

**CONCURRING SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN
THE HILAIRE, CONSTANTINE AND BENJAMIN *ET AL.* CASE VS. TRINIDAD AND
TOBAGO OF JUNE 21, 2002¹**

1. The most relevant and complex issue in this case concerns the incompatibility of the *Offences Against the Person Act* of Trinidad and Tobago, of April 3, 1925 - referred to in the Judgment as the *Offences Against the Person Act*² - with the American Convention on Human Rights. In this respect, the Court unanimously held - together with the concurrence of this Separate Opinion - that the above domestic law is incompatible with Article 4, paragraphs 1 and 2, of said Convention. This implies, in light of Article 2 of the Pact of San José, that the State must adopt the pertinent measures - in these circumstances, of a legislative character, given that the violation results from a legislative act, which in turn governs other actions under it - in order to bring its domestic legal order in conformance with the stipulations of the American Convention.
2. The foregoing conclusion is reached, notwithstanding any of the following: a) that Trinidad and Tobago would have become a State party to the Convention and would have accepted the Court's compulsory jurisdiction subject to certain reservations or limiting declarations with respect to its jurisdiction; b) that the State would have denounced the Convention on May 26, 1998; and c) that the Constitution of Trinidad and Tobago, of 1976, would prevent any norm preceding its entry into force - like the *Offences Against the Person Act*, of 1925 - from constitutional challenge.

In effect, the Court has examined and dismissed - in part - the effectiveness of the reservation or limiting declaration formulated by Trinidad and Tobago, finding that due to its excessively general character³ it runs contrary to the object and purpose of the Convention, and broadly subordinates the jurisdictional function of the Court to domestic norms and to the decisions of national organs, thereby contravening principles of international law.⁴ The Tribunal has likewise resolved - in part - that the State has obligated itself to observe the Convention with respect to *sub judice* case, even as it denounced the Treaty on May 26, 1998, taking effect May 26, 1999 - pursuant to Article 78 of the Convention - given that the

¹ This Opinion was written in Spanish language and translated into English by the Secretariat of the Inter-American Court of Human Rights.

² *Offences Against the Person Act*, of April 3, 1925, applied by the State's domestic courts in considering and resolving various murder cases subject to the death penalty, joined - for the purpose of the present judgment by the Inter-American Court - in the *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago Case*.

³ In this respect, the reservation made by the State was conceived in the following terms: "As regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights as stated in said article only to such extent that such recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that any judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen."

⁴ Cf. I/A Court H.R., *Hilaire Case. Preliminary Objections*. Judgment of September 1, 2001 (corresponding to the judgments on preliminary objections, from the same date, rendered in the *Constantine et al.* and *Benjamin et al. Cases*), paras. 78 and ff. I issued a separate Concurring Opinion with respect to each of these judgments, on the date on which they were delivered.

violations of the Pact took place before this last date.⁵ Finally, the Court has demonstrated, in this same Judgment to which I attach my Separate Opinion, that the State cannot invoke provisions of its domestic law to avoid fulfilling its international treaty obligations.⁶ It is important to note, as well, that Trinidad and Tobago ratified the Pact of San José on May 28, 1991, long after promulgating its Constitution.

3. The incompatibility of the *Offences Against the Person Act* with the American Convention, that I now propose to examine, and which has already been analysed and resolved by the Court in its Judgment, arises from the lack of agreement between the terms in which the Act prevents and sanctions murder, ordering the *mandatory penalty of death penalty* in the process, and the two provisions formulated under Article 4 of the American Convention concerning the death penalty. This implies a violation of Article 2 of the Pact of San José, in relation to Article 4, paragraphs 1 and 2 (to which could be added - as it will be shown below - paragraph 6 of this same precept).

The relevant portion of paragraph 1 of Article 4 indicates that "[n]o one shall be *arbitrarily* deprived of his life" (emphasis added); and the relevant portion of paragraph 2 stipulates that "[i]n countries which have not abolished the death penalty, it may be imposed only for the *most serious crimes*" (emphasis added). There are, therefore, two definite restrictions on the imposition of the death penalty: One, which concerns the *extreme seriousness* of the crimes to which it may relate, and the other, the prohibition of *arbitrariness* in the deprivation of life. In my mind, the *Offences Against the Person Act* fails to respect these restrictions and as a result offends the American Convention that the State adopted and accepted as binding the respective obligations emanating from it, when it became a party to this international treaty.

4. Before examining these incompatibilities, it is important to recall that the Pact of San José does not abolish the death penalty. That widely demanded possibility derives from other national and international acts.⁷ The American Convention likewise recognizes and shares this abolitionist proclivity, and in its proper

⁵ Cf. *id.*, paras. 27-28.

⁶ This principle, found in Article 27 of the Vienna Convention on the Law of Treaties of 1969 (to which Trinidad and Tobago is not a party), constitutes a rule of customary international law. Article 27 "goes to the very foundation of international law, and for which there exist significant precedents." (translation of the Secretariat) De la Guardia, Ernesto, and Delpech, Marcelo, *El Derecho de los tratados y la Convención de Viena*, Buenos Aires, La Ley, 1970, p. 286. The Vienna Convention is in itself, in essence, a codification of preexisting international law, and as such affects even those states that have not ratified it. Cf. Harris, D. J., *Cases and materials on International Law*, London, Sweet & Maxwell, 1998, p.765; Van Hoof, G.J.H., *Rethinking the sources of International Law*, Deventer, The Netherlands, Kluwer Law and Taxation Publishers, 1983, No. 464; in a similar sense, Tunkin, Grigory, "Is general International Law Customary Law only?", *European Journal of International Law*, vol. 4, No. 4, 1993, pp. 534 and ff. With respect to the jurisprudence of the Inter-American Court in regard to the non-opposability of domestic law to the fulfillment of international obligations, cf. I/A Court H.R., *International responsibility for the promulgation and enforcement of laws in violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14; and I/A Court H.R., *Castillo Petruzzi et al. Case. Compliance with Judgment*. Order of November 17, 1999. Series C No. 59, considering 4.

⁷ Among the most recent are, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the General Assembly of the United Nations on December 15, 1989.

moment and circumstances introduces rigorous restrictions - like that contained in Article 4(1) - creating obstacles to the reinstatement of the penalty and opening the way for the reconsideration of corresponding sentences.⁸ Therefore, any interpretation of the Pact of San José on this subject must take into account the general inclination of the Treaty - the *spirit*, clearly manifested in the *letter* - and to assume, by this, the utmost rigor. This demands the strictest interpretation of the conventional norms that govern this area.

It should be made clear, that the foregoing does not imply that the Convention in this case is to be interpreted so as to *abolish* the death penalty. This is not the intention of the Judgment or of my Concurring Opinion, both of which are directed solely at the terms by which the Convention regulates the matter and independent of any personal views held on a subject where it is admittedly difficult to maintain a neutral position for the purpose of the *lege ferenda*.⁹ However, at the time of judicially applying a specific norm - in this case, the American Convention - it is important to follow the *lege lata*, as the Court has effectively done in carrying out its jurisdictional functions, and as I do in the present Opinion. Accordingly, I will not discuss the question of the death penalty's legitimacy and utility.

5. It is also important to observe that the conclusions reached in this case, as in others involving crimes that have been perpetrated on innocent persons and shocked society, do not suggest an indifference or lack of understanding of the need to act with rigor, energy, and efficiency in the fight against crime. The State has the duty - a principal obligation, nuclear, and essential - to provide its citizens with security and justice, which are seriously compromised when crime increases. In such circumstances, the very least which must be expressed is solidarity with the aggrieved society - in particular with the victims of the crimes - and support for the legitimate measures undertaken for its protection. It has often been shown that elimination of impunity and the consequent assurance of punishment would allow for further advances in the fight against crime rather than the mere imposition of harsher penalties. This idea of our forefathers continues in contemporary thinking.¹⁰

⁸ Fourteen signatory States to the American Convention made explicit their desire that the death penalty be abolished, through a future additional Protocol to the Convention. Cf. *Inter-American Conference on Human Rights, San José, Costa Rica, 22 November 1969, Records and Documents, OAS/Ser. K/XVI/1.2*, Washington, D.C., 1973, p. 467. The Court noted for the record, on another occasion, that Article 4 of the Pact of San José "reveals a clear tendency to restrict the scope of [the death] penalty both as far as its imposition and its application"; and that "[o]n this entire subject, the Convention 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 strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance." 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 of September 8, 1983. Series A No. 3, paras. 52 and 57.

⁹ Antonio Beristáin states that the death penalty is "a radical issue" in criminal law; it influences the system as a whole and all the decisions taken in this respect. Cf. "Pro y contra de la muerte en la política contemporánea", in *Cuestiones penales y criminológicas*, Madrid, Reus, 1979, p. 579.

¹⁰ "It is not the cruelty of the penalties which is one of the greatest deterrents of crimes, rather it is their infallibility [...] The certainty of the punishment [...] will always have a greater impact than the fear of one more terrible, this coupled with the hope of impunity," as it was taught centuries ago, by the reformer César Beccaria, *De los delitos y las penas*, trad. Juan Antonio de las Casas, Madrid, Alianza Editorial, 1982, pp. 71-72. (translation of the Secretariat)

6. Evidently, there may be a violation of the right to life even whilst the victims have not yet been deprived of theirs. The right to life - like any other right - can be viewed as affected in an *iter* that moves through various stages, named and identified, all of which, by a common design conferred by nature and sense terminate the life of an individual. The last phase in this *iter* culminates in the deprivation of the life itself, object of the maximum affection of this right. Before, there may be other moments: all of which, in conformance with the circumstances, aspire and lead to this end. Such is the case of a general norm that runs contrary to the American Convention (or to the State Constitution, where domestic issues are at stake): the norm may be challenged on jurisdictional grounds before its implementation produces consequences which may give rise to a concrete case.

It has been maintained that a law contrary to the Convention cannot in itself be impugned (as is often possible in the case of unconstitutional laws in the domestic sphere), before it has actually been applied and the threat it poses is realized in fact. The Inter-American Court held at one time that its jurisdictional authority in litigious cases extends to acts of the State carried out on specific persons,¹¹ but it has also stated - and explained - that a law may *per se* violate the international pact.¹²

It is pertinent to observe that a law may in itself constitute a threat to the right to life, in the same way as it may contravene the right to nationality, to juridical personality, to property, to family, to integrity, etc., although it has yet to be applied in a concrete case. The mere existence of the law - once in force - leaves the protected interest (life) exposed, compromised, and in danger.¹³ Consider that the judicial protection accorded can and often does anticipate the case where someone fears the application of the law in question and seeks to take precautions against it: it is not only the act perpetrated which is impugned but that norm which authorizes its future execution as well. These are the parameters within which constitutional justice operates. The inter-American system moves in this direction when it opens the door to adopting provisional measures, whether

¹¹ Cf. I/A Court H.R., *Genie Lacayo Case. Preliminary Objections*. Judgment of January 27, 1995. Series C No. 21, para. 50.

¹² In OC-13, the Court made reference to types of violations of the American Convention: omitting to dictate binding norms under Article 2 of this pact or to list norms that contravene the Convention. I/A Court H.R., *Certain attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 26. In OC-14, the Tribunal distinguished between laws which do not necessarily affect the legal sphere of specific individuals, because they may require subsequent normative measures, compliance with additional conditions or implementation by state authorities and "self-executing laws", where "the violation of human rights, whether individual or collective, occurs upon their promulgation." I/A Court H.R., *International responsibility for the promulgation and enforcement of laws in violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, paras. 41-43 and 49. In a litigious case, the Tribunal established that a penal norm that denies a category of the prisoners certain rights that are enjoyed conferred on others, "violates *per se* Article 2 of the American Convention, whether or not it was enforced in the instant case." I/A Court H.R., *Suárez Rosero Case*. Judgment of November 12, 1997. Series C No. 35, para. 95 and operative paragraph 5. In the same sense, cf. I/A Court H.R., *Castillo Petruzzi et al. Case*. Judgment of May 30, 1999. Series C No. 52, para. 205.

¹³ It is useful to recall the lesson taught by criminal law in this respect, having its own titular practice for judicially protected interests: not only is the deprivation of life sanctioned, but the attempt to murder, and in some cases conspiracy to murder as well. Punishment appears at diverse moments of the *iter criminis*.

preventative or precautionary, to avoid irreparable damage from being inflicted on people.

Now, in the present case there does not merely exist a law which in itself contravenes the American Convention, which would invoke the considerations that I have referred to above and could justify - from a certain doctrinal perspective - the deliberation and judgment of the international tribunal. One more stage in the *iter* has been completed: the law was applied by way of judgment;¹⁴ it was already decided, individually and imperatively, that the *lives of certain persons must be taken*. The accused's right, regarded as potentially jeopardized by the law, in the end was in fact affected by the judgment. For the accused, the deprivation of life is not *merely a possibility*, rather it is an *imminent reality* to which the punitive power of the State is directed, formally and explicitly.

7. The first issue I propose to examine with respect to the incongruity between the *Offences Against the Person Act* and the American Convention concerns the limitation in the application of the death penalty to only the "most serious crimes" as stated in Article 4(2) of that international instrument. It is important therefore to identify those crimes that are "the most serious" in a determinate time and space within criminal law. These must be identified and the natural result of a classification of this category - diverse sanctions - be speedily adopted to be able to inform criminal legislation, the reason and intention being two-fold: justice and effectiveness. The same classical thinker whom I cited above best summarized this concern in stating: "If the same punishment is meted out for crimes which unequally offend society, men will not encounter a very significant obstacle in committing the more depraved crime, where they perceive in it a greater advantage."¹⁵
8. I would like to address an idea now, rather than later, that has been presented on occasion and which proposes that the "most serious" crimes be identified as those which are sanctioned by capital punishment, the most severe of all penalties.¹⁶ This characterization is unsatisfactory, and for the purposes of this Opinion, it is also tautological. It is easy to caution, that if such a criteria were adopted a determination as to gravity - which entails a determination as well as to protected interests and basic rights - would remain subject to a vacillating discretion. Instead of relating the seriousness of a crime to its corresponding penalty, the severity should be linked to the intrinsic gravity of the crime. It is not the seriousness of the punishment that determines the seriousness of the crime, but it is the latter which justifies the former. In sum, it is necessary to place the terms

¹⁴ In various cases, the United Nations Human Rights Committee has found a violation to the right to life of an offender sentenced to death - not yet executed - when the sentence was dictated without due observance of due process guarantees. *Wright v. Jamaica*, Communication No. 349/1989; *Simmonds v. Jamaica*, Communication No. 338/1988; *Daniel Monguya Mbenge v. Zaire*, Communication No. 230/1987.

¹⁵ (Translation of the Secretariat) Beccaria, *De los delitos y de las penas*, cit., p. 37. The same author cautions that the threat of harsher penalties for many crimes, in fact impedes "the essential proportionality between crime and punishment" (translation of the Secretariat) *Id.*, p. 73. Included in this edition, annotated by Juan Antonio Delval, are some relevant observations of Montesquieu. In one of these, Montesquieu expresses his amazement that there exist "one hundred and sixty (acts) declared capital crimes by act of Parliament, that is, crimes that must be punished by sentence of death", (translation of the Secretariat) amongst which there exist behaviors of varying degrees of severity (*Observations d'un voyageur anglais sur Bicêtre*, 1788).

¹⁶ With respect to this argument, cf. the opinions included by Rodley, Nigel S., *The treatment of prisoners under International Law*, Oxford University Press, 2nd.ed., 1999, p.219.

of the issue in their proper order: in particular, in the order that most benefits the protection of human rights. In this sense, it is necessary to *read beyond the criminal code* to understand which forms of illicit behaviour may be classified as the most serious, so that when transferred to the criminal code, they merit the highest penalty provided for in law.

9. The modern criminal regime, rooted in democracy and in the idea of the State as guarantor, impedes the protection of the most valuable interests from attack or from even greater dangers. The judicially protected interest of the highest rank is human life, and murder - deprivation of the life of another - its most powerful form of attack. The American Convention not only refers to "serious crimes" - of which murder certainly forms part - but to the "most serious crimes", that is, those crimes to be found at the tip of the pyramid, those which deserve the most severe reproach, those that affect in the most grave way individual and social interests, in sum, those that because of their *unsurpassable gravity* are able to carry an equally *unsurpassable punishment*: capital punishment.

This leads one to question, whether it is possible that some alleged murders are more serious than others, not as a function of the result of this type of criminal behaviour - which is the same in every case: deprivation of life - but rather in virtue of the behaviour entailing specific characteristics or because persons with a certain condition may be predisposed to it. The idea in sum would be to establish a gradation in the gravity of facts that might at first glance appear identical.

10. A non-evolved criminal system could sanction diverse conduct with the same penalty. It would indiscriminately administer the most severe punishments as a response to illicit acts of varying depravity. Instead, a developed system identifies with greater precision - a precaution which provides in essence an individual and societal guarantee - the diverse extremes of illicit conduct meriting criminal sanction and adapting the punishment, as much as possible, to the individual circumstances of the crime and the offender who carries it out. This is accomplished through two channels recently opened in modern criminal law: a) the organization of diverse and specific categories of crime designed to differentiate criminal behaviour based on specific characteristics rather than by its consequences, with a corresponding view to imposing different kinds of punishment; and b) giving the trier of fact the authority to individualize the sentence in conformity with information of the offence and the offender tendered, certified and valued in the process, within the parameters - maximum and minimum - of punishment that corresponds to the crime.
11. Murder always entails the deprivation of human life, however not all murder theories are equivalent, nor is the culpability of its authors. In fact, the taking of a life is often carried out or manifested in diverse ways, which fall into different categories of severity. This then leads to the creation of varied categories of crimes that correspondingly describe acts of varying degrees of gravity.

In light of the above, the intentional deprivation of life (intentional homicide) does not fall into a single category of crime, instead it extends over various categories, associated with different levels of punishment. There exists one basic category of homicide and a diverse set of complementary categories which contain mitigating

elements that reduce the gravity and moderate the penalty, as well as aggravating elements which increase the gravity and increase the penalty.¹⁷

Indeed, criminal legislation usually foresees - as it has for a long-time, and continues to a greater extent today - other classes of homicide involving aggravating elements, beyond basic homicide: such as, the relation between author and victim (parricide), the situation in which the actor placed himself in order to take the victim's life (homicide qualified by advantage or betrayal), the motive which provoked the author's conduct (homicide qualified by the purpose of obtaining remuneration or the satisfaction of immoral desires), the means employed (homicide qualified by the use of explosives or other destructive instruments), etc.

It is clear that in all the above cases we are faced with a homicide, but it is also perfectly possible, as well as necessary and justified, to recommend - within the context of criminal matters - diverse levels of gravity for behaviours where the life of another is taken. This definition of seriousness implies a direct consequence in the penal response: punitive diversity. The trier of fact considers 1) the objective difference that lies in the classification of the act, as much as, 2) the degree of culpability of the actor, another relevant question for this case and which must be kept in mind when individualizing a sentence, where a punishable act - generically foreseeable - becomes an actual punishment - a specific aspect of the sentence.¹⁸ The sanction is built on both factors.

12. It is useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty. In these countries the gradation according to gravity of each theory of deprivation of life is well recognized: from homicide to parricide. In all of these countries, there exists a diversity of penalties corresponding to the diversity in gravity.¹⁹ In such cases²⁰

¹⁷ "According to the extent of the encumbrance on the protected interest the categories are classified as fundamental or basic and qualified. Those that are fundamental or basic always relate to other interests: they are those that found the basic concept of the conduct which is to be sanctioned, while qualified interests delineate a mode of conduct which may be more or less serious. If it is more serious, due to degree of encumbrance or immorality (...) it will be qualified as aggravated, to the same extent that it would be qualified as mitigated had the circumstances been the contrary." (translation of the Secretariat) Zaffaroni, E. Raúl, *Tratado de Derecho penal, Parte general*, Buenos Aires, EDIAR, t. III, 1981.

¹⁸ The following reflection of Ihering is largely applicable: "To the objective element of the interest threatened in society, the delinquent adds the subjective element of the danger posed to society, by reason of his willingness to harm and the process by which he elected to carry out his crime. All delinquents guilty of the same crime do not jeopardize society to the same extent." (translation of the Secretariat) *El fin en el Derecho*, Buenos Aires, Bibliográfica Omeba, 1960, p. 237.

¹⁹ "Traditionally parricide has been considered to be the gravest crime committed against life, followed by murder and simple homicide. That is why they appear in this order, from most to least severe, in our penal codes" (referring to Spanish legislation)(translation of the Secretariat). Ortego Costales, José, *Teoría de la parte especial del Derecho penal*, Salamanca, Ed. Dykinson, 1988, p. 240.

²⁰ Evidently, I do not pretend to discuss all the cases that could be invoked on this issue. In the presenting these examples I summarize the circumstances corresponding to criminal categories and I omit those details that would unnecessarily extend the descriptions provided without affecting their value. I cite the legal rules in the terms in which they currently appear in the texts of the Library of the Inter-American Court-Institute of Human Rights at the time of writing this separate Opinion. If those texts were to be modified in the future, the reforms would not affect the essence of the problem or the intrinsic value of the examples.

there is nothing comparable to a *mandatory death penalty*, in the sense it has been given in the matter to which this Opinion refers.

He who kills another will be imprisoned for one to ten years, according to Article 251 of the *Criminal Code of Bolivia*; and will be punished by sentence of death - orders Article 252 - he who kills his descendents, takes a life with premeditation, malice aforethought or brutality, he who does so for a price, gifts or promises or by means of poisonous or other like substances etc. In conformance with the *Criminal Code of Chile*, the penalty for categorical homicide is maximum imprisonment for minimum to medium degrees of gravity; he who takes the life of another with certain aggravating factors (malice aforethought, for reward or remunerative promise, with poison, brutality, premeditation), will suffer maximum imprisonment for medium gravity to life imprisonment (Article 391, paragraphs 2 and 1, respectively); and he who kills his father, mother, or child, will suffer maximum imprisonment for a maximum degree of gravity or death (Article 390). Under the *Criminal Code of Guatemala*, imprisonment for fifteen to forty years will be imposed for causing the death of a person (Article 123); and will punish - under the title of aggravated homicide - with imprisonment of twenty-five to fifty years parricide and murder (homicide aggravated by various elements), however the death penalty will apply to both categories "if by the circumstances of the act, the way in which it was committed and the motives which provoked it, it is revealed that the actor present a great and particular danger" (Articles 131 and 132). (Translation of the Secretariat of the Court.)

13. Having formulated the preceding considerations, it should be recalled that Article 4 of the *Offences Against the Person Act*, of Trinidad and Tobago, orders that "[e]very person convicted of murder shall suffer death". That is how the so-called *mandatory death penalty* is ordered for a broad - and heterogeneous - range of homicidal behavior, in which it would be objectively possible to identify - as the previously cited codes have done, as well as have many other ancient and modern regimes - different degrees of gravity. With this, the rule that the death penalty "may be only imposed for the most serious crimes" (Article 4(2) of the Convention) is neglected, that is, only for those crimes located at the tip of the pyramid which rises from the least grave to the most severe.

Clearly, in structuring the general punishment for murder in this way, the direction domestic criminal proceedings may take remains predetermined: the tribunals lack the possibility of assessing the particularities of homicides to order, as a logical and juridical consequence of such differences, sanctions which are equally diverse. The negative aspects of criminal homogeneity ordered where there exist a heterogeneity of acts, meriting proportionality and individualization, have been extensively examined - from its own perspective - in the jurisprudence of the Judicial Committee of the Privy Council.²¹

14. A legislator from Trinidad and Tobago itself has advised of the need to classify the sentence in relation to the gravity of the crimes of murder, clearly overriding the old formulation of the *Offences Against the Person Act*. In effect, the State's Legislature approved the *Offences against the Person (Amendment) Act*, 2000,

²¹ In this respect, the judgment in *Patrick Reyes v. The Queen*, of March 11, 2002, is interesting and significant. This case was previously considered by the Belize Court of Appeal. Cf., esp., paras. 29, 30, 32, 34, 36, and 40-43.

which reforms the *Offences Against the Person Act* but has yet to come into force.²² According to the terms of this amendment, there would be three categories of murder, namely: *capital murder* or *murder 1*, *murder 2*, and *murder 3*. The first comprises circumstances of a greater severity: aggravated murder with elements that usually bring, as it has been observed in comparative law, the maximum penalty and which class of crime is punished by the death; murder of a lesser degree, having other characteristics, punished by life imprisonment, and culpable homicide.²³ This kind of regulation already appears in the corresponding laws of other States in the region, which categorize in detail diverse theories in which life may be taken.²⁴

15. Having examined the incompatibility that exists between the criminal legislation in Trinidad and Tobago and Article 4(2) of the Pact of San José, it is fitting to study the disparity between that legislation and Article 4(1), which prohibits the "arbitrary" deprivation of life. For this purpose it is pertinent to recapture in a broad sense the concept of *arbitrariness* - not only existing, as the circumstances now under consideration will show, in the context of extra-judicial executions, while these may be its most flagrant manifestation - and project it onto the issue with which we are now concerned.

The Court has previously understood that "[t]he expression 'arbitrarily' excludes, as is obvious, the legal proceedings applicable in those countries that still maintain the death penalty."²⁵ Nevertheless, it is necessary to delimit the scope of such a broad affirmation that may extend to situations which merit clarification. Evidently, in the terms of the Convention, death imposed or inflicted on a person in conformance with norms of substance and form adjusted to those principles which must inform them, and by means of a trial before a competent authority in accordance with due process guarantees, may not be classified as arbitrary. This defence appears inadequate however, when the above has not occurred, even though the case does not involve an extra-judicial execution or the excessive use of force at the margins of judicial orders.

16. If we limited ourselves to superficially considering only, the fact that the death penalty provided for in law and applied to concrete cases comes from a judgment issued by a competent tribunal, the classification of the case at bar as arbitrary might seem excessive. However, this charge is justified if certain statements approved before the Inter-American Court and articulated in the judgment issued

²² This reform was approved by the House of Representatives on October 13, 2000 and by the Senate on the 24th of the same month and year, and will come into force when the President of the Republic promulgates it.

²³ Within the qualifying element that aggravate the murder and intensify the sentence, are: that the victim was part of the security forces, a prison or judicial official; that the life taken was that of a participant as witness or juror in a criminal proceeding; that the crime was committed using bombs or explosives; that the crime is carried out in the expectation of reward; that the brutality in the commission of the crime causes an exceptional loss; that the murder is committed with motives related to race, religion, nationality or national origin, etc. (Sections 4D and following)

²⁴ Cf., in what refers to Jamaica, the *Act to amend the Offences Against the Person Act* (October 14, 1992), which distinguishes between *capital murder*, punishable by death, and *non-capital murder*, punishable by life in prison.

²⁵ Corte I.D.H., *Caso Neira Alegría y otros*. Sentencia de 19 de enero de 1995. Serie C No. 20, para. 74.

by this Court are invoked, namely: a) the prevention of the death penalty, *tabula rasa*, for all murders, without consideration of the diverse characteristics which they embody, as previously stated in this Opinion: this fact - the existence of an arbitrary law - renders the sentences, and clearly, the eventual executions arbitrary; b) the application of the death penalty by means of trials that fail to satisfy, in any way, certain due process exigencies,²⁶ such as those concerning the resolution of the dispute within a reasonable time and the provision of adequate legal aid; c) the real ineffectiveness, in concrete cases, of the right to apply for - and, it is understood, to participate and advocate for - amnesty, pardon or commutation of sentence; and d) the execution of one person - Joey Ramiah - who was protected under the provisional measures ordered by the Court; execution prior to there being a decision by the organs of the inter-American human rights protection system constitutes - as stated by the Judicial Committee of the Privy Council - a "violation of the constitutional rights" the petitioners.²⁷

17. In this of line thought, I would like to comment on the violation of Article 4(6) of the Convention that is also established in the judgment. This norm, found under the "Right to Life" heading - the protected subject of the entire article made up of six paragraphs - indicates that "[e]very person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases [...]."

Such a right - to truly be a right and not merely a declaration - assumes that the bearer of the right will have an expedited and authentic possibility to apply for and receive the revision and modification of the juridical situation created by the condemnatory judgment. It would not make sense that such a right be instituted as a pure formality, what in this case would be a trivial: a mere power to request, exhausted by the request itself. The right must possess reasonable substance and meaning. This implies that the rights-bearer must enjoy the juridical and material possibility of submitting his petition - which is a claim - to be resolved on the merits before a competent authority, and to present supporting material capable of - while it remains difficult and uncertain - a favourable outcome. This did not occur in the *sub judice* case, because the inmates did not have the opportunity to plead their cause using elements from trial that supported and favoured their case, or benefit from indispensable legal assistance in the processing of their case; moreover, their claims were predestined to failure: inevitably coming up against the unshakeable wall of the "mandatory" death penalty.

In the situation that concerns us, the absolute ineffectiveness of the petition for amnesty, pardon or commutation may be analysed from two perspectives, equally

²⁶ In OC-16, the Court made it clear that when due process guarantees are affected that the "imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties (eg. The American Convention on Human Rights, Article 4...) with the juridical consequences inherent in a violation of this nature i.e., those pertaining to the international responsibility of the State and the duty to make reparations." I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 137.

²⁷ In *Darrin Roger Thomas and Haniff Hilaire v. Cipriani Baptiste (Commissioner of Prisons), Evelyn Ann Peterson (Registrar of the Supreme Court) and The Attorney General of Trinidad and Tobago, Privy Council Appeal No. 60 of 1998* (Decision of January 27, 1999), the tribunal held: "Their Lordships declare (...) that to carry out the death sentences imposed on the appellants before the final disposal of their respective applications to the Inter-American Commission and Court of Human Rights would be a breach of their constitutional rights and order that the carrying out of the said death sentences be stayed accordingly."

valid: in one sense, as a violation of the right to life according to the terms of the principle contained in the right; and in another sense, as a due process violation, as there was no due process in the processing of the claim: nor was there a hearing, evidence or argumentation that opened even a minor possibility that the request would be granted. It is from this that the Court deems, rightly in my opinion, that there has been a multiple violation: of Articles 4(6) and 8 in relation to 1(1).

18. Another issue, to which I would like now to refer, corresponds to the detention system that in the circumstances of this case constitutes a violation of Article 5, paragraphs 1 and 2, of the American Convention. In this framework it must be noted that the State as guarantor of the rights of the detained, is directly and wholly answerable for situation of its prisoners.²⁸ The position of guarantor, held in this case by the State, is derived from the fact that prisoners detained, awaiting execution or carrying out a sentence, are the subject of a carefully regulated regime, applied and supervised by the State itself, in a manner that is likely more rigorous than could otherwise be applied to any other category of persons.

In these cases, which correspond to the *entire institution* that is prison, the condition of the State as guarantor originates in the duties contingent upon it in respect of arrest orders - or its equivalents - and sentencing judgments. Both authoritative acts imply the removal of the subject from the free environment in which he has developed and his placement in a completely different environment where his every act is subject to the control of the public authority. The title of guarantor implies: a) avoiding all that which may inflict further suffering on the subject than is strictly necessary for the purposes of the detention or the fulfilment of the sentence, on the one hand, and b) providing all that is relevant - pursuant to the applicable law - to meet the aim of the imprisonment: security and social re-adaptation, regularly, on the other.

19. There is no lack of international material on the subject of the treatment of prisoners, where detainment is legally foreseen; in this literature a line is drawn between what is due and undue, between what is admissible and inadmissible. These materials provide a starting point from which to delineate the space in which the State acts and the features of its mission as guarantor.²⁹ A comparison of what is foreseen in the literature and the reality of the prison system could provide an understanding of the degree to which public duties have been fulfilled, duties which may not be neglected simply because those who are detained have seriously failed to comply with - and are thereby deserving of their sentence - their societal obligations.

Indeed, imprisonment implies severe restrictions. I do not question their relevance. I leave this question outside the scope of my present considerations. However, it is important to take into account that said restrictions have their

²⁸ This has been affirmed by the Court in I/A Court H.R., *Neira Alegría et al.* Judgment of January 19, 1995. Series C, No. 20, para. 60, referred to in the judgment to which this Opinion is attached. Mention is also made of the criteria of the United Nations Human Rights Committee, in *Moriana Hernández Valenti de Bazzano v. Uruguay*, No. 5/1977 of August 15, 1979, paras. 9-10.

²⁹ Therefore - and only referring to the best known instruments - I will mention the *Standard Minimum Rules for the Treatment of Prisoners* (Geneva, 1955), approved by the United Nations Economic and Social Council on July 31, 1957, and reformed on May 13, 1977 by the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the United Nations General Assembly on December 9, 1988 (Res. 43/173), and the *Basic Principles for the Treatment of Prisoners*, adopted by the United Nations General Assembly on December 14, 1990 (Res. 45/111).

limits: beyond which, they become - as has effectively occurred - cruel, inhuman or degrading treatment. As well, it is necessary to distinguish between a regime of deprivation (precautionary or provisional) of liberty corresponding to a person not yet convicted and a convicted criminal. The former, in whose favour there exists a presumption of innocence, which must be reflected in the detention conditions, where the deprivation of liberty, while their case is processed is considered indispensable.

Judge Sergio García-Ramírez

Manuel E. Ventura-Robles
Secretary