month in a damp and poorly ventilated cell measuring five meters by three, together with sixteen other persons. In finding that the victim had been subjected to cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention, the Court stated as follows:

[FN99] I/A Court H.R., Suarez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, at p. 283.

The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suarez-Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his incommunicado detention was arbitrary and carried out in violation of Ecuador’s domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspapers; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suarez-Rosero was subjected may be described as cruel, inhuman and degrading.[FN100]

[FN100] Id., at pp. 302-3, para. 98.

126. While Mr. Knight does not claim to have been held incommunicado, he is being held in solitary confinement on death row, and the prison conditions under which he has been detained are strikingly similar to those to which the victim in the Suarez-Rosero case was subjected. Mr. Knight has been held in confined conditions, with inadequate hygiene, ventilation and natural light, and is infrequently allowed out of his cell. Nor has Mr. Knight been provided with adequate medical care. These observations, suggest that Mr. Knight's treatment whilst in detention has failed to meet the minimum standards established under Articles 5(1) and 5(2) of the Convention, which apply irrespective of the nature of the conduct for which the person in question has been imprisoned[FN101] and regardless of the level of development of a particular State Party to the Convention.[FN102]

[FN101] See e.g. Eur. Court H.R., *Ahmed v. Austria*, Judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 220, para. 38.

[FN102] See similarly U.N.H.R.C., *Mukong v. Cameroon*, Communication N° 458/1991, U.N. Doc. N° CCPR/C/51/D/458/1991 (1994), para. 9.3 (observing that certain minimum standards governing conditions of detention for prisoners, as prescribed by the International Covenant on Civil and Political Rights and reflected in the U.N. Standard Minimum Rules for the Treatment of Prisoners, must be observed regardless of a state party's level of development).

127. The Commission considers that the Petitioners' allegations should be evaluated in light of minimum standards articulated by international authorities for the treatment of prisoners, including those prescribed by the United Nations. More particularly, Rules 10, 11, 12, 15, 21, 24, 26, 40, 41, and of the United Nations Standard Minimum Rules for the Treatment of Prisoners[FN103] (UN Minimum Rules) provide for minimum basic standards in respect of accommodation, hygiene, exercise, medical treatment, religious services and library facilities for prisoners, as follows:

[FN103] United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (N° 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (N° 1) at 35, U.N. Doc E/5988 (1977).

10. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

11. In all places where prisoners are required to live or work,

(a) the windows shall be large enough to enable prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

21. (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical and mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should see daily all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

40. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.

(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.

42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

128. It is evident based upon the information provided by the Petitioners that the conditions of detention to which Mr. Knights has been subjected to, fail to meet several of these minimum standards of treatment of prisoners, in such areas as hygiene, exercise and medical care.

129. The State has failed to provide any information in respect of prison conditions in Grenada, generally or as they pertain to Mr. Knights. Based upon the information on the record before it, the Commission finds that the State has failed to treat Mr. Knights with respect for his physical, mental or moral integrity, and has therefore violated Article 5(1) of the Convention, and in all of the circumstances, constitute cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention. The Commission therefore concludes that the State is responsible for violations of these provisions of the Convention in respect of Mr. Knights in conjunction with the State's obligations under Article 1(1) of the Convention.

d. Articles 8 and 25, – Unavailability of Legal Aid for Constitutional Motions

130. The Petitioners argue that legal aid is not effectively available for Constitutional Motions before the courts in Grenada, and that this constitutes a violation of the right to a fair trial under Article 8 of the Convention. Although the Petitioners have not specifically referred to Article 25 of the American Convention, the right to an effective remedy, the Commission considers that their allegations relating to the denial of an effective remedy at law also encompass Article 25 of the Convention. Therefore, the Commission has also analyzed their claims relating to the unavailability of legal aid for Constitutional Motions under Article 25 of the Convention, in conformity with Article 32(c) of the Commission's Regulations.[FN104]

[FN104] Article 32 of the Commission's Regulations provides that: "Petitions addressed to the Commission shall include (c) an indication of the state in question which the petitioner considers responsible, by commission or omission, for the violation of a human right recognized in the American Convention on Human Rights in the case of States Parties thereto, even if no specific reference is made to the article alleged to have been violated."

131. The Petitioners contend that the failure of the State to provide legal aid denies Mr. Knights access to the Court in fact as well as in law. The Petitioners argue that to bring a Constitutional Motion before the domestic courts often involve sophisticated and complex questions of law that require the assistance of Counsel. In addition, the Petitioners claim that Mr. Knights is indigent, and that legal aid is effectively not available to him to pursue a Constitutional Motion in the courts of Grenada. They also contend that there is a dearth of Grenadian lawyers who are prepared to represent Mr. Knights pro bono.

132. Based upon the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by Mr. Knights in his petition, such as the

right to due process and the adequacy of his prison conditions, are procedurally and substantively complex and cannot be effectively raised or presented by a prisoner in the absence of legal representation. The Commission also finds that the State does not provide legal aid to individuals in Grenada to bring Constitutional Motions, and that Mr. Knights is indigent and is therefore not otherwise able to secure legal representation to bring a Constitutional Motion.

133. The Commission considers that in the circumstances of Mr. Knights' case, the State's obligations regarding legal assistance for Constitutional Motions flow from both Article 8 and Article 25 of the Convention. In particular, the determination of rights through a Constitutional Motion in the High Court must conform with the requirements of a fair hearing in accordance with Article 8(1) of the Convention. In the circumstances of Mr. Knights' case, the High Court of Grenada would be called upon to determine whether the victim's conviction in a criminal trial violated rights under the Grenada's Constitution. In such cases, the application of a requirement of a fair hearing in the High Court should be consistent with the principles in Article 8(2) of the Convention.[FN105] Accordingly, when a convicted person seeking Constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State.

[FN105] See I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Annual Report 1991, para. 28 (interpreting Article 8(1) of the Convention as follows:

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

See also I/A Comm. H.R., Loren Laroye Riebe Star and others v. Mexico, Report N° 49/99 (13 April 1999), Annual Report 1998, para. 70 (interpreting Article 8(1) in the context of administrative proceedings leading to the expulsion of foreigners as requiring certain minimal procedural guarantees, including the opportunity to be assisted by counsel or other representative, sufficient time to consider and refute the charges against them and to seek and adduce corresponding evidence.).

134. Due to the unavailability of legal aid, Mr. Knights' has effectively been denied the opportunity to challenge the circumstances of his conviction under Grenada's Constitution in a fair hearing. This in turn constitutes a violation of his right under Article 8(1) of the American Convention.[FN106]

[FN106] See similarly Currie v. Jamaica , Communication N° 377/1989, U.N.Doc. N° CCPR/C/50/D/377/1989 (1994), para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the

costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights required the State to provide legal assistance).

135. Moreover, Article 25 of the Convention provides individuals with the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the Constitution or laws of the state concerned or by the Convention. The Commission has stated that the right to recourse under section 25 when read together with the obligation in Article 1(1) and the provisions of Article 8(1), “must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the Constitution, or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.”[FN107] In addition, the Inter-American Court has held that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigence, then that person is exempted from the requirement under the Convention to exhaust domestic remedies.[FN108] While the Court rendered this finding in the context of the admissibility provisions of the Convention, the Commission considers that the Court's comments are also illuminating in the context of Article 25 of the Convention in the circumstances of the present case.

[FN107] See Peru Case, *supra*, pp. 190-191.

[FN108] I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies*, *supra*, para. 30.

136. By failing to make legal aid available to Mr. Knights to pursue a Constitutional Motion in relation to his criminal proceedings, the State has effectively barred recourse for Mr. Knights to a competent court or tribunal in Grenada for protection against acts that potentially violate his fundamental rights under Grenada's Constitution and under the American Convention. Moreover, in capital cases, where Constitutional Motions relate to the procedures and conditions through which the death penalty has been imposed and therefore relate directly to the right to life and to humane treatment of a defendant, it is the Commission's view that the effective protection of those rights cannot properly be left to the random prospect as to whether an attorney may be willing or available to represent the defendant without charge. The right to judicial protection of these most fundamental rights must be guaranteed through the effective provision of legal aid for Constitutional Motions.[FN109] The State cannot be said to have afforded such protection to Mr. Knights. As a consequence, the State has failed to fulfill its obligations under Article 25 of the American Convention in respect of Mr. Knights.

[FN109] See similarly U.N.H.R.C., *William Collins v. Jamaica*, Communication N° 240/1987, U.N. Doc. N° CCPR/C/43/D/240/1987 (1991), para. 7.6 (finding that in capital punishment

cases, legal aid should not only be made available, it should enable counsel to prepare his client's defense in circumstances that can ensure justice.).

137. Accordingly, the Commission concludes that the State has failed to respect Mr. Knights' rights under Article 8(1) of the Convention by denying him an opportunity to challenge the circumstances of his conviction under the Constitution of Grenada in a fair hearing. The Commission also concludes that the State has failed to provide Mr. Knights' with simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the Constitution or laws of Grenada or by the Convention, and has therefore violated the rights of Mr. Knights to judicial protection under Article 25 of the American Convention.

V. PROCEEDINGS SUBSEQUENT TO REPORT N° 88/00

138. On October 5 2000, the IACHR, at its 108th Regular Session, approved Report N° 88/00 in this case on the basis of Article 50 of the Convention, and forwarded it to the State with its Conclusions and Recommendations, on October 20, 2000. In its Recommendations to the State, the Commission requested that the state inform it within two months of the measures that it had taken to comply with the Commission's Recommendations. So that the Commission could have all the necessary information to decide whether the measures taken are adequate and whether to publish its Report pursuant to Article 51 of the American Convention. The period of two months has elapsed and the Commission has not received a response from the State of Grenada in respect of its Recommendations in this case.

VI. FINAL CONCLUSIONS

139. The Commission, on the basis of the information presented, and the due analysis under the American Convention, reiterates its conclusions as follows:

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

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

142. The State is responsible for violating Mr. Knights' rights under Article 5(1) and 5(2) of the American Convention, in conjunction with a violation of Article 1(1) of the American Convention, because of Mr. Knights' conditions of detention.

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

VII. RECOMMENDATIONS

144. Based on the analysis and the conclusions in this Report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE STATE OF GRENADA:

1. Grant Mr. Knights an effective remedy which includes commutation of sentence and compensation.
2. Adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed in violation of the rights and freedoms guaranteed under the Convention, including Articles 4, 5, and 8, and in particular, to ensure that no person is sentenced to death pursuant to a mandatory sentencing law.
3. Adopt such legislative or other measures as may be necessary to ensure that the right under Article 4(6) of the American Convention to apply for amnesty, pardon or commutation of sentence is given effect in Grenada.
4. Adopt such legislative or other measures as may be necessary to ensure that the right to a fair hearing under Article 8(1) of the American Convention and the right to judicial protection under Article 25 of the American Convention are given effect in Grenada in relation to recourse to Constitutional Motions.
5. Adopt such legislative or other measures as may be necessary to ensure that the right to humane treatment under Article 5(1) and Article 5(2) of the American Convention in respect of the victim's conditions of detention is given effect in Grenada.

VIII. PUBLICATION

145. On February 21, 2001, in conformity with Article 51(1) and 51 (2) of the American Convention, the Commission sent Report N° 13/01 which was adopted in this case on February 20, 2001 to the State of Grenada, and granted the State a period of one month for it to adopt the necessary measures to comply with the foregoing recommendations and to resolve the situation under analysis.

146. The period of one month has elapsed and the Commission has not received a response from the State of Grenada in respect of its Recommendations in this case.

IX. FINAL ANALYSIS AND CONCLUSIONS

147. For these reasons, the Commission decides that the State has not taken all of the appropriate measures to comply with the recommendations set forth in this report.

148. Based on the foregoing and pursuant to Article 51(3) of the American Convention and Article 48 of the Commission's Regulations, the Commission decides to reiterate the conclusions and recommendations contained in Report N° 13/01. The Commission further decides to make public this report and include it in the Commission's Annual Report to the General Assembly of the OAS.

Done and signed in Santiago, Chile, on the 4th day of the month of April, 2001 (Signed): Claudio Grossman, Chairman; Juan Mendez, First Vice-Chairman; Marta Altolaguirre, Second Vice-Chair; Commissioners: Hélio Bicudo, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo.

CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO

1. Although I endorse the findings, reasoning and motives of my fellow commissioners in this report, I would like to take the matter further and express my understanding concerning the lawfulness of the death penalty in the Inter-American System.
2. The American Declaration of the Rights and Duties of Man (hereinafter American Declaration), approved at the Ninth International American Conference, which took place in Santa Fe de Bogota in May and June of 1948, affirms that “Every human being has the right to life, liberty and the security of his person” (Article I) and, moreover, that “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor” (Article 2).
3. Article 4 of The American Convention on Human Rights (hereinafter American Convention), approved on November 22, 1969 in San Jose, Costa Rica, states that “Every person has the right to have his life respected. The right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”
4. At the same time, the American Convention, by including the right to personal integrity in the civil and political rights framework, affirms that “No one shall be subjected to torture or to cruel, inhumane, or degrading punishment or treatment.”
5. However, death penalty is provided for in the American Convention in its original version. Article 4, Section 2 allows the death penalty to be applied by Member States only for the most serious crimes.
6. There is a contradiction among the aforementioned articles which repudiate torture, cruel, inhumane or degrading punishment or treatment.
7. The American Declaration considers life to be a fundamental right, and the American Convention condemns torture or the imposition of cruel, inhumane or degrading punishment or treatment. The elimination of a life could be deemed torture or cruel, inhumane or degrading punishment or treatment.
8. It seems that the tolerance expressed in Article 4, Section 2 of the American Convention reveals the sole adoption of a political position of conciliation between all Member-States in order to approve a more general article, the one about the right to life.
9. Before analyzing what it means for some States to retain the death penalty as a part of their legal systems, it is important to note that the Inter-American Convention to Prevent and

Punish Torture, signed in Cartagena de Indias, Colombia, on December 9th, 1985, describes the meaning of torture as follows: “Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose” (Article 2).

10. Notice that this article addresses torture as a personal punishment or penalty in all circumstances.

11. The death penalty brings immeasurable suffering to the individual. Is it possible to imagine the anguish that the individual feels when he/she is informed of the verdict? Or the moments leading up to the actual execution? Would it be possible to evaluate the suffering of those who wait on death row for execution, in some cases for several years? In the United States, fifteen, sixteen or seventeen year-old minors, who committed homicide and subsequently received the death penalty, wait for fifteen years or longer for their execution. Is it possible to imagine a fate worse than remaining between hope and despair until the day of execution?

12. The OAS Member-States, by adopting the Convention on Forced Disappearance of Persons, reaffirms that “the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in the Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights.”

13. It is important to mention that in 1998 and 1999, the United States was the only country in the world known for executing minors under 18 years of age. To that extent, it is important to note that the United States has accepted the International Covenant on Civil and Political Rights since September 1992, Article 6(5) of which establishes that the death penalty cannot be imposed on minors under 18 years old or on pregnant women. The U.S. Senate opted to express its reservation to this section at the moment of its ratification but currently, there is an international consensus opposed to that reservation based on Article 19 (c) of the Vienna Convention on the Law of Treaties. This Convention gives the State the possibility to formulate reservations, but these reservations cannot be incompatible with the object and purpose of the treaty.

14. In June 2000, Shaka Sankofa, formerly known as Gary Graham, was convicted in the State of Texas for a crime he committed when he was 17 years old. He was executed after waiting 19 years on death row, although the Inter-American Commission on Human Rights (hereinafter “IACHR” or “Commission”) had formally presented requests to the American government to suspend the act until the case was decided by the Commission. There were serious doubts regarding whether Shaka Sankofa had really committed the crime. The U.S. Government did not respond to the Commission’s recommendation but could not escape from the jurisdiction of the IACHR on the protection of human rights, according to the American Declaration. The Commission thus sent out a press release condemning the U.S. decision, since it was not in accordance with the Inter-American System of Protection of Human Rights.[FN110]

[FN110] Press Release N° 9/00, Washington, D.C. June 28, 2000: “The Inter-American Commission on Human Rights deplores the execution of Shaka Sankofa, formerly known as Gary Graham, in the state of Texas on June 22, 2000. Mr. Sankofa was executed, despite formal requests by the Commission for the United States to ensure a suspension of Mr. Sankofa's execution pending the determination of a complaint lodged on his behalf before the Commission”.

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

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

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

By communication dated June 21, 2000, the United States acknowledged the receipt of the Commission's February 4, 2000 communication and indicated that it had forwarded the same to the Governor and Attorney General of Texas. On June 22, 2000, however, the Commission received information that the Texas Board of Pardons and Paroles declined to recommend that Mr. Sankofa be granted a reprieve, commutation or pardon, and that his execution was to proceed on the evening of June 22, 2000. Consequently, by communication of the same date, the Commission requested that the United States provide an urgent response to its previous request for precautionary measures. Regrettably, the United States did not respond to the Commission's June 22, 2000 request, and Mr. Sankofa's execution proceeded as scheduled.

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

Commission's requests for precautionary measures, particularly in those cases involving the most fundamental right to life.”

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

16. Article 24 of the American Convention affirms that all persons are equal before the law, and consequently, they are entitled, without discrimination, to equal protection of the law. Although that Convention does not define discrimination, the IACHR understands that discrimination includes distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life (Manual on the Preparation of Reports on Human Rights, International Covenant on Civil and Political Rights, Article 26.)

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

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

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

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

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

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

23. The issue will be examined under legal hermeneutics of positive law. International law presupposes [normative] dispositions that are above [the] State [law]. As set forth by the illustrious Italian jurist, Norberto Bobbio, universalism – which international law attempts to embody – reappears today, specially after the end of WWII and the creation of the UN, no longer as a belief in an eternal natural law [order], but as the will to constitute, in the end, a single body of positive law of the social and historical development (as natural law and the state of nature). He also ponders that the idea of the single global State is the final limit of the idea of the contemporary juridical universalism, that is the establishment of a universal positive law (Cf. *Teoria do Ordenamento Jurídico*, Universidade de Brasília, 1991, p. 164).

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

25. According to Mr. Bobbio, the criteria to solve an antinomy are the following: a) chronological criteria, b) hierarchical criteria, c) specialty criteria.[FN111]

[FN111] Op.cit 2, p.92

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

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

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

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

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

“The delegations that sign below, participants of the Specialized Inter-American Conference on Human Rights, taking into consideration the highly prevailing feeling, expressed in the course of the debates on the abolishment of the death penalty, in accordance with the purest humanistic traditions of our peoples, solemnly declare our firm aspiration of seeing the application of the death penalty in the American context eradicated as of now, and our indeclinable purpose of effecting all possible efforts so that, in the short term, an additional protocol to the American Convention on Human Rights “Pact of San Jose, Costa Rica” might be adopted, consecrating the definitive abolition of the death penalty, and putting America once more in the forefront of the protection of fundamental human rights.” (author’s translation from the original in Spanish, Acts and documents, OAS-serv. K-XVI-I2, Washington – DC, 1973, hereafter Acts and Documents, repr. 1978, Spanish version, p. 161, 195, 296 and 449/441).

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

32. Moreover, the rule of law (*Estado de derecho*) implies, when punishment is imposed, the knowledge of what the penalty actually means. When the purpose of the punishment applied is not only retribution, but the recuperation or rehabilitation of the convict, he or she knows what

will happen in his or her future. If the punishment is purely retributive, as in a sentence imposing imprisonment for life, the convict still envisages his future. But if the convict is sentenced to death, the State does not point to what the elimination of his being will bring him. Science, with all its developments, has not managed, up to now, to unveil the after-death: future life, with prize or punishment? Pure and simple elimination?

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

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

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

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

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

38. It could be argued that there is also a qualitative difference between a fine and detention, but the calculus of the former can be reduced to chronological criteria, being determined, for instance, in terms of work days lost, so that it has a meaning of punishment and suffering to the perpetrator, linked to his patrimonial situation. In any circumstance, these are rational criteria of convenience, susceptible to contrast with experience, that govern the passage from one type of punishment to the other, whereas the notion of “proportion” is submerged in face of death.

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

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

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

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

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

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

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

46. It is convenient to observe, furthermore, that the European Court of Human Rights, in its decision in the Soering Case – Jens Soering, born in Germany, in detention in England and submitted to an extradition procedure on behalf of the government of the United States pending charges of murder committed in Virginia, a State that punishes this crime with the death penalty – made opportune comments regarding Article 3 of the European Convention, which establishes the interdiction of torture, inhuman cruel or degrading treatment or punishment. The Court considered that the request could not be granted unless the person subject to extradition would be

guaranteed his or her rights under Article 3 of the Convention (cf. *Jurisprudence de la Cour européenne des droits de l'homme*, 6th ed. 1998, Sirey, Paris, pp. 18 and ff.).

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

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

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

50. Therefore, the absolute prohibition, in the European Convention, of the practice of torture or of inhuman or degrading treatment or punishment shows that article 3, referred to above, proclaims one of the fundamental values of democratic societies. The judgment underlines that provisions in the same sense can be found in the International Covenant on Civil and Political Rights of 1966, and in the American Convention on Human Rights of 1969, protecting, in all its extension and depth, the right of the human person. The Court concludes that it is an internationally approved norm.

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

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

53. For its part, the Inter-American Court on Human rights has already affirmed that “The right to life and the guarantee and respect thereof by States cannot be conceived in a restrictive manner. That right does not merely imply that no person may be arbitrarily deprived of his or her life (negative obligation). It also demands of the States that they take all appropriate measures to protect and preserve it (positive obligation).” (Cf. *Repertorio de Jurisprudencia del Sistema*

Interamericano de Derechos humanos, 1998, Washington College of Law, American University, 1/102)

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

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

56. In the same line of thought, in the case between Ireland and the United Kingdom, the European Court had already decided that “The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (...) Article 3 (art. 3) makes no provision for exceptions (...)the only relevant concepts are "torture" and "inhuman or degrading treatment", to the exclusion of "inhuman or degrading punishment".(par. 163-164)

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

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

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

60. In his concurring vote, the illustrious international legal scholar and current President of the Court (1999/2001) underlines that “The very emergence and consolidation of the corpus juris of the International Law of Human Rights are due to the reaction of the universal juridical

conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (el Derecho) came to the encounter of the human being, the ultimate addressee of its norms of protection.” (Concurring vote, par.4)

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

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

63. Finally, with the demystification of the postulates of the voluntarist legal positivism, it has become clear that the answer to the problem of the basis and the validity of general international law can only be found in the universal legal consciousness, from the affirmation of an idea of objective justice.

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

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

66. In effect, the Inter-American Court, in its Advisory opinion OC-14/94, has held that: “Pursuant to international law, all obligations imposed by it must be fulfilled in good faith;

domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions [Greco-Bulgarian “Communities”, Advisory Opinion, 1930, P.C.I.J., Series B, N° 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, N° 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, N° 46, p. 167; and, I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) 12, at 31-2, para. 47].” (par.35)

67. In view of the considerations presented here, it can be said that the norm of article 4, section 2 of the Inter-American Convention, has been superseded by the aforementioned conventional provisions, following the best hermeneutic of the International Law of Human Rights, with the result that it is prohibitive, for domestic law – even if older than the American Convention – to apply cruel punishment, such as the death penalty.

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

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

Done and signed in Santiago, Chile, on the 4th day of the month of April, 2001 (signed):
Commissioner: Hélio Bicudo.