

## THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE DEATH PENALTY\*

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*ABSTRACT. This essay examines the jurisprudence of the Inter-American Court of Human Rights with regard to the death penalty: advisory opinions, final judgments and provisional measures. The general tendency of the jurisprudence is abolitionist, since it stresses the strict limits for the imposition of the death penalty and moves toward the final elimination of this punishment. In its decisions on the matter, the Court has examined the issue of the mandatory death penalty, which is still stipulated in some States when “the most serious crimes” are involved. The Court has reviewed national criminal justice systems and established clear limits for laws concerning crimes and penalties. Similarly, the Court has examined the guarantees of an accused person who faces trial, particularly when the possibility of imposing the death penalty exists. The essay also highlights other issues of the highest importance regarding the punitive role of the State and the means of defense of the accused.*

*KEY WORDS: Death penalty, abolitionism, respect for life, procedural guarantees, Inter-American Court of Human Rights.*

*RESUMEN. En este ensayo se examina la jurisprudencia de la Corte Interamericana de Derechos Humanos a propósito de la pena capital, que consta en resoluciones de diversa naturaleza: opiniones consultivas, sentencias y medidas provisionales. El signo general de la jurisprudencia es abolicionista, en cuanto acentúa los límites estrictos para la imposición de la pena de muerte y avanza hacia la supresión final de esta sanción. En sus decisiones sobre esta materia, la Corte ha examinado el concepto de pena de muerte obligatoria*

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*(mandatory death penalty) que todavía disponen algunos Estados cuando se trata de los "más graves delitos". El tribunal ha debido revisar el sistema penal nacional y fijar los límites a los que debe sujetarse la legislación sobre delitos y penas. Asimismo, la Corte ha examinado las garantías del inculpado sujeto a un proceso penal, particularmente acentuadas cuando existe la posibilidad de imponer la pena de muerte. En el artículo figuran otras cuestiones de primer orden a propósito de la actuación punitiva del Estado y de los medios de defensa del inculpado.*

PALABRAS CLAVE: *Pena de muerte, abolicionismo, respeto a la vida, garantías procesales, Corte Interamericana de Derechos Humanos.*

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#### I. THE ISSUE OF DEATH IN THE AMERICAS

The Inter-American Court of Human Rights was established thirty years ago when the American Convention on Human Rights took effect, determining the legal basis for its creation and defining its sphere of competence.

It represents an important stage in the American process —constantly changing and always at risk— of developing a homegrown system for the protection of human rights. The seminal idea emerged in 1945 under the auspices of the Inter-American Conference on Problems of War and Peace held at an emblematic location for our continent: Chapultepec Castle, at the heart—in more ways than one— of Mexico.

The “American journey” toward recognition and the effective exercise of human rights has been long and turbulent and will continue to be so in the years to come. It represents a strong reaction to a deep-rooted authoritarian tradition: predating the presence of Europeans, active through conquest and colonization, assiduous in the 19th and 20th centuries and persistent in the 21st. Its motives have been varied; its manifestations, numerous. Activists in favor of human dignity have included defenders of indigenous peoples, true insurgents, liberal democrats who brought Western political decisions to the American legal system, social movements at the dawn of the 20th century, and militants in the 21st century.

Within this context that frames its historical and contemporary circumstances, the Inter-American jurisdiction on human rights has struggled against death inflicted by agents of the incumbent powers or their emissaries. The reality of inferred death, whether formal or informal, is never far off, although it appears—if we are optimistic—to be in decline. On the one hand, there are extrajudicial executions: fugitive law, summary execution, extrajudicial execution, massacres;<sup>1</sup> on the other, capital punishment: punitive death. All of them are manifestations of the “violent efficiency of the penal system,” to quote Raúl Zaffaroni.<sup>2</sup> In the Americas—and especially south of the Rio Grande, which is much more than a political border, it covers increasingly limited geography; however, it persists despite good intentions and abolitionist provisions.

When we speak of the Western Hemisphere within the context of the Inter-American system, we commonly refer to various regions. To the north

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<sup>1</sup> The *Historical Clarification Commission Report on Guatemala*, which analyzes the most violent phase of the country’s historical conflict (1978-1983), refers to 626 massacres. IACHR Court, *Masacre Plan de Sánchez*, ruling of April 29, 2004. Several cases brought before the Inter-American Court have been identified with reference to this form of collective or mass execution (which has also appeared in other lawsuits identified differently). Thus: *Masacre Plan de Sánchez v. Guatemala* (2004), *Mapiripán Massacre v. Colombia* (2005), *Pueblo Bello Massacre v. Colombia* (2006), *Ituango Massacres v. Colombia* (2006), and *Rochela Massacre v. Colombia* (2007) all the cases mentioned in this article are available in English and Spanish at the website of the Court <http://www.corteidh.or.cr/casos.cfm>.

In terms of the elimination of members of indigenous communities, as a category in the set of violations against these groups, cf. the observations in my concurring opinion for the ruling of the Inter-American Court in *Yatama v. Nicaragua* of June 23, 2005.

<sup>2</sup> RAÚL ZAFFARONI, MUERTES ANUNCIADAS 11-13 (Temis-Instituto Interamericano de Derechos Humanos, 1993).

—mainly the United States (which did not sign the American Convention on Human Rights)— the debate centers on abolitionism and retentionism. To the south (which includes Mexico), abolitionist laws prevail. In the Caribbean, contradictory currents persist; however, we are seeing a tendency toward an abolitionist stance. The Inter-American Court and the Inter-American Commission on Human Rights —an important cog in the system— operate under these circumstances.

I shall now briefly discuss the most relevant and recurrent issues in the abolitionist project —evident in the norms and the decisions resulting from them— in the Inter-American *corpus juris*, pointing in the only logical direction.

## II. THE REGULATORY FRAMEWORK OF THE ABOLITIONIST PROJECT: THE CONVENTION AND THE PROTOCOL

I shall not elaborate on the intentions expressed in the texts leading to the Universal Declaration of Human Rights of 1948 and the Inter-American Convention on Human Rights of 1969. These documents and their effects on the *corpus juris* highlight the defense of human life and shun, reduce or proscribe the death penalty, accordingly. Here, events have followed the same path as elsewhere —whether globally or in Europe: death does not die swiftly, with a single blow; it needs to be hounded and it has been necessary to confine it with perseverance.

It would be advisable to refer to the preparatory work of the Pact of San Jose to weigh the tendencies at play and the solutions adopted. These were —as it is often the case— commitment formulas in hope of better times, which are invariably slow in coming. At the 1969 San Jose Conference, there was an abolitionist conviction, the predominance of which could not be established in the pact itself despite being a strong majority view among the participating nations. Fourteen of the nineteen States attending the conference left explicit evidence of holding this conviction, as well as a follow-up plan to formalize it in a binding text.

Argentina, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela defined their common position: “reflecting the broad majority sentiment expressed in the course of the debates on prohibition of the death penalty, in accordance with the purest humanistic traditions of our peoples, we solemnly state our unwavering aspiration to see the application of the death penalty eradicated forthwith in the Americas and our unyielding intention to make every effort possible to see that, in the short term, an additional Protocol to the American Convention on Human Rights —Pact of San Jose— may be signed that enshrines the definitive abolition of the death

penalty and returns America to a position of leadership in the defense of the fundamental rights of man.”<sup>3</sup> The “firm ethos” —also present in some individual affirmations— was reflected in the Report of the Rapporteur of Commission I.<sup>4</sup>

The term was not that short, nor would the concurrence of the States be unanimous once the Protocol was open for signing. This took place on June 8, 1990, in a process similar to that of the European Convention and the United Nations International Covenant on Civil and Political Rights, to which the respective abolitionist protocols were added: Protocol 6 of 1983 and Protocol 13 of 2002 to the former, and the second elective Protocol of 1989, to the latter.

The Protocol was based on a series of precepts illustrated in its whereas clauses: the right to the respect for life, the aforementioned abolitionist ethos, the obvious connection between that respect and this ethos, the irreparable condition of the death penalty and the need for “an international accord that represents a progressive development of the American Convention” in the field.

However, the Protocol’s plausible intention has proven insufficient to gather all the ratifications and overcome reservations. To date, only eleven countries have ratified it,<sup>5</sup> compared to 24 parties to the American Convention —an unsatisfactory number if we consider there are 35 members in the Organization of American States— and the 32 signatories of the Belém do Pará Convention on the Prevention, Punishment and Eradication of Violence against Women.

How are we to interpret the fact that this Protocol is the instrument with the least coverage of all those that make up the inter-American *corpus juris* on human rights? Are they keeping an ace up their sleeves? Does this caution —for the lack of a better word— coincide with the regularly made suggestions to reinstate capital punishment in countries that have suppressed it, even though it could not be re-established without violating higher-ranking national decisions and external commitments?

On the other hand, as with other instruments, the suppression of capital punishment is not absolute: so-called extremely serious military offenses committed during wartime are left pending. The State that ratifies or adheres to the Protocol may make reservations for these possibilities, as has

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<sup>3</sup> Conferencia Especializada sobre Derechos Humanos [Inter-American Specialized Conference on Human Rights], San Jose, Costa Rica (Nov. 7-22, 1969), *Actas y Documentos*, OEA/Ser. K/XVI/1.2, Washington, D.C., 1973, at 467 [*Proceedings and Documents OAS/Ser. K/XVI/1.2*, Washington, D.C., 1973, at 389].

<sup>4</sup> *Id.*

<sup>5</sup> As of November 27, 2009, the corresponding instrument of ratification had been deposited by: Argentina, Brazil, Chile, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

occurred in some cases.<sup>6</sup> Total, unconditional abolition of the death penalty, along the lines of Protocol 13 of the European Convention of 2002, is still a thing of the future.

### III. INTER-AMERICAN JURISPRUDENCE

The above-mentioned aim of reducing the death penalty is enhanced by the judicial interpretation rooted both explicitly and consistently in the principle *pro homine* or *pro persona*, which extends the coverage for protecting individual rights and liberties and has been invoked again in the Inter-American Court's most recent ruling on the death penalty, handed down in *DaCosta Cadogan v. Barbados* on September 24, 2009.<sup>7</sup>

This abolitionist inclination is spurred on by the necessary re-reading of Convention texts with the idea —upheld by the European Court based on Amnesty International's assertion in *Soering v. The United Kingdom*— that a treaty is “a living instrument which... must be interpreted in the light of present-day conditions.”<sup>8</sup> This shows how the Court's authority to interpret international law works, as the Court itself has ruled in its *Advisory Opinion OC-20/09* of September 29, 2009 —although on a different issue than the one addressed here. This opinion excludes —and alters a criterion that had remained unchanged for a quarter of a century— *ad-hoc* judges and national judges of the respondent State from participating in proceedings arising from complaints or accusations instituted by private citizens.

The jurisprudential actions of the Inter-American Court support this abolitionist approach in an important —and influential— series of advisory opinions, rulings and provisional measures. From among the different channels and to different extremes (in addition, obviously, to the numerous pronouncements relating to the killing of persons: extrajudicial execution), the jurisprudence that applies to my chosen topic is abundant and diverse.

The backbone of the jurisprudence explicitly associated with substantive or procedural issues relating to the death penalty under Inter-American jurisdiction is contained in: *a*) two advisory opinions: *OC-3/83, Restrictions to the Death Penalty* of September 8, 1983, and *OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process* of October 1, 1999; *b*) several rulings on actions against States in the region: mainly those referring to the cases of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* of June 21, 2002;<sup>9</sup> *Raxcacó Reyes v. Guatemala* of Septem-

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<sup>6</sup> Thus, Brazil and Chile have expressed reservations to leave open the possibility of applying the death penalty in wartime for extremely serious crimes of a military nature.

<sup>7</sup> *DaCosta Cadogan v. Barbados*, para. 49 (Sept. 24, 2009).

<sup>8</sup> *Soering v. The United Kingdom, Judgment (Merits and Just Satisfaction)*, para. 102 (Apr. 23, 1989).

<sup>9</sup> Originally, there were three different cases: *Hilaire, Constantine et al.*, and *Benjamin et*

ber 15, 2005; *Fermín Ramírez v. Guatemala* of June 20, 2007; *Boyce et al. v. Barbados* of November 20, 2007; and *DaCosta Cadogan v. Barbados* of September 24, 2009. To these, we can add: *c*) provisional measures aimed at ensuring procedural propriety and protecting the rights of persons facing sentencing or execution: the rulings in *James et al. (Trinidad and Tobago)* of May 27, 1998; *Boyce and Joseph* (Barbados) of June 14, 2005; and *Fermín Ramírez* (Guatemala) of March 12, 2005.

Together, this series of decisions defines the criteria the Inter-American jurisdiction has upheld over slightly more than a quarter of a century within the context of the defense of human rights. It is a core issue as expressed by Antonio Beristain in his study on capital punishment within the context of criminal law: it influences all other issues in the system; it is the rotten apple that spoils the barrel.<sup>10</sup>

In this regard, it is fitting to mention a far-reaching proposal put forward by the Inter-American Commission on Human Rights —making use of its inherent powers as an organ of the OAS and the American Convention— that seeks to obtain certain Court rulings on the issue. I specifically refer to the April 20, 2004 request for an advisory opinion on “*Legislative rulings or other measures denying an appeal or other effective remedy to challenge the death penalty.*”<sup>11</sup>

In this request, the Commission asked that the Court “more accurately define how the American Convention on Human Rights and the corresponding principles and jurisprudence of the Inter-American Human Rights System impose requirements or restrictions on legislative actions by the States, in particular with regard to the death penalty.”<sup>12</sup>

The request referred to measures adopted in Barbados, Belize and Jamaica, and pointed out that “various Caribbean Community member States have considered, and in one case promulgated, constitutional amendments designed to counteract jurisprudence on human rights of local justice systems and the Inter-American Commission and Court in relation to the application of the death penalty.”<sup>13</sup> To support the use of the Court’s advisory function in the matter, it stated that “the majority of OAS member States that maintain the death penalty have not ratified the American Convention, and therefore are subject to the requirements of the American Declaration.”<sup>14</sup>

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*al.*, merged by a ruling of November 30, 2001, and resolved in a single judgment of June 21, 2002.

<sup>10</sup> Antonio Beristain, *Pro y contra la pena de muerte en la política criminal contemporánea*, in CUESTIONES PENALES Y CRIMINOLÓGICAS 579 (Reus, 1979).

<sup>11</sup> Opinión consultiva de la Comisión Interamericana de Derechos Humanos (Apr. 20, 2004), available at [http://www.corteidh.or.cr/docs/opiniones/soli\\_comi\\_20\\_04\\_04.doc](http://www.corteidh.or.cr/docs/opiniones/soli_comi_20_04_04.doc).

<sup>12</sup> *Id.* para. 3.

<sup>13</sup> *Id.* para. 19.

<sup>14</sup> *Id.* para. 15.



The Court did not see fit to respond to the questions raised in the Commission's request by means of an advisory opinion. Instead, it stated its position in a resolution issued on June 24, 2005, observing that the Court "on several occasions... has handed down rulings in relation to the imposition of the death penalty and its execution, both in contentious cases and provisional measures, and in advisory opinions."<sup>15</sup> The Court went on to list the above-mentioned rulings.

The Court added that "In such jurisprudence the Court has referred to issues related to the object of the request for an advisory opinion, which clearly present the court's position on the questions raised by the Commission."<sup>16</sup> In the form of a "complete and concise reply," it then stated that its decisions regarding all the topics mentioned in the Commission's request, and in its conclusions it underscored that "it follows that the answers to the questions raised by the Commission can be extracted from a comprehensive analysis and interpretation of the Court's *corpus* of jurisprudence."<sup>17</sup>

Finally, in view of the relevance of its decisions (referring in turn to the binding nature of the pronouncements of the interpreter of the Convention, a very important issue that will not be discussed here), the Court said that this interpretation and the Court's application of Convention norms "should also constitute a guide for the actions of other States that are not parties in the case or the measures."<sup>18</sup> The petition for criteria regarding certain death penalty issues was not ignored: the Court expressly reiterated its jurisprudence.

#### IV. THE RESPECT FOR LIFE

The American Convention or Pact of San Jose devotes Article 4 to the proclamation of life and the limitation of punitive death. The former is comprised within a single, emphatic paragraph; the limitation extends along several paths and takes up five more or less detailed paragraphs.

The general proclamation set forth in Article 4, which the Inter-American Court has named the "substantive principle,"<sup>19</sup> proclaims that "every person has the right to have his life respected." It then adds a fluctuating formula, which reflects the intense debate over the interruption of a pregnancy: "This right shall be protected by law and, in general, from the moment of conception," and concludes with an affirmation that is constantly

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<sup>15</sup> Resolución de la Corte Interamericana de Derechos Humanos (Jan. 24, 2005), available at [http://www.corteidh.or.cr/docs/opiniones/res\\_cor\\_24\\_06\\_05.doc](http://www.corteidh.or.cr/docs/opiniones/res_cor_24_06_05.doc).

<sup>16</sup> *Id.* para. 7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* para. 13.

<sup>19</sup> *Advisory Opinion OC-3/83. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, para. 53 (Sept. 8, 1983) [hereinafter *Advisory Opinion OC-3/83*].



referred to in judicial Inter-American system rulings: “No one shall be arbitrarily deprived of his life,” a provision that the Court refers to as the “procedural principle.”<sup>20</sup> What follows is, as I have remarked, a series of clauses on limitation or resistance, and even —fortunately— the prohibition of the death penalty.

For several years now, our jurisprudence has placed greater emphasis on one aspect of the protection of life that requires that particular mention. It has done so on the basis of a far-reaching ruling —Case of the “Street Children” (*Villagrán-Morales et al.*) *v. Guatemala* of November 19, 1999— which underscores the positive side of the right to life and the corresponding duties of the State: not only abstentions, but also measures that favor quality of life, personal development, the choice of one’s own destiny.

In this paradigmatic judgment, the Inter-American Court stated:

In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not to be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur.<sup>21</sup>

## V. LEGALITY AND ARBITRARINESS

Under the American Convention, the death penalty is conditioned, as it often is, by the principle of legality. It must be provided for by law. Article 4 states this provision emphatically in the section on *lex praevia*, a manifestation of the principle of legality. However, it is necessary to measure the true reach of the legal reserve. On this point, conventional norms concur —Article 30— which authorize the restriction or deprivation of rights —and among them the deprivation of the most valued: life itself— and the broadly tutelary concept contributed by the Inter-American Court in *Advisory Opinion OC-6/86* of May 9, 1986, on *The Word “Laws” in Article 30 of the American Convention on Human Rights*.

When jurisprudence defines the meaning of the term “laws,” there is a twofold demand that legitimates a law under the coverage of the Pact of San Jose: on the one hand, it must be formal; on the other, material or substantive.<sup>22</sup> The American Convention contains no specific premises that

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<sup>20</sup> *Id.*

<sup>21</sup> *The “Street Children” (Villagrán Morales et al.)*, para. 144 (Nov. 19, 1999).

<sup>22</sup> This Advisory Opinion affirms that “laws” are “normative acts directed towards the general welfare, passed by a democratically elected legislature and promulgated by the Executive Branch,” para. 35.

eliminate the infringement of Article 4, like those of Article 2.2 of the European Convention.

The application of the death penalty should also respond to another condition: that it not be arbitrary. The first paragraph of Article 4 of the Convention repudiates arbitrariness, which is also rejected in the detention regime under Article 7.3. The norm on rejection appears in the International Covenant on Civil and Political Rights (Article 6.1), and appears again in the African Charter (Article 4). The Inter-American Court has explored and unraveled the concept of arbitrariness—so deeply rooted in authoritarianism—in ways that allow it to evade numerous unacceptable hypotheses through broad *pro persona* interpretations, which invoke reasonableness, measure, necessity and proportionality.<sup>23</sup>

At this stage, the assessment of the court comes into play, weighing circumstance and experience based on those criteria, and not on legality alone. This in turn leads to the constant erosion of the right to apply or impose punitive death, despite express authorization by law, as the Court has maintained in the relevant judgments—accompanied by a broad explanatory vote—on cases in Trinidad and Tobago, which I will discuss below, and which opened an important chapter in the manifestations of the Inter-American justice system on the matter.

## VI. RESTRICTIONS AND PROHIBITIONS

We now turn to the regime of restrictions and prohibitions defined in five paragraphs of Article 4 of the American Convention. The Inter-American Court has examined this point and the path shown by these restrictions and prohibitions when its consequences are set forth in general premises and specific cases. The Court stresses that this precept reveals “a clear tendency to limit the scope of this (death) penalty both as far as its imposition and its application are concerned.” Thus, the Convention—and the Court that interprets and applies it—“adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.”<sup>24</sup>

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<sup>23</sup> The Court has associated arbitrariness (with reference to detention) with “methods... incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.” *Gangaram Panday*, para. 47 (Jan. 21, 1994). For deprivation of liberty not to be arbitrary, its ends must be compatible with the Convention, and it must represent an appropriate means of achieving those ends, necessary and proportional. *Contra Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, para. 93 (Nov. 21, 2007) and *Yvon Neptune v. Haiti*, para. 98 (May 6, 2008).

<sup>24</sup> *Advisory Opinion OC-3/83*, *supra* note 19, par. 52, 57.

This tendency extends itself in four directions: *a)* commination, in other words statutory prevision (reduction) of the death penalty for certain offenses; *b)* imposition, which is judicial disposition of the death penalty at the end of a process that culminates in separate criminal rulings; *c)* execution of the penalty; and *d)* interpretation, which represents a perspective from which to examine and assess the other three dimensions.

When the Inter-American Court refers to this subject—in *Advisory Opinion OC-3/83 on Restrictions of the Death Penalty*, as well as in various judgments, it finds three types of limitations that apply to countries that have not ruled on the abolition of the death penalty.<sup>25</sup> First, the imposition or application of the death penalty is subject to comply with procedural requirements that must be strictly observed and reviewed. Second, its sphere of application should be reduced to only the most serious common crimes that are not related to political offenses. Finally, certain considerations involving the offender that may exclude the imposition or application of the death penalty must be considered.

This list of contentions does not cover—or does not clearly address—a pair of forthright prohibitions that shed light on the future. In effect, Article 4, paragraph 2, states that “[t]he application of [the death penalty] shall not be extended to crimes to which it does not presently apply;” and paragraph 3 anticipates the step that would be taken, with greater emphasis, by the additional Protocol on the subject, stipulating that “[t]he death penalty shall not be reestablished in States that have abolished it.”

This last norm is not merely a limitation, but a categorical exclusion. According to Professor Schabas and based on sound legal grounds, the Pact of San Jose “was in reality an abolitionist treaty, at least for those States that had already abolished the death penalty, because it provided that capital punishment may not be reinstated once it has disappeared from a State’s statute books.”<sup>26</sup>

The prohibition of the death penalty, which reflects a widespread rejection in a large part of the Americas, could constitute regional *jus cogens*, as Schabas suggests.<sup>27</sup> This is further compounded by the consequences of *de facto* abolition, a point raised in the rulings in *Soering v. United Kingdom* and *Öcalan v. Turkey*, handed down by the European Court of Human Rights.<sup>28</sup>

Even so, the temptation to broaden death penalty statutes has persisted. The Inter-American Court has had to resist it and has done so in performing advisory functions and in exercise of its contentious jurisdiction. In *Advisory Opinion OC-3/83, Restrictions on the Death Penalty*—one of the oldest pro-

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<sup>25</sup> *Id.* para. 55.

<sup>26</sup> WILLIAM SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 367 (3rd ed., Cambridge University Press, 2004).

<sup>27</sup> *Id.* at 376.

<sup>28</sup> *Soering v. The United Kingdom*, par. 102-103. *See also*, Schabas, *supra* note 26, at 260-261.

nouncements made and proof of the Court's historical concern for these issues—the Court defined a stance that should be noted within this context.

In analyzing the above-cited conventional paragraphs, the Inter-American Court maintained that

...it is no longer a question of imposing strict conditions on the exceptional application or execution of the death penalty, but rather of establishing a cut off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to countries which have not decided to abolish the death penalty altogether as well as to those countries which have done so.

Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offenses subject to the death penalty has been prevented.

In the second case, the reestablishment of the death penalty for any type of offense whatsoever is absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, *ipso jure*, a final and irrevocable decision.<sup>29</sup>

Attempts to bring back the death penalty have reached some internal penal laws, spurred on by conditions of insecurity and criminality, which breed profound social unease. This then starts to permeate the legislative agenda, with calls for greater penal rigor and reduced guarantees, as occurred with the Guatemalan penal code reform which, through Legislative Decree 81/96, extended the application of the death penalty to include not only kidnapping and murder of a person—already capital offenses—but kidnapping by itself—which was not. The *nomen juris* of the crime was not changed; what changed was its contents.

The Inter-American Court ruled against this reinstatement of the death penalty. In its ruling on *Raxcacó Reyes v. Guatemala*, the Court stated:

...although the *nomen juris* of kidnapping or abduction remains unaltered from the time Guatemala ratified the Convention, the factual assumptions contained in the corresponding crime categories changed substantially, to the extent that it made it possible to apply the death penalty for actions that were not punishable by this sanction previously. If a different interpretation is accepted, this would allow a crime to be substituted or altered with the inclusion of new factual assumptions, despite the express prohibition to extend the death penalty contained in Article 4.2 of the Convention.<sup>30</sup>

One heading under the substantive limitations concerns political crimes and related common crimes. The admission of this regime has not been

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<sup>29</sup> Para. 56.

<sup>30</sup> *Raxcacó Reyes v. Guatemala*, para. 66 (Sept. 15, 2005).

unanimous or peaceable. Some countries have expressed reservations or interpretative declarations: Barbados, on the exclusion of treason if treason is considered a political crime; Guatemala, on related common crimes, although its reservation was withdrawn in 1986; and Dominica, also for this same type of crimes. It is also significant that the issue of political crimes has not been raised before the Court.

## VII. THE “MOST SERIOUS” CRIMES AND THE “MANDATORY” DEATH PENALTY

Another heading under the substantive limitations, which holds some points in common with the International Covenant on Civil and Political Rights (Article 6.2) and the United Nations Safeguards (paragraph 1), restricts the death penalty to the “most serious” crimes. This has led the Court to produce copious jurisprudence and inspired reflections on the exercise of State powers of classifying and penalizing offenses in general and in a way that is compatible with Inter-American human rights law. Judicial opinions, which flow from pondering the issue of the death penalty, go further still, to touch upon the meaning and operation of the penal system.

The Inter-American Court had to define the scope of the expression “most serious crimes” grounded on its findings in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, which contain some of the Court’s core decisions on the issue of capital punishment, as well as on the penal system itself.

Both the conventional notion of “most serious crimes” and the Inter-American Court’s jurisprudential interpretation have a notoriously restrictive nature and entail a specific application of the political-criminal idea of minimal penal law, which was not invoked under that name in the preliminary work for the Convention. This involves the rational and moderate use of the punitive instrument, only in response to the most serious injuries to the most valued assets, with the penalties deemed strictly necessary, an idea with a strong Beccarian component.<sup>31</sup> In its *Advisory Opinion OC-3/83*, the Court affirmed that the fact that the death penalty is limited to the most serious crimes “indicates that it was designed to be applied in truly exceptional circumstances only.”

Distinctions are drawn not only between extremely serious and less severe crimes, but also between serious and “most serious crimes,” which are “those that affect most severely the most important individual and social

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<sup>31</sup> As the celebrated last paragraph of Beccaria’s peerless work clearly states: “That a punishment may not be an act of violence, of one, or of many, against a private member of society, it should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime, and determined by the laws.” BECCARIA, *DE LOS DELITOS Y DE LAS PENAS* 323 (preface by Sergio García Ramírez, Juan Antonio de las Casas trans., Fondo de Cultura Económica, 2006).

rights, and therefore merit the most vigorous censure and the most severe punishment,” as the Court stated in its ruling on *Raxcacó Reyes*.<sup>32</sup> Needless to say, invoking these concepts in no way means that the Court favors capital punishment for the most serious crimes; it only affirms that their singular seriousness can warrant the most severe consequences provided for by the State’s criminal code, in which capital punishment ought never to figure: the limit is set below such a sanction.

The point arose with regard to a well-known and highly disturbing issue: the so-called mandatory death penalty, as provided for in the laws of Trinidad and Tobago in the *Offences against the Person Act* of 1925.<sup>33</sup> Under this concept, it suffices to prove the existence of willful homicide for the capital punishment to be found pertinent, or worse still, inexorable. Put differently—as stated in the ruling in *DaCosta Cadogan v. Barbados*—“statutory and common law defenses and exceptions for defendants in death penalty cases are relevant only for the determination of the guilt [*rectius*, responsibility] or innocence of the accused, not for the determination of the appropriate punishment.”<sup>34</sup>

The Trinidadian State itself had started to reform this statute before the Inter-American Court resolved on this first lawsuit. The same occurred with other reforms to the Caribbean penal system, among them those introduced by Jamaica in the Act to amend the Offences against the Person Act of 1992, which differentiates capital murder (punishable by death) from non-capital murder (punishable by life imprisonment).<sup>35</sup>

The Court’s decision reiterated the need to address the various statutory categories under willful homicide that reflect the varying degree of seriousness of crimes and explain the varying severity of applicable penalties.<sup>36</sup> I analyze this point in my explanation of my vote on the judgments of Trinidad and Tobago.<sup>37</sup> With this, the Inter-American Court clearly established a rigorous impediment not only to the death penalty, but also to the characterizing authority of the State, as it has done on other occasions and for different reasons.

The excess of the legislating State was described by the Court as arbitrariness, which conflicts with Article 4.1 of the Convention<sup>38</sup> and implies a violation of the general obligation provided in the Convention to adopt measures

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<sup>32</sup> *Raxcacó*, para. 70, which follows the orientation of *Advisory Opinion OC-3/83*, para. 54.

<sup>33</sup> Section 4 of this ordinance, of April 3, 1925, cit. in *Hilaire, Constantine and Benjamin et al.*, para. 103.

<sup>34</sup> *DaCosta Cadogan v. Barbados*, para. 55.

<sup>35</sup> Section 2.

<sup>36</sup> *Hilaire, Constantine and Benjamin et al.*, para. 102.

<sup>37</sup> SERGIO GARCÍA RAMÍREZ, TEMAS DE LA JURISPRUDENCIA INTERAMERICANA SOBRE DERECHOS HUMANOS. VOTOS PARTICULARES 110 (ITESO-Universidad Iberoamericana, Puebla-Universidad Iberoamericana, 2006).

<sup>38</sup> *Hilaire, Constantine and Benjamin et al.*, para. 108-109 and resolution.

to adjust the national order to the international order, as part of the commitment assumed by the State itself. In this context, the issue of laws violating the Convention, which is challengeable in the Inter-American order, was reexamined. This occurs when the law can be applied immediately, even though no specific act of application has yet been confirmed.

This was the Court's understanding, as expressed in *Advisory Opinion OC-14/94* of December 9, 1994, on *International Responsibility for Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*. When dealing with provisions of immediate application, it is not necessary for the transcendent law to be applied for a violation to be denounced and for the obligation to rectify the situation to exist; the mere enactment of the law in question violates, *per se*, the obligation assumed by the State.<sup>39</sup>

It is worth noting that the Human Rights Commission has also understood—in Communiqué 806/1998 of October 18, 2000, in reference to *Eversley Thompson (Saint Vincent and the Grenadines)*—that the mandatory death penalty is incompatible with the right to life established in Article 6.1 of the International Covenant.

The Inter-American Court could explicitly go to other extremes on this issue, elaborating on cases on the applicability of capital punishment within the term permitted by Article 4, which would require a more detailed examination of the regime of restrictions and limitations on human rights and a review of the principles the Court itself has invoked in other precedents, like suitability, proportionality and necessity. The Human Rights Commission has held that “crimes that do not involve loss of human life cannot be punished with the death penalty.”

Another problem posed by the indiscriminate application of the death penalty in cases of intentional homicide derives from the irrelevance of forms of participation in the crime, which often influence the assessment of the penalty. For this purpose, the difference between material responsibility—true responsibility—and complicity is well known. However, the *Offences against the Person Act* of Barbados maintains that whomsoever “assists (or) advises” “another person to commit homicide” can be charged and condemned as “primary perpetrator”, and consequently subject to capital punishment.<sup>40</sup>

## VIII. COLLISION BETWEEN CONSTITUTION AND LAW

The reflections expressed on this delicate issue, which also originated from the jurisdiction of other bodies, such as the United Nations Commis-

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<sup>39</sup> *Advisory Opinion OC-14/94*, para. 93. *But see* the judgment reached by the Court in *Hilaire, Constantine and Benjamin et al.*, para. 116-118 and resolutions 2 and 8.

<sup>40</sup> *Boyce et al. v. Barbados*, Series C, No. 169 (Nov. 20, 2007), available at [http://www.corte.idh.or.cr/docs/casos/articulos/seriec\\_169\\_ing.doc](http://www.corte.idh.or.cr/docs/casos/articulos/seriec_169_ing.doc).



sion on Human Rights —regarding Barbados, among other countries— and the Judicial Committee of the Privy Council, opened the door to further questions. Above all, we can observe that the criminal statutes challenged in *Hilaire, Constantine and Benjamin* were inconsistent with constitutional norms on human rights.

These norms, however, added to the inconsistency through what we might call an “ultra-active validity clause,” which shielded an unconstitutional law from being challenged and used the protection it afforded to permit the continuation of the mandatory death penalty.<sup>41</sup> Initially, the Privy Council overruled the continuation of previous norms and interpreted the constitutional provisions so as to exclude the mandatory death penalty, but that criterion changed later.

The Inter-American Court sharply questioned the continuance of statutes favoring death in defiance of constitutional provisions that favor life. This time, the Court questioned this issue in the Trinidadian cases in 2002 and reiterated its position in 2009 with the ruling on *DaCosta Cadogan*, which drew the court’s attention to the conflict between section 2 of the Offences Against the Person Act and section 26 of the Constitution of Barbados.

At the pertinent procedural juncture, to withstand this onslaught and others like it, Trinidad and Tobago invoked a limitation of enormous latitude established when it recognized the jurisdiction of the international Court, which could be exercised —according to the State— “only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that any ruling of the court does not infringe, create or abolish any existing rights or duties of any private citizen.”<sup>42</sup>

The Court rejected this broad limitation, which contravenes the object and the purpose of the American Convention and subordinates supranational jurisdiction to national appraisals and authorizations. For the Inter-American Court,

...[i]t would be meaningless to suppose that a State which had freely decided to accept the compulsory jurisdiction of the Court had decided at the same time to restrict the exercise of its functions as foreseen in the Convention. On the contrary, the mere acceptance by the State leads to the over-

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<sup>41</sup> Article 26 of the Barbadian Constitution, which contains the “exclusion clause,” prevents a review of the constitutionality of norms promulgated before the entry into effect of the Constitution, on November 30, 1966. Such is the case of Article 2 of the Offences against the Person Act of 1868. Cf. *Boyce et al. v. Barbados*, para. 71, *passim* (Nov. 20, 2007).

<sup>42</sup> *Basic Documents Pertaining to Human Rights in the Inter-American System*, Secretariat of the Inter-American Court of Human Rights, San Jose, Costa Rica, at 72 (updated to May 2008).

whelming presumption that the State will subject itself to the compulsory jurisdiction of the Court.<sup>43</sup>

In this finding, the Inter-American Court also reiterated an extensive position contained in *Advisory Opinion OC-2/82*, concerning *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, which clearly explains the singular nature of human rights treaties and the consequences these treaties entail. They are not traditional conventions that establish rights and obligations between States, but are much broader in scope: they recognize individual rights, and should be construed and applied accordingly.<sup>44</sup>

In summary, the regional court left the criterion it had upheld unaltered: the inherently arbitrary *mandatory death penalty* is unacceptable even if it is in a law conflicting with the State's Constitution itself. As is known, Trinidad and Tobago denounced the Convention. Such a denunciation has occurred only once in the history of the Inter-American System. In this case, it was motivated by reasons related to the death penalty: in the conflict between abolitionism and retentionism, although there are specific arguments surrounding the dispute. Despite its being an isolated denunciation, it constitutes a significant event in the historical process leading to the abolition of capital punishment.

The issue, which appeared to be jurisprudentially settled by the rulings on Trinidad and Tobago, has recently resurfaced—first in *Boyce et al. v. Barbados*<sup>45</sup> and again in *DaCosta Cadogan v. Barbados*.

The Court's position has been unwavering, of course. It is noteworthy—as well as encouraging—that in response to the *Boyce* ruling the State announced its decision to reform its national criminal code in the terms requested by the Inter-American Court. Resistance was starting to subside. The change had not yet occurred when *DaCosta Cadogan* came before the Court, but in the course of the proceedings, the State reiterated its intention of repealing the mandatory death penalty.<sup>46</sup> However slowly, resistance has been gradually abating.

In my view, the applicability of capital punishment for the most serious crimes could and should have an impact on the functions of the legislature and the judiciary. In my personal vote attached to the Court's ruling in

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<sup>43</sup> *Hilaire*, preliminary objections, judgment of September 1, 2001, par. 90. The Court issued similar findings in the judgments on preliminary objections of the same date in *Benjamin et al.*, *Constantine et al.*, par. 81.

<sup>44</sup> *Advisory Opinion OC-2/82*, para. 27 (Sept. 24, 1982).

<sup>45</sup> *Boyce et al. v. Barbados*, para. 47 *passim* (Nov. 20, 2007). The State found that the fact that the death penalty was established by law rescinded the burden of arbitrariness. Needless to say, the Court rejected this argument. Cf. *Boyce et al. v. Barbados*, para. 56.

<sup>46</sup> *DaCosta Cadogan v. Barbados*, para. 74.

*Cadogan*, I stated that “the requirement contained in Article 4 extends both to the typification/classification of the conduct and selection of the punishment and to judicial individualization for purposes of a conviction. This duality has not always been highlighted.”<sup>47</sup>

#### IX. A RELATED ISSUE: DANGEROUSNESS AND THE DEATH PENALTY

In death penalty case hearings, the Inter-American Court has had the opportunity to examine other crucial matters and redefine the boundaries of punitive power. Such was the case in *Fermín Ramírez v. Guatemala*, in which the Criminal Code established the possibility of imposing the death penalty on a defendant charged with murder if “a greater dangerousness of the agent is revealed.”<sup>48</sup> The challenge to the death penalty added another issue to the debate: is it admissible to take into account dangerousness when deciding on the punishment? Does a law that does so conflict with the provisions of Inter-American Law?

The Court restored the criminal law of act or event, considered the material implications of the principle of legality in the normative structure of a democratic society, and rejected—not only for cases related to the death penalty—the invocation of dangerousness as relevant to the characterization of an offense and the corresponding punishability. The ruling declared this “is not compatible with the freedom from ex post facto law and, therefore, contrary to the Convention.”<sup>49</sup> This criterion, and others of the same nature, updates the meaning of Article 9, which is no longer circumscribed to the prior existence of penal statutes and the precise description they contain.

#### X. MAXIMUM PROCEDURAL EXIGENCY

I shall now discuss conventional exigencies apropos of the proceedings that culminate in the imposition of the death penalty. Many cases brought before the Inter-American Court include points of due process, violated by national authorities. This issue—which has also received considerable attention in the European jurisdiction—usually arises under several headings, both in doctrine and legislation, as well as in jurisprudence. It is the primary subject of Article 8 of the American Convention, under the epi-

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<sup>47</sup> My vote appears after the Court’s judgment, on the Court’s website available at [http://www.corte.idh.or.cr/docs/casos/votos/vsc\\_garcia\\_204\\_esp.doc](http://www.corte.idh.or.cr/docs/casos/votos/vsc_garcia_204_esp.doc).

<sup>48</sup> *Fermín Ramírez v. Guatemala*, para. 92.

<sup>49</sup> *Id.* para. 96.

graph “Judicial Guarantees/Civil and Political Rights.” The Court has taken the concept of due process as an expression of the broadest defense.

The procedural issue appears prominently in Articles 8 and 25, the latter relating to the judicial protection of fundamental rights. It also appears in other statutes, for different reasons: Articles 5, on integrity; 7, on liberty; 28, on the validity of judicial guarantees in a state of emergency, and —of course— 4, in relation to the death penalty.

In this regard, it is worth emphasizing both general procedural norms, and statutes that strengthen procedural rigor in capital cases. This latter issue is addressed by both the United Nations Safeguards —an appeal by the Inter-American Court to establish the context, the standard and the scope of procedural guarantees—<sup>50</sup> and certain extreme positions examined by Inter-American and universal jurisprudence. I refer specifically to presumptions linked to consular protection.

The issue of the strict procedural constraints on the death penalty has been considered from two mutually complementary perspectives: *a*) under the comprehensive regime of procedural guarantees, in its two normative extremes: judicial guarantees (ACHR, Article 8) and judicial protection (urgent and expeditious) of fundamental rights (ACHR, Article 25), which includes the intangibility of *habeas corpus* and special injunctions in case of states of emergency; and *b*) under the specific regime covered by Article 4.2, also considering procedural references, similarly specific, set forth in paragraph 6 of the same Article 4.

*Advisory Opinion OC-16/99* referred to the generic regime in these terms: “given the exceptionally grave and irreparable nature of the [death] penalty... If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty... protects is at stake: human life.”<sup>51</sup> Failure to observe these requirements violates due process and results in the arbitrary taking of life. In other words, as stated in the Court’s ruling in *Fermín Ramírez v. Guatemala*, “respect to the set of guarantees that inform of the due process and provide the limits to the regulation of the state’s criminal power in a democratic society is especially impassable and rigorous when dealing with the imposition of the death penalty.”<sup>52</sup>

*Advisory Opinion OC-3/83* referred to the specific regime: “the fact that these guarantees are envisaged in addition to those stipulated in Articles 8 and 9 clearly indicates that the Convention sought to define narrowly the conditions under which the application of the death penalty would not vio-

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<sup>50</sup> Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Resolution 1984/50 of the Economic and Social Council of the United Nations.

<sup>51</sup> *Advisory Opinion OC-16/99*, para. 135.

<sup>52</sup> *Fermín Ramírez v. Guatemala*, para. 78.

late the Convention in those countries that had not abolished it.”<sup>53</sup> To inform its position on this point, the Court has demanded in its recent ruling in *DaCosta Cadogan*<sup>54</sup> —and I myself have done so in my explanation of vote— observance of the standard that the 1984 Safeguards require to guarantee due process in trials in which the death penalty is a possibility.

What should the judge’s position be on this issue, considering the clearly reductionist, protectionist orientation established by the substantive and procedural death penalty system? Equally a guarantor of human rights, vigilant —and responsible, with other issues in the process— of the regularity of prosecution, it must concur in the exigency and thoroughness that govern the issue. In my view —and also, with some limitations, in the view of the Inter-American Court, this can nuance the position and actions of the courts, derived from an accusatory regime conceived in its strictest terms.

The problem arose in the Court’s deliberations on *DaCosta*. The application of the law, from the perspective of the defense, could prevent the defendant from being found eligible for the death penalty. There was a possibility —granting the arguments of the defense— that certain personal circumstances (use of intoxicants, drug use) might qualify the defendant for a statutory exclusion from capital punishment, but not necessarily from all punishment. This would be relevant not only for purposes of the hearing, but for the statutory framework of the proceedings, *ab initio*. However, the full burden of proof was placed on the defense, with no judicial initiative to assist it.

The Court acknowledged the existence of an omission on behalf of the State in the case in reference. It warned that “the [State’s] failure to guarantee these rights in a death penalty case could undoubtedly result in a grave and irreversible miscarriage of justice;” in this area it is “requires that the right to life be interpreted and applied in such a manner that its safeguards become practical and effective (*effet utile*).”<sup>55</sup> In the explanation of my vote, I went further still: “the [national criminal] tribunal’s first concern in a case such as the one brought before the Court should be the precise verification that the conditions on which the trial was based were fulfilled.”<sup>56</sup>

I do not share the idea that “according to the strict rules of the accusatory criminal procedural system, the judge should abstain from assuming probative initiatives,” limiting itself to “[waiting] for the other parties to request [them].”<sup>57</sup> We should recall that it was not a matter of proving the defendant’s guilt or innocence, but the presence —or absence— of the stat-

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<sup>53</sup> *Advisory Opinion OC-3/83*, para. 53.

<sup>54</sup> Para. 85.

<sup>55</sup> Para. 84, 85.

<sup>56</sup> *Explanation of vote*, para. 15.

<sup>57</sup> *Id.* para. 18.

utory conditions for prosecution that would necessarily end, in case of conviction, in the imposition of capital punishment.

## XI. FOREIGN DETAINEES AND CONSULAR ASSISTANCE

Continuing our discussion of procedural issues, *Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, cited above, has particular relevance for the subject under consideration. In this opinion, the Court was able to state and argue its opinion centering on the right that Article 36 of the Vienna Convention on Consular Relations grants to foreign detainees. While the convention is not a human rights treaty, the Inter-American Court held that this convention defines an individual right in the framework of the due process of law,<sup>58</sup> regardless of which it also establishes a specific legal relationship—with rights and obligations—between the detainee’s State of origin and the State conducting the criminal proceedings.

The cases of interest often involve subjects who belong to highly vulnerable groups, who need special attention from the standpoint of access to justice. Their vulnerability is twofold: on the one hand, they are foreign citizens; on the other, they are detainees and criminal defendants. (However, this presumption could equally apply, with a guaranteeist leaning, to defendants facing administrative proceedings which will often culminate in the application of measures that severely affect their human rights of liberty, movement, residence).<sup>59</sup>

Mexico requested that the Court issue the opinion that concerns me here, associating its petition with the cases in which capital punishment can be imposed—or is effectively imposed—without advising the foreign detainee of his right to receive consular assistance. Evidently, the petition could have covered a broader scope: any type of punishment, not only death. It may have been limited to capital cases in view of its supreme importance and because of the relevance of placing emphasis where it needed to be, in light of practical considerations. For that reason *OC-16/99*—which the European Court cites in its ruling in *Öcalan v. Turkey* and was invoked by some participants in *LaGrand* and *Avena* before the International Court of Justice—is pertinent to our discussion of Inter-American jurisprudence on the death penalty.

The Mexican petition referred to both the interpretation of the Vienna Convention and the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man and the Interna-

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<sup>58</sup> *Advisory Opinion OC-16/99*, para. 87.

<sup>59</sup> My explanation of vote concurring with *Advisory Opinion OC-16/99*, in García Ramírez, *supra* note 37, at 12.

tional Covenant on Civil and Political Rights. The American Convention was passed over. Although the petition referred not to an interstate contentious issue but to an enquiry on the interpretation of international instruments, it is important to note that the United States of America is a signatory to the OAS Charter, the Vienna Convention and the International Covenant, of which the petitioner requested an interpretation, but not the Pact of San Jose, for which it did not.

The Inter-American Court established its competence to examine the aforementioned instruments and recognized the detainee's right —faced with the resulting obligation of the State that detained him— to be informed of the possibility of receiving consular assistance: Article 36 “concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law”.<sup>60</sup> By adopting this interpretation, the Court shifted the borders of due process in favor of the individual, as they have been shifted at a national level whenever a defendant is guaranteed the timely exercise of legal defense by having received warnings on the right not to incriminate oneself, to remain silent, to know the reason for his detention, to legal counsel, etc.

Referring to Article 14 of the International Covenant, which establishes the right to due process, the Court stated that it “is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added.”<sup>61</sup> In the concurring explanation of my vote, I examined this expansive nature —never static or exhausted— of the due process of law. The interest behind this issue, which intensely reflects the principle *pro persona*, the implications of which are heightened, often appears in Inter-American Court jurisprudence.

Also, the Court determined that such notification should be given before the defendant makes his first statement to the authority and ruled that failure to observe the obligation of informing the detainee of this constitutes a violation of due process, similar in entity, opportunity and consequences to the failure to inform defendants of other means of defense. On the issue of opportunity —a particularly relevant point from the standpoint of the defense, access to justice and protection for the defendant's rights, the Court adopted the most protective interpretation of the words “without delay,” which Article 36.1 uses in the context of other expressions that refer to maximum promptitude and haste: “without unnecessary tardiness,” “without delay.” If one seeks to guarantee effective defense —and that is, in effect, the aim, the idea the Inter-American Court adopted regarding the opportunity of notification takes on its full meaning.<sup>62</sup>

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<sup>60</sup> Cf. *Advisory Opinion OC-16/99*, Resolution 2, ¶¶ 68 *passim*, 107 *passim*.

<sup>61</sup> *Id.* par. 117.

<sup>62</sup> *Id.* Resolution 3 and para. 99.



The Inter-American Court considered that such inobservance implies an essential violation that tarnishes the process as a whole and diminishes the effectiveness of the sentence.<sup>63</sup> It established, then, the general criterion that would later be upheld by the rulings of the International Court of Justice in *LaGrand*, of *Germany v. United States*, and *Avena*, of *Mexico v. United States*.<sup>64</sup>

It remains for the future—which should not be too distant—to explore the expansion of protective information provided to foreign detainees, to embrace cases in which they are not at risk of suffering the death penalty, and also to cases in which they are not detainees *per se*, but are in the midst of an advanced criminal process that entails a serious risk that warrants opportune acts of defense.

Such extended protection could be supported by the motives that have led the Court to set references on the exercise of certain rights prior to the decision to prosecute or detention. This guaranteeist expansion has emerged, and will probably be developed further with the passing of time, especially in the areas of notification of charges, the right to defense, *dies a quo* for a reasonable term (understanding *dies* as the act that marks the beginning of the term taken into consideration for the purposes of serving justice and protecting human rights).

## XII. SPECIFIC PROCEDURAL GUARANTEES: IMPUGNATION, SUBSTITUTION, RECTIFICATION

The American Convention, among other instruments, contains a specific and additional definition of the due process of law, which elevates some guarantees for reasons regarding the impugnation of death sentences or measures seeking the extinction of punitive authority or criminal benevolence. Such is the case of Article 4, paragraph 6, of the Convention, which refers to three acts that can lead to the lifting of a death sentence: amnesty, pardon and commutation, all of which must be accessible to the sentenced person.

It is understood that these concepts are to be interpreted with reference to the current use of the respective terms, which also encompass institutions with the same nature and the same effects even though they might be presented under different names in local laws. In short, what matters is to bring all available means of excluding capital punishment or preventing its execution within reach of the defendant.

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<sup>63</sup> *Id.* Resolution 7 and para. 133 *passim*.

<sup>64</sup> See my comment on this point in Sergio García Ramírez, *La pena de muerte en la Convención Americana sobre Derechos Humanos y en la jurisprudencia de la Corte Interamericana*, in 114 BOLETÍN MEXICANO DE DERECHO COMPARADO 1083 (2005).

This obviously supposes that there is legal provision for these precepts; that some organ of public power has the authority to exercise amnesty, pardon or commutation; that there is a proceeding—observing the rules of due process of law—that leads to the relevant review and decision; and that the proper resources are within reach of the condemned.

The acts to which I refer should be effective for the petitioner or the beneficiary, in the sense that they can be granted in all cases, without prejudicial obstacles that deny the petitioner the benefit the Convention provides. Total obstruction of such access for the lack of a public organ empowered to rule on petitions for reprieve is inadmissible. This issue emerged in the cases of *Fermín Ramírez* and *Raxcacó Reyes*, both in relation to Guatemalan law: Decree 32/2000 suppressed the recognized authority of an organ of the State to deliberate and rule on such matters.<sup>65</sup> This in turn led to condemnation for negligence of Article 4.6 of the Convention, in relation to Article 2, which obliges [States] to adopt measures conducive to respect and protection of the rights invoked in Article 1.1.

The remedy should be processed “through impartial and appropriate procedures,”<sup>66</sup> in accordance with Article 4.6 of the Convention along with relevant provisions on the guarantees of due process established in Article 8. In other words, as the Court stated in its ruling in *Hilaire, Constantine and Benjamin*, “it is not enough merely to be able to submit a petition; rather, the petition must be treated in accordance with procedural standards that make this right effective.”<sup>67</sup> In other words, there will be true access to justice, that replaces the death penalty if the rules of due process are scrupulously observed; there will be no unyielding, previously established, impediments resulting from the severity of the crime or the conditions of the offender—under the catchwords of guilt or “dangerousness,” for example—that obstruct granting the benefits mentioned outright in the Convention.

The Court elaborated,

Article 4(6) of the [American] Convention, when read together with Articles 8 and 1(1), places the State under the obligation to guarantee that an offender sentenced to death may effectively exercise this right. Accordingly, the State has a duty to implement a fair and transparent procedure by which an offender sentenced to death may make use of all favorable evidence deemed relevant to the granting of mercy.<sup>68</sup>

It is important to mention that, in the view of the Inter-American Court, acts of grace are not the ideal means of remedying arbitrariness in the application of the death penalty, although they may obviously be performed

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<sup>65</sup> *Fermín Ramírez vs. Guatemala*, para. 107.

<sup>66</sup> *Id.* para. 54, 29 and 105.

<sup>67</sup> *Id.* para. 186.

<sup>68</sup> *Id.* para. 188.

to prevent its execution. In these cases, rectification should be placed in the hands of a jurisdictional organ by means of a process of the same nature.

At first —as seen in *Boyce et al. v. Barbados*, the Inter-American Court accepted rectification through political and administrative channels, although the same ruling affirmed that:

...a distinction must also be made between the right under Article 4(6) of the Convention of every convicted person to “apply for amnesty, pardon, or commutation of sentence,” and the right recognized in Article 4(2) to have a “competent court” determine whether the death penalty is the appropriate sentence in each case, in accordance with domestic law and the American Convention.<sup>69</sup>

Jurisprudence has progressed through *DaCosta Cadogan*, also of Barbados. Given that the remedy for injustice in jurisdictional venue is an act of justice, providing it is for a judicial organ; “sentencing is a judicial function;” “...the judicial branch may not be stripped away of its responsibility to impose the appropriate sentence for a particular crime.”<sup>70</sup>

### XIII. SUBJECTS EXCLUDED FROM CAPITAL PUNISHMENT

I have mentioned that there are restrictions on the death penalty —or rather proscriptions— related to certain categories of subjects: those excluded from capital punishment. They are mentioned in Article 4.5, with different expressions that could leave room for doubt. Capital punishment shall not be “imposed” on persons under 18 or over 70 years of age “at the time the crime is committed,” a reference that has a different impact when applied to crimes that are committed instantly and when referring to ongoing or continued crimes. Furthermore, it shall not be “applied” (sentenced? executed?) to pregnant women.

In my understanding, neither of the two presumptions refers merely to the inexecution of the penalty —which would constitute deferral in the case of a pregnant woman, but of exclusion from being condemned to death. I acknowledge that this conclusion is debatable, but it concurs with the rule *pro persona*: when faced with the choice of one of two possible interpretations of the words, I opt for the one that offers the greatest protection for the individual.

### XIV. PRECAUTIONARY OR PROVISIONAL MEASURES

The Court’s precautionary function implies a third sphere of competence for this Court, in which issues related to the death penalty have also

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<sup>69</sup> *Boyce et al. vs. Barbados*, para. 60.

<sup>70</sup> *Id.* para. 56.

been raised. It happened initially in the deliberations relating to *James, Briggs, Noel, García and Bethel* (Trinidad and Tobago), in which the court was charged with attempting to halt the execution of convicts until the Inter-American Commission could rule on the regularity of the proceedings that had led to their death sentences.<sup>71</sup>

Here, the Court was not questioning the death penalty *per se*: the point challenged involved the due process of law. In its 1998 ruling, the Court ordered that the execution be stayed while the case was pending before the Commission: "...should the State execute the alleged victims, it would create an irremediable situation incompatible with the object and purpose of the Convention, would amount to a disavowal of the authority of the Commission, and would adversely affect the very essence of the Inter-American system."<sup>72</sup> Clearly, it would be impossible to achieve the *restitutio in integrum* so often proclaimed in the debate on reparations.

The Inter-American Court understood that its provisional measures were binding for the State: they do not exhort; they order. Thus, the Court stressed that "the execution of Joel Ramiah by Trinidad and Tobago constitutes arbitrary deprivation of the right to life," a situation which "is aggravated because the victim was protected by Provisional Measures ordered by this Tribunal, which expressly indicated that his execution should be stayed pending the resolution of the case by the Inter-American Human Rights system."<sup>73</sup>

This issue of great importance appeared in *LaGrand*, before the International Court of Justice, which also confirmed the binding force of the measures. On the date these opinions were issued, March 3, 1999, Walter LaGrand was executed. In due course, the Court of The Hague would maintain that such measures did not constitute a "mere exhortation," but "created a legal obligation for the United States,"<sup>74</sup> an interpretation that was reiterated in *Avena*.

## XV. EXECUTION OF THE PENALTY

Execution of the imposed or impossible penalty—understood as through a regular process—suggests other important questions. One of them concerns the method of execution. The Court has not ruled on this point. If the Court finds that the imposition of this penalty contravened the regime of

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<sup>71</sup> The first ruling on provisional measures in this case, which would be followed by others also examined by the Court, was issued on May 22, 1998. On the succession of cases and rulings in 1998 and 1999, cf. *Hilaire, Constantine and Benjamin et al.*, para. 26 *passim*.

<sup>72</sup> *James et al., Ruling on provisional measures requested by the Inter-American Commission on Human Rights in relation to the Republic of Trinidad and Tobago* (Aug. 29, 1998), Whereas Clause 9.

<sup>73</sup> *Hilaire, Constantine and Benjamin et al.*, ¶¶ 198, 200, and Resolution 7.

<sup>74</sup> *LaGrand case (Germany v. United States of America)*, para. 110, (March 31, 2004).

the Convention, there would be no point in examining execution procedures. In *Boyce*, the Court ruled that it “does not find it necessary to address whether the particular method of execution by hanging would also be in violation of the American Convention” (in addition to the violation implicit in the mandatory death penalty).<sup>75</sup>

However, this issue may be examined in light of Article 5.2 of the Pact of San Jose, which prohibits —with a *jus cogens* proscription as ruled by the Inter-American Court— submission to torture or cruel, inhumane and degrading treatment. The Court’s findings in this regard, when examining corporal punishments —flogging executed in an especially cruel, humiliating or intimidating manner— are developed in *Caesar v. Trinidad and Tobago*.<sup>76</sup> The considerations relating to execution of the penalty of flogging could be transposed, *mutatis mutandis*, to methods of execution of the death penalty.

The issue of execution —in particular its more or less relative degree of imminence— also leads us to examine the phenomenon of the wait in the so-called “tunnel or canal of death,” which can be very prolonged, anxiety-ridden, and harmful to human dignity. In *Soering*, the European Court referred to this point,<sup>77</sup> which has also drawn attention from the Inter-American Court in *Hilaire, Constantine and Benjamin*: “...compel the victims to live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment.”<sup>78</sup>

Finally, humanitarian considerations have led this Court to exclude execution of the death penalty in cases in which it might prove applicable. I refer to the case in which a person is condemned to death irregularly. The Inter-American Court has ruled that in the new sentence —if there are grounds to issue another one— the death penalty is to be replaced by another sanction. Such was the Court’s finding, on the basis of equality, in *Hilaire, Constantine and Benjamin*.<sup>79</sup>

## XVI. SUSPENSION OF GUARANTEES

On reviewing the substantive, procedural and executive information contained in the American Convention and examined by the jurisprudence of the International Court, it is important to mention an obstacle of a general scope, both for this subject and others beyond the bounds of this arti-

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<sup>75</sup> *Boyce v. Barbados*, para. 85.

<sup>76</sup> *Caesar v. Trinidad and Tobago*, para. 88 (March 11, 2005).

<sup>77</sup> *Soering v. United Kingdom*.

<sup>78</sup> *Hilaire, Constantine and Benjamin et al.*, para. 169.

<sup>79</sup> Para. 215 and Resolution 11.

cle: the rights established in Article 4 of the American Convention, which include all those relating to capital punishment, are not subject to the suspension authorized in extreme cases by Article 27.1 of the Pact of San Jose. The exclusion of the hard core of rights —as it has been called— appears in Article 28.2.

This exception in favor of life covers both the substantive, procedural and executive rights established in Article 4 and their broad jurisdictional safeguards, specifically the judicial guarantees required for their protection. Consequently, it is similarly impossible to suspend *habeas corpus* and special injunctions (*amparo*) —or other judicial recourses or remedies that may exist in the national order— in cases of the suspension of State obligations aimed at responding to exceptional circumstances of danger or emergencies.

Inter-American jurisprudence has affirmed this position in two advisory opinions from the 1980s: *OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A N. 8.,<sup>80</sup> and *OC-9/87, Judicial Guarantees in States of Emergency*, of October 6, 1987.<sup>81</sup> Needless to say, under the terms of Articles 1.1 and 2 of that instrument, the signatories of the American Convention need to adopt measures to adapt their national statutes to the standards of the Pact of San Jose in this area —with the exception of opportunely formulated admissible reservations, as always. This is particularly important if we consider that the suspension affects the protection of the Inter-American *corpus juris*.

It is worth noting that this obligation has not resulted in regulatory reforms —which would be constitutional— in all cases, with the risk posed by discrepancies between national constitutional provisions and international human rights law statutes, especially if that difference —the source of dilemmas that put the rule of democracy and human rights at risk, whether in specific or relatively isolated cases— leaves the right to protection of life against the historical onslaught of capital punishment undefended.

## XVII. THE “FEDERAL CLAUSE”

Neither the Convention nor its interpreter, the Inter-American Court, have overlooked the problem that arises from the federal organization of the State obliged to respect and guarantee certain rights. Under the epigraph “Federal Clause,” Article 28.2 of the Pact of San Jose establishes:

With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall

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<sup>80</sup> *Advisory Opinion OC-8/87*, para. 42.

<sup>81</sup> *Advisory Opinion OC-9/87*, Resolutions 1 and 2, ¶¶ 25, 38-40.

immediately take suitable measures in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

This specifies an obligation for federal States, which stresses the general duties attributed to all States.

The central government—that is, the federation that put its name to the international agreement on behalf of the State as a whole—must “immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units [which have jurisdiction in federated regions or states] may adopt appropriate provisions for the fulfillment of this Convention.” There is, then, a kind of “reinforced obligation” derived from the general obligation to take measures to ensure respect and protection for human rights, and the particular obligation resulting from the federal clause.

The Court, in turn, has been emphatic on this point, to which it has referred on several occasions: international precepts on human rights must be respected by the States regardless of their unitary or federal structure.<sup>82</sup> In its 1998 ruling in *Garrido and Baigorria v. Argentina*, the Court affirmed: “a State cannot plead its federal structure to avoid complying with an international obligation.”<sup>83</sup>

It is fitting to stress the fact that the State must “immediately” adopt the measures in question as ordered in Article 28.2, and we need not be reminded that it is not possible to hide behind obstacles of national law—the existence of which is recognized in the international convention—since these obstacles can and must be overcome or else breach an international commitment. The emphasis on this issue is pertinent in view of the vast importance it has clearly had in international death penalty litigation, as seen, without having to look much further, in the cases *LaGrand* and *Avena* as resolved by the International Court of Justice.

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<sup>82</sup> *Advisory Opinion OC-16/99*, Resolution 8 and para. 138 *passim*.

<sup>83</sup> *Garrido and Baigorria v. Argentina. Reparations (Art. 63(1) American Convention on Human Rights)*, Judgment of August 27, 1998, para. 46.