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CASE 11.686

REPORT ON ADMISSIBILITY AND MERITS

ROBERTO GIRÓN AND PEDRO CASTILLO MENDOZA
GUATEMALA

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I.	SUMMARY	2
II.	PROCEEDINGS BEFORE THE COMMISSION	2
III.	POSITIONS OF THE PARTIES	3
	A. Position of the petitioners.....	3
	B. Position of the State	4
IV.	ADMISSIBILITY ANALYSIS	4
	A. The Commission’s <i>ratione materiae, ratione personae, ratione temporis</i> and <i>ratione loci</i> competence.....	4
	B. Admissibility Requirements.....	5
	1. Exhaustion of Domestic Remedies	5
	2. Timeliness of the petition	5
	3. Duplication of proceedings and international <i>res judicata</i>	5
	4. Colorable claim.....	6
V.	PROVEN FACTS	6
	A. General considerations about the application of the death penalty in Guatemala.....	6
	B. The criminal proceedings against the alleged victims	10
VI.	ANALYSIS ON THE MERITS	15
	A. General considerations on the analysis standard in death penalty cases	15
	B. Rights to a Fair Trial and to Judicial Protection in the criminal procedure.....	16
	C. Right to Humane Treatment and relevant provisions of the Inter-American Convention to Prevent and Punish Torture in relation to the “the execution method	19
	D. Right to Life and the imposition of the death penalty sentence and its execution	22
VII.	CONCLUSIONS	22
VIII.	RECOMMENDATIONS	23

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I. SUMMARY

1. On July 11¹ and August 14, 1996,² the Inter-American Commission on Human Rights (hereinafter “the Commission,” “the Inter-American Commission” or “the IACHR”) received two petitions lodged, respectively, by The Magnus F. Hirschfeld Centre for Human Rights and the *Instituto de Estudios Comparados en Ciencias Penales de Guatemala* (Institute for Comparative Studies in Criminal Sciences of Guatemala) in conjunction with the *Centro para la Acción Legal en Derechos Humanos* (Centre for Human Rights Legal Action) (hereinafter “the petitioners.”) The petitions were submitted on behalf of Roberto Girón and Pedro Castillo Mendoza (hereinafter “the alleged victims”) and alleged the responsibility of the Republic of Guatemala (hereinafter “the State,” “the Guatemalan State” or “Guatemala”) for sentencing the alleged victims to the death penalty, in the context of criminal proceedings carried out without due guarantees.

2. The petitioners argued that several breaches of the due process guarantees were committed in the frame of the criminal proceedings against the alleged victims for the crime of aggravated rape, which provides for the death penalty in cases where the victim dies. They alleged that, despite the afore-mentioned, the alleged victims were executed by firing squad and, therefore, they were subjected to an arbitrary deprivation of their lives.

3. The State argued that all due process guarantees were respected in the process against the alleged victims. It stated that the death penalty sentence was applied for perpetrating a serious crime which was established by the law in force at the time, and therefore it does not infringe the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention.”)

4. After analyzing the parties allegations, the Inter-American Commission concluded that the Guatemalan State is responsible for the violation of the rights enshrined in Articles 4(1,) 4(2) (Life;) 5(1,) 5(2) (Humane Treatment;), 8(2,) 8(2)(c,) 8(2)(e) (Fair Trial;) and 25(1) (Judicial Protection) of the American Convention in connection with the obligations set forth in Articles 1(1) and 2 of the same Convention to the detriment of Roberto Girón and Pedro Castillo Mendoza. The Commission also concluded that the State is responsible for the violation of Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture (hereinafter “ICPPT.”)

II. PROCEEDINGS BEFORE THE COMMISSION

5. The petition was received by the Commission on July 11, 1996, and the proceedings were started on July 12, of the same year, following a series of submissions by the parties. On June 17, 2002, the Commission informed the parties that pursuant to Article 37(3) of the Rules in effect then, it had decided to defer the admissibility decision until the debate and decision on the merits. The Commission then requested that the petitioners submit their additional observations on the merits within a period of two months. On April 18, 2005, the petitioners submitted additional observations on the merits, which were forwarded to the State on April 21, 2005. The State submitted its observations on the merits on June 29, 2005. The

¹ The petition of July 8, 1996 was submitted in English by The Magnus F. Hirschfeld Centre for Human Rights.

² The petition of August 14, 1996 was submitted in Spanish by the *Instituto de Estudios Comparados en Ciencias Penales de Guatemala* and the *Centro para la Acción en Legal en Derechos Humanos*, CALDH.

Commission has continued to receive communications from the petitioners and the State, which have been duly forwarded to the relevant party.

6. In this case, the Commission made itself available to assist the parties in reaching a friendly settlement but none expressed their interest in such procedure.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

7. The petitioners indicated that the alleged victims were subjected to a criminal procedure for the rape and killing of Sonia Marisol Álvarez García, a girl. They indicated that on October 4, 1993, the First Court of the First Criminal Instance sentenced the alleged victims to death and they were executed by means of a firing squad on September 13, 1996.

8. The petitioners stated they complied with the requirement of exhaustion of domestic remedies as they appealed the conviction on December 1, 1993. The appeal was submitted before the Twelfth Chamber of the Appeal Court, which upheld the original ruling. Also, on September 27, 1994, they filed an extraordinary cassation appeal before the Supreme Court of Justice, which was dismissed as well. On June 9, 1995, they lodged an *amparo* constitutional remedy against the aforementioned decision, which was dismissed by the Constitutional Court on November 7, 1995. Subsequently, they requested a Presidential Pardon on July 17, 1996, which was denied that same day. Finally, on August 23, 1996, they applied for judicial review which was rejected in full by the Criminal Chamber of the Supreme Court of Justice on August 29, 1996.

9. On the basis of the information provided by both parties, the specifics of the facts and proceedings of the case will be referred to in the factual analysis of the Commission. In this section, a summary of the main arguments put forward during the merits stage is presented.

10. The petitioners alleged that in the context of the criminal proceedings that led to the conviction of the alleged victims, the State incurred various violations of the **Rights to a Fair Trial and to Judicial Protection** which can be summarized as the following: (a) for 10 days, at the beginning of the process, in which fundamental proceedings took place, they did not have legal defense; (b) subsequently, legal representation was provided by law students who did not have the experience or the time necessary to prepare an adequate defense; (c) during the trial stage they were not allowed to cross-examine witnesses who testified during the investigation stage; and (d) the judge failed to establish the individual responsibility of each defendant.

11. The petitioners argued that the **Right to Life** was violated because the death penalty sentence requires strict observance of judicial guarantees, which was not met in this case, and therefore, there was an arbitrary deprivation of the life of the alleged victims.

12. They alleged that the **Right to Humane Treatment** was breached because the execution by firing squad of the alleged victims was aired on television, as an act of humiliation to them. They also argued that, despite the fact there was an initial shooting by twenty members of the security forces of the penitentiary system, there was the need for an additional fatal shot to kill one of the alleged victims who did not die as a result of the initial shootings.

13. The petitioners pointed out that the State breached its duty to adopt provisions to give **Domestic Legal Effects** to the rights and freedoms of the Convention because the then in force Code of Criminal Proceedings granted investigative functions to the judge, which breached the guarantee of an independent and impartial judge.

14. Finally, they referred to the violation to the **Obligation to Respect Rights**, enshrined in Article 1(1) of the American Convention as the actions afore-mentioned show the State did not comply with its duty to respect the rights and freedoms of the alleged victims.

B. Position of the State

15. In general terms, the State indicated that its position regarding the death penalty is that the sentence can be applied when it has been the result of a process carried out in strict observance of all due process guarantees. It argued that the convictions of the alleged victims were the result of processes in which such guarantees were respected.

16. In the terms of the requirements for the admissibility of the petition, the State did not allege lack of exhaustion of domestic remedies. It instead indicated that all the remedies exercised by the alleged victims were decided in compliance with all due process guarantees and that the death penalty sentence was executed after the exhaustion of the ordinary and extraordinary remedies by the alleged victims. It argued that in this case prompt and proper justice was applied, in accordance with the speed that judicial proceedings must have.

17. The State maintained that no violations to the **Rights to a Fair Trial and to Judicial Protection** were committed, because: (a) the defense was appointed *ex officio* as the alleged victims did not appoint defense lawyers within the time period granted, and even though the defense were students, this was allowed by law, and they were at all times advised by their University Legal Aid Clinic; (b) the defense had the opportunity to cross-examine witnesses after the decision to indict the alleged victims was made; and (c) the criminal responsibility of the alleged victims was established in accordance to the law.

18. The State argued that it did not violate the **Right to Life**, as the death penalty was sentenced for perpetrating a serious crime established by law at the time, which does not breach the American Convention.

19. Guatemala indicated that it did not breach the duty to adopt provisions to give **Domestic Legal Effects** to the rights and freedoms of the Convention, because even though the process took place under the term of Decree 52-73,³ this Decree aimed to investigate an event established to be a crime or offense and the possible participation of those accused.

IV. ADMISSIBILITY ANALYSIS

A. The Commission's *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci* competence

20. The petitioners have standing under Article 44 of the American Convention to lodge petitions. In addition, the alleged victims are individuals that were subject to the jurisdiction of the Guatemalan State at the time of the events alleged. Therefore, the Commission has competence *ratione personae* to examine the petition. The Commission has competence *ratione loci* to study this petition insofar it alleges violations to the American Convention that are said to have taken place in the territory of a State party to the Convention. The IACHR has competence *ratione materiae* as the petition refers to alleged violations of the American Convention.

21. Finally, the Commission has competence *ratione temporis* as Guatemala ratified the American Convention on May 25, 1978, and also ratified the Inter-American Convention to Prevent and Punish Torture on December 10, 1986. Therefore, the obligation to respect and ensure the rights recognized in both treaties was in force for the State at the time the events are said to have occurred.

³ Code of Criminal Proceedings of 1973 which granted investigative faculties to the judge in criminal proceedings.

B. Admissibility Requirements

1. Exhaustion of Domestic Remedies

22. Article 46(1)(a) of the American Convention provides that, in order for a petition submitted to the Inter-American Commission pursuant to Article 44 of the same Convention to be admissible, it is necessary that domestic remedies have been invoked and exhausted in keeping with generally recognized principles of international law. This requirement is designed to allow national authorities to examine the alleged violation of a right protected and, if appropriate, to have the opportunity to resolve them before they are taken up by an international proceeding.

23. The Commission notes that the petitioners denounced several violations of the American Convention in the frame of criminal proceedings that ended with the death penalty sentence. The information available shows that after the conviction was rendered they submitted an appeal, a cassation appeal and a request for presidential pardon, which were dismissed.

24. In addition, there is no controversy about the exhaustion of domestic remedies and the State acknowledged that all the “ordinary and extraordinary” remedies were exhausted and there were no other remedies available.

25. Therefore, the Commission concludes that the requirement to exhaust domestic remedies established in Article 46(1)(a) of the American Convention is satisfied.

2. Timeliness of the petition

26. Article 46(1)(b) of the Convention establishes that, for the petition to be declared admissible, it must be lodged within six months from the date on which the interested party was notified of the final decision that exhausted remedies in the domestic jurisdiction.

27. The Commission notes that in the instant case, the pardon requested to the President of the Republic was dismissed on July 17, 1996 and the petition was lodged on August 14, 1996. The petitioners filed a writ of amparo against that decision before the Constitutional Court, which was dismissed on August 9, 1996. The petition was filed before the IACHR on August 14, 1996.

28. The Commission considers that the request for pardon or clemency is not a remedy for which exhaustion is required. This, taking into account that it is not properly a judicial remedy, but a discretionary power of the President of the Republic of Guatemala. In addition, the effect of a favorable decision would have been the commutation of the death sentence but that did not necessarily amount to a remedy of the alleged violation of due process guarantees. Without detriment of the above-mentioned, the Commission notes that the request for clemency was indeed submitted by the alleged victims. Since it was the last resort tried and given that it was provided for by domestic law, it corresponds to take the date it was dismissed into account when considering the deadline for submission of a petition in a timely manner.

29. In view of the above, the Commission concludes that the petition met the deadline for six months provided for in Article 46(1)(b) of the American Convention.

3. Duplication of proceedings and international *res judicata*

30. Article 46(1)(c) of the Convention provides that the admission of a petition is subject to the requirement that “the subject of the petition is not pending in another international proceeding for settlement.” Article 47(d) of the Convention establishes that the Commission shall consider inadmissible any petition that is “substantially the same as one previously studied by the Commission or by another international organization.” In the instant case, the parties have not argued the existence of either of those circumstances, nor can they be deducted from the record.

4. Colorable claim

31. For the purposes of admissibility, the Commission must decide whether the petition states facts that tend to establish a violation, as stipulated in Article 47(b) of the American Convention or whether the petition is “manifestly groundless” or is “obviously out of order,” as established in Article 47(c) of the Convention. The standard to assess these requirements is different from the one necessary to decide the merits of the petition. The Commission must complete a *prima facie* evaluation to examine whether the complaint establishes a basis for an apparent or potential violation of a right guaranteed by the Convention and not an evaluation to establish the existence of a violation. Such review is a short analysis that does not imply any pre-judging or anticipation of an opinion on the merits.

32. Neither the American Convention nor the Rules of Procedure of the IACHR require that the petitioner identifies the specific rights allegedly violated by the State in the matter submitted to the Commission, although the petitioners may do so. It is up to the Commission, based on the case-law of the System, to determine in its admissibility reports which provision of the relevant inter-American instruments is applicable or could be established as having been violated, if the events alleged are sufficiently proven.

33. The Commission considers that, if proven, the events alleged by the petitioners could constitute and infringement of the rights established in Articles 4, 5, 7, 8, and 25 of the American Convention, in connection with the duties set forth in Articles 1(1) and 2 of the same Convention. The Commission will also analyze in the merits the arguments related to the Inter-American Convention to Prevent and Punish Torture.

V. PROVEN FACTS

A. General considerations about the application of the death penalty in Guatemala

1. The application of the death penalty in Guatemala

34. The death penalty is established both in the Guatemalan Political Constitution and in its Criminal Law. Article 18 of the 1985 Constitution of Guatemala establishes:

Death penalty. The death penalty may not be imposed in the following cases.

- a. With the basis on presumptions;
- b. On those older than sixty years of age;
- c. On those convicted of political crimes and common crimes connected to political ones; and
- d. On those convicted and whose extradition has been granted under such condition.

Against a sentence that imposes the death penalty, all of the pertinent legal recourses, including that of cassation, will be admissible; the afore-mentioned will always be admitted for its processing. The penalty will be executed after all of the recourses are exhausted.

The Congress of the Republic can abolish the death penalty.⁴

35. Likewise, the Criminal Code establishes in its Article 43 that:

The death penalty has an extraordinary nature and can only be sentenced in the cases expressly stipulated by the law and will not be executed until after the exhaustion of all legal recourses.

⁴ Political Constitution of the Republic of Guatemala of 1985.

The death penalty may not be imposed:

1. For political crimes
2. When the conviction is based on presumptions
3. On women
4. On men older than seventy years
5. On persons whose extradition has been granted under such condition.

In these cases and provided that the death penalty is commuted to deprivation of liberty, maximum imprisonment penalties will be applied.⁵

36. Article 175 of the Criminal Code regulated the crime of aggravated rape in the following terms:

If with reason of or as a result of the rape, the offense resulted in death, the sentence of twenty to thirty years imprisonment shall be imposed. The death penalty will be sentenced if the victim is younger than ten years of age.⁶

37. By means of Decree 20-96, that came into force in May, 1996, this crime was modified in the following terms:

If with reason of or as a result of the rape, the offense resulted in death, the sentence of thirty to fifty years imprisonment shall be imposed. The death penalty will be sentenced if the victim is younger than ten years of age.⁷

38. Despite being established in Guatemalan legislation, according to a Report from Amnesty International, the death penalty was rarely sentenced in Guatemala before the 1990s. Said Report indicates that four executions were carried out in 1982, and eleven more were carried out in 1983 under Emergency Decree 46-82, which was promulgated during the state of siege imposed by Efraín Ríos Montt.⁹

39. During the 1990s the Guatemalan State returned to the application of the death penalty. First by means of firing squad, according to Decree 234 of the Congress. Then, after Decree 234 was annulled by Decree 100-96 of November 1996, by applying lethal injection.¹⁰ The latter Decree established this new method of execution and regulated the procedure in its Article 7.

2. Petition for presidential pardon and annulment of Decree 159 of 1892

40. At the time of the events of this case, the last remedy available in the Guatemalan law to revoke the death penalty sentence was a petition for clemency or pardon, which was set forth by Decree 159 of the National Legislative Assembly of April 19, 1892. The petition for clemency provided the President of

⁵ Decree No. 17-73, Guatemala Criminal Code.

⁶ Decree No. 17-73, Guatemala Criminal Code.

⁷ Decree No. 17-73, Guatemala Criminal Code.

⁸ Decree No. 20-96, Congress of the Republic of Guatemala.

⁹ Amnesty International. *The Return of the Death Penalty: Guatemala*. March 1997; also see: IACHR, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.63 doc.10, September 28, 1984, Guatemala, para. 9; IACHR, Report on the Situation of Human Rights in the Republic of Guatemala, Chapter II-Right to life, C. Executions decreed by the Court of Special Jurisdiction, OEA/Ser.L/V/II.61, Doc.47, October 3, 1983.

¹⁰ To that respect, Decree No. 100-96 of November 28, 1996, Law that Establishes the Procedure for the Execution of the Death Penalty.

the Republic discretion not to apply the death penalty to a person so sentenced. Although, when deciding an *amparo* remedy submitted by the alleged victims in this case, the Constitutional Court stated on August 9, 1996, that Decree 159 was not in force but the clemency prerogative was; however, there was no procedure established to govern this prerogative.¹¹

41. The Constitutional Court determined that Decree 159 was in force from April 21, 1892 to December 22, 1944. It was then in force again, with modifications, between December 23, 1944 and March 14, 1945, the day before the 1945 Constitution entered into force. Therefore, the Constitutional Court found that “the procedure set forth in Decree 159 of the National Legislative Assembly, is not in effect.” It added that the request for the commutation of the sentence is a recourse admissible for a death penalty sentence. It also concluded that the decision on such request corresponds to the President of the Republic, whose only obligation is to decide and notify the decision, without there being a procedure that the President must follow.¹²

42. Subsequently, on June 1, 2000, the National Congress formally annulled Decree 159 of 1892 when considering that there is no norm “that gives grounds for the Executive Organ to commute the death penalty as set forth in Decree No. 159 of the National Legislative Assembly of the Republic, due to the annulment of previous Constitution (...)”¹³

43. Since then, over 17 years ago, the death penalty has not been sentenced or executed in Guatemala.

3. The cases of Fermín Ramírez and Raxcacó Reyes v. Guatemala heard by the Inter-American Court of Human Rights

44. In 2005 the Inter-American Court ruled on the death penalty in Guatemala and, in particular, on the reference to a dangerousness criterion to impose the death penalty for the crime of murder, and the lack of regulation for the clemency prerogative.

45. The crime of murder was defined in Article 132 of the Criminal Code. It established in the relevant section that “imprisonment of 25 to 50 years will be sentenced on the offender convicted of murder; however, the death penalty will be sentenced instead, if due to the circumstance of the acts and of the occasion, the way it was carried out and the determining motives, a greater dangerousness of the agent is revealed.”¹⁴ Decree 20-96 modified the prison sentence for the crime of murder to 25 to 50 years.¹⁵

46. In the Fermín Ramírez v. Guatemala Case, the Inter-American Court analyzed, *inter alia*, the aforementioned paragraph with regards to the crime of murder and it indicated that the “assessment of the agent’s dangerousness implies the judge’s appreciation with regard to the possibility that the defendant will commit criminal acts in the future, that is, it adds to the accusation for the acts committed, the prediction of future acts that will probably occur.” The Court considered that the introduction of the dangerousness criterion for the criminal classification of the acts is not compatible with the freedom from *ex post facto* law and, therefore, is contrary to Article 9 of the Convention in connection to Article 2 of the same.¹⁶ In light of

¹¹ Constitutional Court, File 1015-96, Jurisprudential Gazette No. 41- *Amparos en Única Instancia*.

¹² Constitutional Court, File 1015-96, Jurisprudential Gazette No. 41-*Amparos en Única Instancia*.

¹³ See Decree No. 32-2000 published on June 1, 2000.

¹⁴ See Article 132 of Decree 17-73 of the Congress of the Republic of Guatemala, Criminal Code.

¹⁵ See Article 5 of Decree 20-96 of the Congress of the Republic of Guatemala.

¹⁶ I/A Court H.R., *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005. Series C No. 126, paras. 94 and following.

the above, the Court ordered the Guatemalan State to modify Article 132 of the Criminal Code to eliminate the reference to the dangerousness of the agent as an aggravating criterion for the crime or murder.¹⁷

47. In the abovementioned case, the Inter-American Court made reference to Article 4(6) of the American Convention, which stipulates that “every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases.” The Court considered that with the annulment of Decree 159 of 1892 which, as indicated, regulated the clemency prerogative of the President of the Republic, “an organization with the power to know of and decide upon the measure of grace established in Article 4(6) of the Convention was expressly disregarded. The Court also verified that from Governmental Agreement Number 235-2000, issued on a later date, it can be concluded that no State body has the power to know of and decide upon the measure of grace.”¹⁸ The Court determined that, since the internal legislation did not set forth any attribution so that a State body has the power to know of and decide upon the measures of grace, the State violated Article 4(6) of the Convention in connection to Articles 1(1) and 2 of the same Convention.¹⁹

48. The Court ordered that “in the absence of a legal procedure that guarantees the right to request pardon, the commutation of the sentence, or amnesty, the State shall decree the commutation of the punishment imposed upon all those sentenced to death who were not able to exercise their right to seek for pardon” and ordered that the “State must adopt, within a reasonable period of time, the legislative and administrative measures necessary to establish a procedure that guarantees that every person sentenced to death has the right to request pardon or commutation of the sentence, pursuant to a regulation that determines the authority with the power to grant it, the events in which it proceeds and the corresponding procedure; in these cases the sentence must not be executed while the decision regarding the pardon or commutation of the sentence requested is pending.”²⁰

49. In the Raxcacó Reyes Case, the Court reiterated that the annulment of Decree No. 159 of 1892, by Decree No. 32/2000, resulted in the elimination of the powers granted to an organ of the State to hear and decide the right to a pardon stipulated in Article 4(6) of the Convention.²¹

4. The death penalty in Guatemala presently

50. After these decisions, the Guatemalan State has not sentenced or implemented the death penalty. Neither has it regulated the pardon prerogative. However, the Criminal Chamber of the Supreme Court of Justice has commuted the death penalty sentence to all of those who have requested it.²²

¹⁷ I/A Court H.R., *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005. Series C No. 126, paras. 94 and following.

¹⁸ I/A Court H.R., *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005. Series C No. 126, para. 107.

¹⁹ I/A Court H.R., *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005. Series C No. 126, para. 110.

²⁰ I/A Court H.R., *Case of Fermín Ramírez v. Guatemala Case. Merits, Reparations and Costs*. Merits, Reparations and Costs. Judgment of June 20, 2005. Series C No. 126.

²¹ I/A Court H.R., *Case of Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 133, para. 85.

²² See press note published by Efe Agency, *Piden en Guatemala restituir figura de indulto, y con ella, la pena de muerte* (There are requests in Guatemala to reinstate clemency, and with it, the death penalty,) March 10, 2016, El periódico, *conmutación de la pena de muerte* (Death penalty commutation,) February 12, 2016. The IACHR has also kept note of several domestic decisions made before year 2000, in which domestic tribunals decided not to execute the death penalty as it was in violation of Article 4(2) of the American Convention. To that respect, in its Annual Report of 1997, the IACHR stated: “The Commission referred in its last report to the noteworthy judgment of the Ninth Chamber of the Court of Appeals of January 30, 1997, commuting three death sentences to non-commutable sentences of 50 years on the basis of the requirements of domestic law including the State’s obligations pursuant to Article 4 of the American

51. The death penalty is still established for the following crimes: 1. Abduction or kidnapping; 2. Parricide; 3. Extrajudicial execution; 4. Murder of the President or Vice-president of the Republic; 5. Crimes related to drug trafficking in which persons die. Some of these crimes make reference to the dangerousness of the agent as a decisive criterion for the imposition of the death penalty.

52. On February 12, 2008, Guatemalan Congress passed a law which restored the President's power to condone the life or confirm the death penalty of those sentenced to it by means of a clemency request.²³ However, that same month then President, Alvaro Colom, vetoed the law, arguing that it violated Guatemalan commitments under the American Convention.²⁴ In January 2012, President Alvaro Colom vetoed again the restitution of the power of Presidential pardon for those sentenced to death penalty.²⁵

53. On February 11, 2016 the Constitutional Court declared unconstitutional the phrase that enabled the death penalty to be sentenced in cases of murder. Said phrase read that "however, the death penalty will be imposed instead of the maximum imprisonment, if due to the circumstance of the acts and of the occasion, the way it was carried out and the determining motives, a greater dangerousness of the agent is revealed. Those who are not sentenced to the death penalty for this crime will not be granted a sentence reduction for any reason." Although the Constitutional Court only ruled with respect to the crime of murder, the same phrase was declared unconstitutional with regards to the crimes of parricide, extrajudicial execution and in the murder of the President of the Vice-president.

54. According to information of public knowledge, in 2016 draft bills to both abolish and reinstate the death penalty were submitted to the National Congress. Draft bill 5100, filed on July 6, 2016 aims to approve the abolition of the death penalty law. Draft bill 4941, lodged on February 4, 2016 aims to reinstate the death penalty and regulate the procedure to seek for clemency.²⁶

B. The criminal proceedings against the alleged victims

1. Proceedings during the pre-trial phase

55. During the investigative phase, while the alleged victims were deprived of their liberty, there were proceedings that took place while the alleged victims did not have legal defense.

56. According to the case record, on April 19, 1993, Roberto Girón gave his "initial statement" for the purpose of the investigations ("*declaración indagatoria*") before the First Peace Judge.²⁷ In this

Convention. The Commission has received information that the Court of First Criminal Instance, Narcoactivity and Crimes against the Environment of the Department of Santa Rosa, Cuilapa issued a similar decision on May 8, 1997, in the case of Guillermo López Contreras, having determined that, under the terms of the applicable legal regime, the court could not legally impose the death penalty for a crime for which that punishment was not prescribed at the time of Convention ratification. The Commission recognizes and values such decisions which properly respect and reflect the international human rights obligations which the State has undertaken." See IAHR, Annual Report of the Inter-American Commission on Human Rights 1997, Guatemala, OEA/Ser.L/V/II.98, Doc.6, February 17, 1998, para. 27.

²³ See Congress of the Republic of Guatemala, Decree Number 6-2008, *Ley Reguladora de la Conmutación de la Pena para los Condenados a Muerte* (Law regulating sentence commutation for those sentenced to death.)

²⁴ News article published at: elmundo.es, *Colom veta la ley que restituyó la pena de muerte en Guatemala* (Colom vetoes the law that reinstated the death penalty in Guatemala,) March 15, 2008; News article published at: BBCMundo.com, *Colom vetó pena de muerte* (Colom vetoed the death penalty,) March 15, 2008.

²⁵ News article published at: laprensa.com.ni, *Colom veta ley con que reactivarían pena de muerte* (Colom vetoes law that would reactivate the death penalty,) November 5, 2010.

²⁶ *Iniciativas de ley presentadas ante el Congreso de la República de Guatemala* (Draft bills lodged before the National Congress of Guatemala.)

²⁷ Annex 1. Initial statement rendered by Roberto Girón before the First Peace Judge, April 19, 1993. Annex A to the observations brief of the State submitted on September 5, 1996.

proceeding, the judge advised him that he could propose a defense attorney and that he had five days to do so or the Court would do it *ex officio*. Mr. Girón expressed that he would appoint counsel later.²⁸

57. In his statement, the alleged victim expressed that he was detained on April 18, 1993, and he was not informed of the reason for it. The alleged victim was asked: “which was the participation in the crime committed by Mr. Pedro Castillo Mendoza?” He replied, “It wasn’t me, it was possibly he with other persons.”²⁹

58. According to the case record, Pedro Castillo Mendoza gave his initial statement during the investigative phase twenty minutes later, on the same date and before the same authority.³⁰ The record of the proceedings stated the alleged victim was detained for the crime of aggravated rape and that he “can propose a defense attorney, who may be present during his initial statement proceeding and that he has five days to do so, otherwise the Court would appoint him one *ex officio*. He stated that he will do it later.”³¹

59. In said proceeding the Judge asked Pedro Castillo Mendoza the following: “is it true that you were under the influence of alcohol, drugs, medications or narcotics when you raped the child Sonia Marisol Alvarez García?” He replied: -“No, I was in my right mind and so was Roberto Girón, who was in a normal state.” The judge also asked -“Which was the reason for you to rape and kill the afore-mentioned child?” He replied: “I don’t know what happened to us, who knows what we were thinking” and then he added “I have never committed any crime, and this is the first time I did it, but I don’t know what happened to my co-worker Roberto Girón and I, and I don’t recall it was our idea to act that way (...)”³²

60. On April 22, 1993, the Second Chamber of the First Trial Court ordered the pre-trial detention of Messrs. Girón and Castillo. It stated the following: “to order the pre-trial detention it will be necessary: I) that there is information of a crime being committed; II) that there are enough rational reasons to believe that the person detained has committed the crime or participated in it. The analysis of the documents in file shows that there is merit in the process to order the measure of pre-trial detention against the accused identified above, and therefore, what corresponds should be decided by law.”³³

61. On April 27, 1993 Leonel Chinchilla Cristales was appointed before a judge as Roberto Girón’s *ex officio* defense attorney³⁴. On the same date, Edy Iván Bocanegra Conde was appointed as *ex officio* defense attorney for Pedro Castillo Mendoza.³⁵ It is a non-controversial fact that both were law students and not practicing attorneys.

²⁸ Annex 1. Initial statement rendered by Roberto Girón before the First Peace Judge, April 19, 1993. Annex A to the observations brief of the State submitted on September 5, 1996.

²⁹ Annex 1. Initial statement rendered by Roberto Girón before the First Peace Judge, April 19, 1993. Annex A to the observations brief of the State submitted on September 5, 1996.

³⁰ Annex 2. Initial statement rendered by Pedro Castillo Mendoza before the First Peace Judge, April 19, 1993. Annex A to the observations brief of the State submitted on September 5, 1996.

³¹ Annex 2. Initial statement rendered by Pedro Castillo Mendoza before the First Peace Judge, April 19, 1993. Annex A to the observations brief of the State submitted on September 5, 1996.

³² Annex 2. Initial statement rendered by Pedro Castillo Mendoza before the First Peace Judge, April 19, 1993. Annex A to the observations brief of the State submitted on September 5, 1996.

³³ Annex 3. Pre-trial detention order of April 22, 1993 by Second Chamber of First Trial Court.

³⁴ Annex 4. Appointment record for Leonel Chinchilla Cristales as assigned defender for Roberto Girón, April 27, 1993.

³⁵ Annex 4. Appointment record for Edy Iván Bocanegra Conde as assigned defender for Pedro Castillo Mendoza, April 27, 1993.

62. On May 5, 1993 the Judge from the Second Chamber of the First Trial Court carried out a “confrontation” (*careo*³⁶) between the defendants. The record of said proceeding indicates that “for the record, during this proceeding the only present are the two mentioned defendants, not their defense attorneys.”³⁷ It is noted that the defendants did not agree “about each of the aspects already mentioned.”³⁸

63. On May 12, 1993 the Department of Escuintla First Chamber of the First Trial Criminal Court, decided to proceed with the criminal prosecution against Roberto Girón and Pedro Castillo Mendoza for the crime of aggravated rape.³⁹

64. The Commission notes that the crime of aggravated rape, Article 175 of the Criminal Code, established: “If with reason of or as a result of the rape, the offense results in death, the sentence of twenty to thirty years imprisonment shall be imposed. The death penalty will be sentenced if the victim is younger than ten years of age.”⁴⁰

65. On June 2, 1993, Roberto Girón’s assigned defender submitted a brief expressing his view with respect to the evidence provided in the proceedings, concluding that “according to the proceedings carried out, there is a discrepancy between the statements of witnesses, captors and police report and in addition to this; nobody knows for sure that my defendant had participated in the crime (...)”⁴¹

66. On June 14, 1993, Pedro Castillo Mendoza’s assigned defender submitted his arguments during the hearing granted by the Court for an extension of five days. In his arguments he stated that his defendant is accused of aggravated rape, however “there are mitigating circumstances that modify his criminal responsibility. This because he had confessed the crime in his initial statement during the investigative phase, and in doing so, helped to clarify the crimes for which he is accused.”⁴²

2. Conviction

67. On October 4, 1993 the First Chamber of the First Trial Criminal Court of Escuintla convicted the alleged victims for the crime of aggravated rape and sentenced them to the death penalty.⁴³

68. In the judgment it was indicated that on June 1, 1993 the Court decided to open the proceedings for evidence gathering for a term of 28 days. A public hearing was scheduled for July 29, 1993 as well as the proceedings to hear statements from: Carlos Enrique del Cid Lopez, Juan Ernesto del Cid Tuche and Pablo de Jesús Rivera. However, this was not carried out because “when opening and revising the

³⁶ Procedure established in Guatemalan Criminal Law, which aims to clarify the contradictory aspects of the statements of those involved in criminal proceedings.

³⁷ Annex 5. Record of the confrontation of the defendants (*careo*) by Second Chamber Judge of First Trial Court of May 5, 1993.

³⁸ Annex 5. Record of the confrontation of the defendants (*careo*) by Second Chamber Judge of First Trial Court of May 5, 1993.

³⁹ Annex 6. Decision by the Department of Escuintla First chamber of the First Trial Criminal Court, May 12, 1993.

⁴⁰ Decree No. 17-73, National Congress of the Republic of Guatemala, Criminal Code.

⁴¹ Annex 7. Brief submitted by Leonel Chinchilla Cristales to the Judge of the First Chamber of the First Trial Criminal Court of Escuintla proposing evidence on June 2, 1993.

⁴² Annex 8. Brief submitted by Edy Iván Bocanegra Conde during a hearing that took place for 5 days before the Judge of the First Chamber of the First Trial Criminal Court of Escuintla on June 14, 1993.

⁴³ Annex 9. Judgment of the First Chamber of the First Trial Criminal Court of Escuintla, October 4, 1993.

document submitted by LEONEL CHINCHILLA CRISTALES, the Judge realized that it was not signed and does not have the respective signature.”⁴⁴

69. It was stated in the judgment that: “(i) evidential value is given to the initial statement given by the defendant Roberto Girón, single surname, since it constitutes an improper confession, accepting facts to his detriment, like that he was carrying a *machete* knife which had blood stains; (ii) evidential value is given to the initial statement given by Pedro Castillo Mendoza, which constitutes a qualified confession, where he states that it was Roberto Girón who was carrying the *machete* knife and not he. He also expressed that “it was the first time he committed a crime and he accepted that he didn’t remember who came up with the idea of committing the crime investigated and especially, of behaving in such a way, and therefore he accepted the facts to his detriment.”⁴⁵ The Court concluded that “ROBERTO GIRÓN, single surname, and PEDRO CASTILLO MENDOZA were guilty of the crime of AGGRAVATED RAPE, based on the initial statements given by both, where they admitted to the facts alleged against them (...).”⁴⁶

70. With regards to the sentence, the Court considered: “our criminal law establishes that the DEATH PENALTY should be imposed to the person who rapes and then kills another person who had not reached ten years of age.” The Court added that the crime committed “has the only sanction of the sentence mentioned in our Criminal Code, that was mentioned before.”⁴⁷

3. Appeal

71. The alleged victims submitted appeals against the conviction. According to information provided by the parties, these remedies were dismissed by the Twelfth Chamber of the Appeal Court on December 1, 1993.

4. Cassation Appeal

72. The alleged victims submitted cassation appeals on substantive grounds against the decision of the Twelfth Chamber of the Supreme Court of Justice.

73. In particular, Pedro Castillo Mendoza’s defense attorney argued the following: i) the chamber did not take into account the mitigating elements in favor of his defendant, such as his confession in his initial statement at the pre-trial phase and not having any previous criminal records; ii) the girl died because of the wounds to her neck and not because of the rape and his defendant was not carrying the knife nor was he seen with it, which suggests that his client was not the person who killed the offended but that he only participated in the rape.⁴⁸

74. For his part, Roberto Girón’s defender argued, among other things, that the Chamber erred in the sentencing of the death penalty because it did not link each of the evidence with the other evidence and it did not include the reasoning of why it gave value, or not, to such evidence and reached the conclusions it reached with legal certainty.⁴⁹

⁴⁴ Annex 9. Judgment of the First Chamber of the First Trial Criminal Court of Escuintla, October 4, 1993.

⁴⁵ Annex 9. Judgment of the First Chamber of the First Trial Criminal Court of Escuintla, October 4, 1993.

⁴⁶ Annex 9. Judgment of the First Chamber of the First Trial Criminal Court of Escuintla, October 4, 1993.

⁴⁷ Annex 9. Judgment of the First Chamber of the First Trial Criminal Court of Escuintla, October 4, 1993.

⁴⁸ Annex 10. Brief from Iván Bocanegra Conde explaining the substantive grounds of the cassation appeal submitted on March 17, 1994.

⁴⁹ Annex 11. Brief from Leonel Chinchilla Cristales explaining the substantive grounds of the cassation appeal submitted on February 25, 1994.

75. On September 27, 1994 the Supreme Court of Justice dismissed the cassation appeals submitted. According to information provided by the parties, on June 9 the alleged victims submitted an Amparo remedy before the Constitutional Court, against the decision of the Supreme Court of Justice. On November 7, 1995 the Constitutional Court dismissed the Amparo.

5. Clemency

76. On July 12, 1996 Pedro Castillo Mendoza and Roberto Girón submitted a request for pardon to the President of the Republic. They alleged that the different judicial bodies in the process against them omitted a deep analysis about the evidence produced in their trial and about the breaches of the law. They indicated that the convictions were more of a political nature than juridical, and they requested the commutation of their sentences to the maximum prison term.⁵⁰

77. On July 17, 1996 the President of the Republic denied clemency. He considered that “competes exclusively to the instituted courts to judge and implement the execution of the decision, which exercise must be respected by the other State powers, abiding by judicial decisions, especially if constitutional guarantees of due process have been observed and the right of the defense has been exercised.”⁵¹

78. The petitioners submitted an application for Amparo against the decision of the President of the Republic before the Constitutional Court on July 20, 1996.

79. The Constitutional Court denied the Amparo requested on August 9, 1996. The Court stated Decree 159 of the Legislative Assembly was not in effect, nevertheless, the request for the commutation of the death penalty is an admissible remedy against the conviction that imposes the death penalty. The Court added that in the case under study, due process was observed.⁵²

6. Remedies to stay the execution of the death penalty

80. Subsequently, the judge of the criminal enforcement phase set a date for the execution of the death penalty.⁵³ The alleged victims exhausted a series of remedies to stay the execution, which was stayed initially. However, on September 13, 1996 the death penalty of the alleged victims was carried out by firing squad.

81. According to public information, in the execution participated 20 guards of the Jail Farm Canada⁵⁴ and was broadcasted nationally and, since Pedro Castillo didn't die during the shooting from the firing squad, one of the members of the squad approached him to fatally shoot him.⁵⁵

⁵⁰ Annex 12. Clemency request submitted by Pedro Castillo Mendoza and Roberto Girón before the President of the Republic on July 12, 1996.

⁵¹ Annex 13. Decision made by the President of the Republic denying the clemency request of July 17, 1996.

⁵² Annex 14. Decision from the Constitutional Court that denies the application for Amparo of August 9, 1996. [File 1015-96](#).

⁵³ Annex 15. Communication from the First Judge of Criminal Execution phase to the Director of the *Granja Modelo de Rehabilitación Canadá* (Canada Model Rehabilitation Farm), Escuintla.

⁵⁴ Artículo de prensa publicado en El País, [Fusilados dos campesinos que violaron y asesinaron a una niña guatemalteca](#), 14 de septiembre de 1996.

⁵⁵ Amnesty International. The Return of the Death Penalty: Guatemala. March, 1997, p. 1; *El País* Newspaper, [Fusilados dos campesinos que violaron y asesinaron a una niña guatemalteca](#) (Shot by firing squad two peasants that raped and killed a Guatemalan girl,) September 4, 1996; AP Archive, Guatemala: [two men executed by firing squad](#); Svendsen, Kristin, Gustavo Cetina. *El corredor de la muerte. Condición carcelaria de los condenados a muerte en Guatemala* (The death corridor. Prison conditions of those sentenced to death in Guatemala). *Instituto de Estudios Comparados en Ciencias Penales*, p. 58.

82. As indicated in the general considerations section, the execution by firing squad was a method set forth in the Guatemalan Law at the time of the events. Later, by means of Decree 100-96 of October, 1996, said method was repealed and was replaced with the lethal injection procedure. This was done in considering that “while death penalty is in force in Guatemala, its execution must be carried out in the most humanitarian way possible not only for the convicted that suffers it but also for the society, which in a way or another, is a spectator.” It also considered that “modern trends in Forensic Medicine recommend the use of the procedure of lethal injection, which combines the guarantee of its effectiveness in a very short period of time, with the minimum suffering on the part of the person subject to it (...).”⁵⁶

VI. ANALYSIS ON THE MERITS

A. General considerations on the analysis standard in death penalty cases

83. The Inter-American Commission considers it relevant to reiterate its previous decisions regarding the heightened scrutiny to be used in cases involving the death penalty. The right to life has received broad recognition as the supreme human right and as a *condition sine qua non* for the enjoyment of all other rights.⁵⁷

84. For this reason, the IACHR’s duty to ensure that any deprivation of life that may occur by the application of the death penalty does not violate any obligation enshrined in the instruments of the Inter-American System of Human Rights, is particularly important.⁵⁸ This rigorous scrutiny is consistent with the restrictive approach adopted by other international human rights bodies when they analyzed cases involving the death penalty⁵⁹ and the Inter-American Commission has mentioned and applied it in previous cases of death penalty submitted before it.⁶⁰

85. As the Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and the attendant due process guarantees.⁶¹ The IACHR has stated:

⁵⁶ Decree Number 100-96 of the Congress of the Republic of Guatemala.

⁵⁷ IACHR; Report No. 76/16, Case 12.254. Merits. Victor Saldaño. United States of America. December 10, 2016, para.169.

⁵⁸ See on this regard, IACHR, The Death Penalty in the Inter-American Human Rights System: from Restrictions to Abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011.

⁵⁹ See, for example, I/A Court H.R., Advisory Opinion OC-16/99 (October 1, 1999) “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,” para. 136 (the finding that “[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result;”) HRC-UN, Baboheram-Adhin et al. v. Suriname, Communications Nos. 148-154/1983, approved on April 4, 1985, para. 14(3) (considering that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State;) Report of the UN Special Rapporteur on Extrajudicial Executions, Bacre Waly Ndiaye, submitted in accordance to 1994/82 Order of the Inter-American Commission on Human Rights, Question of the violation of human rights and fundamental freedoms in any part of the world with particular reference to colonial and other dependent countries and territories, UN Doc.E/CN.4/1995/61 (December 14, 1994) (hereinafter the “Ndiaye Report”), para. 378 (in which it is highlighted that in cases related to the death penalty, the observance of all the rules for an impartial trial to each and every of the cases is what must be guaranteed and when there is indicia to the contrary, verified in accordance with the obligation that international law imposes, to conduct exhaustive and impartial investigations of all the claims of a violation to the right to life.)

⁶⁰ IACHR, Report 11/15, Case 12.833, Merits (Publication,) Félix Rocha Díaz, United States of America, March, 23, 2015, para. 54; Report No. 44/14, Case 12.873, Merits (publication,) Edgar Tamayo Arias, United States of America, July 17, 2014, para. 127; Report No. 57/96, Andrews, United States of America, IACHR Annual Report, 1997, paras. 170-171.

⁶¹ IACHR, The Death Penalty in the Inter-American System of Human Rights: from Restrictions to Abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, para. 41.

due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.⁶²

86. Therefore, the Inter-American Commission will review the allegations of the petitioners in this case, with a rigorous level of scrutiny to ensure, in particular, that the rights to life, fair trial and judicial protection, among others set forth in the American Convention, have been respected by the State.

B. Rights to a Fair Trial⁶³ and to Judicial Protection⁶⁴ in the criminal procedure

1. General Considerations

87. In line with that indicated in the previous section, the IACHR reiterates the fundamental importance of ensuring full and strict compliance with the guarantees of due process to prosecute people for crimes that carry a death penalty sentence. As the Commission has stated, “the States that still maintain the death penalty must, without exception, exercise more stringent control of the observance of the judicial guarantees in those cases”⁶⁵ in order to ensure that any deprivation of life through such sentence is in strict compliance with the requirements established in the applicable Inter-American Human Rights instruments.⁶⁶

88. In general terms, the Court has stated that the right to defense must be necessarily exercised as from the moment a person is accused of being the perpetrator or participant of an illegal act and ends when the jurisdiction thereby ceases.⁶⁷

89. The Commission considers that an adequate and effective exercise of due process guarantees significantly depends on the technical defense available to the defendant in criminal proceedings. The Inter-American Court has pointed out that the right to a defense includes a defense that is effective, timely, exercised by skilled people, strengthens the defense of the concrete interest of the accused, and is not simply

⁶² IACHR, Report No. 78/07, Case 12.265, Merits (Publication,) Chad Roger Goodman, Bahamas, October 15, 2007, para. 34.

⁶³ Article 8 of the American Convention sets forth, on the relevant, the following:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to the law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (...) (c) adequate time and means for the preparation of his defense; (...) (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law (...).

⁶⁴ Article 25 of the American Convention establishes, on the relevant, the following: 1. Every person has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

⁶⁵ IACHR. The Death Penalty in the Inter-American System of Human Rights: from Restrictions to Abolition, OEA/Ser.L/V/II.Doc.68, December 3, 2011, p. 91.

⁶⁶ IACHR, Report No. 54/14, Petition 684-14, Admissibility, Russell Bucklew and Charles Warner, United States of America, July 21, 2014, para. 39.

⁶⁷ I/A Court H.R., *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C No. 206, para. 29. Citing *mutatis mutandis* I/A Court H.R., *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 71; and *Case of Heliodoro Portugal v. Panamá. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 186, para. 148.

a means to comply formalistically with the legitimacy of the process. Therefore, any form of insubstantial defense would result in the violation of the American Convention.⁶⁸

90. Specifically, on the right to right to have an assigned counsel when the person does not have private counsel, the Inter-American Court has stated that:

(...) to appoint an *ex officio* defender with the only purpose to comply with a procedural formality would be the tantamount to not having technical defense, so it is compulsory that said counsel acts diligently in order to protect the due process of the defendant and avoid the infringement of his rights and break the trust relationship. To this end, it is necessary that the institution of the public defense as a means, through which the State guarantees the inalienable right of all accused of a crime to be assisted by a defender, is equipped with sufficient guarantees for its efficient participation and equality of arms with the persecutory power. The Court has recognized that to fulfill this purpose, the State shall adopt all appropriate measures. Among them, having trained and qualified defenders who can act with functional autonomy.⁶⁹

91. In the Ruano Torres *et al. v. El Salvador* Case, the Inter-American Court stated that the States may be responsible for not providing a suitable, properly trained and effective defense to persons subject to criminal proceedings and who do not have their own appointed counsel.⁷⁰

92. In similar sense, the UN Basic Principles on the Role of Lawyers provide that,

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services⁷¹.

93. The Commission reiterates that the guarantee of an adequate technical defense in cases that could result in the imposition of a death penalty must be analyzed very strictly. In the words of the Commission, "strict compliance with the right to receive competent technical assistance is imposed by the possibility of the death penalty being sentenced."⁷²

94. Como lo ha expresado la CIDH:

The appointment of an attorney by the state does not, in and of itself, ensure effective assistance of counsel. At the same time, while the state is responsible for ensuring that such assistance is effective, it is not responsible for what may be understood as decisions of strategy or for every possible shortcoming. Rather, the Commission must evaluate whether the assistance of counsel was effective in the overall context of the process and taking into

⁶⁸ I/A Court H.R., *Case of Ruano Torres et al. v. El Salvador Case. Merits, Reparations and Costs*. Judgment of October 5, 2015. Series C No. 303, para. 158.

⁶⁹ I/A Court H.R., *Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of October 5, 2015. Series C No. 303, para. 157.

⁷⁰ I/A Court H.R., *Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of October 5, 2015. Series C No. 303, para. 164.

⁷¹ Basic Principles on the Role of Lawyers, Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, ONU Doc. A/CONF.144/28/Rev.1 p. 118 (1990).

⁷² IACHR, *The Death Penalty in the Inter-American System of Human Rights: From Restrictions to Abolition*, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, p. 131.

account the specific interests at stake. In the present case, the interests at stake included the potential application of the death penalty, and the assistance of counsel must be evaluated in that context⁷³.

95. Finally, under Article 25 of the Convention, the States must provide adequate and effective remedies against acts in violation of their rights, both those established in the Convention and in the law.⁷⁴

2. Case analysis

96. Firstly, the Commission recalls that as outlined in the proven facts section, the alleged victims did not have technical defense in at least the following proceedings: (i) when offering their initial statements in the investigative phase on April 19, 1993, (ii) during the confrontation proceeding (*careo*) among the defendants, which took place before the Second Chamber of the First Trial Court on May 5, 1993; (iii) on 22 April 1993, during the proceeding in which pretrial detention was ordered.

97. This fact alone constitutes a violation of the right to technical assistance because, as stated above, said right must be exercised from the beginning of the procedure and in every proceeding without exception. In addition, the IACHR has observed that the absence of technical defense has a clear impact on the process. Indeed, according to the conviction, the initial statements which were rendered without technical assistance had a predominant value to justify the sentence, when considered an "improper confession" in the case of Roberto Girón and "qualified confession" in the case of Pedro Castillo Mendoza.

98. In addition, the Commission notes that the decision of April 22, 1993, which imposed the pretrial detention, was arbitrary, as indicated in the previous section. Therefore, it was of particular relevance that the alleged victims had technical assistance at that time in order to exercise control on the legality of the decision and to exercise the relevant remedies.

99. Secondly, the Commission highlights that the *ex officio* defenders appointed on April 27, 1993, were law students and not graduated lawyers. As informed by the State, the appointment of law students for to defend criminal cases was allowed by the Criminal Procedural Code in effect at the time.

100. As noted in the previous section, it is a State duty to guarantee the right to technical assistance to persons who do not have private counsel and such appointment may not be a mere formality. In addition, such defense must be duly qualified and for this purpose the State shall adopt all necessary measures to create the conditions required for the exercise of this right. The Commission considers that the allocation of law students as *ex officio* defense attorneys on a death penalty case, violates the right to have adequate technical assistance. The resort to law students to exercise this essential function shows that at the time of the facts the State had not created the conditions needed to guarantee this fundamental component of due process.

101. The Commission also recalls that lawyers defending death penalty cases should be professionals with adequate experience and training in such cases.⁷⁵ As a consequence, the resort to law

⁷³ IACHR, Report No. 78/15, Case 12.831. Merits (Publication), Kevin Cooper. United States. October 28, 2015, para.130.

⁷⁴ I/A Court H.R., *Case of Castillo Páez v. Perú. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 82; *Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151, para. 131, and *Case of Castañeda Gutman v. México. Preliminary Objections, Merits and Reparations and Costs*. Judgment of August 6, 2008. Series C No. 183, para. 78.

⁷⁵ For example, in the case of Roberto Moreno Ramos against the United States of America, the IACHR expressed its particular concern respecting the Petitioners' submissions on the deficient state of the capital public defender system in the state of Texas. According to the Petitioners, Texas has no state-wide agency responsible for providing specialized representation in capital cases. The IACHR expressed its concern regarding the strong possibility that the quality of public defender services offered in death penalty cases in Texas may be deficient in part due to the lack of effective oversight by the State (...). See IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States of America, January 28, 2005, paras. 56-57; IACHR, Report No. 78/15, Case 12.831. Merits (Publication). Kevin Cooper. United States. October 28, 2015, para.133.

students to exercise defense results in an aggravated violation of the right to technical assistance, considering that the cases could end with the death penalty sentence.

102. In addition, and notwithstanding that the violation of the right of defense was materialized by itself by the appointment of students as *ex officio* defenders, the Commission notes that the detrimental consequences of these appointments were reflected in the specific case. For instance, according to the record, in its Order of July 29, 1993, the Court decided to receive the statements of three people; however due diligence could not be achieved because Roberto Girón's defender did not follow the legal formalities for submitting to the judge the list of questions that he would ask witnesses.

103. The Commission further notes that none of the multiple remedies exhausted by the alleged victims, carried out a control of the process in terms of due process violations outlined in this section. Therefore, Messrs. Girón and Castillo were in a situation of defenselessness in this respect.

104. For the above reasons, the Commission concludes that the Guatemalan State is responsible for the violation to the Right to a Fair Trial established in Article 8(2)(c) and 8(2)(e) of the American Convention to the detriment of Roberto Girón and Pedro Castillo Mendoza in connection to the obligations set forth in Articles 1(1) and 2 of the same Convention.

C. Right to Humane Treatment⁷⁶ and relevant provisions of the Inter-American Convention to Prevent and Punish Torture⁷⁷ in relation to the “the execution method

1. General Considerations on certain methods of execution and their compatibility with human rights law

105. The Commission notes that even though the American Convention does not prohibit the death penalty, various organs have considered that an execution method is incompatible with the right to humane treatment and the prohibition of torture when it is not designed to inflict the least possible suffering⁷⁸.

106. The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment has stated that public executions increase the cruel, inhumane or degrading treatment that is characteristic of the death penalty and could only have a dehumanizing effect over the victim, as well as a brutal effect on the

⁷⁶ Article 5 of the American Convention establishes in the relevant:

1. Every person has the right to have his physical, mental and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of liberty shall be treated with respect for the inherent dignity of the human person.

⁷⁷ Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture set forth:

Article 1. The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

Article 6. In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction. The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

⁷⁸ In that respect, guideline xi) of the “UE Guidelines on Death Penalty” establishes that “Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other degrading manner [EU Guidelines on the Death Penalty: revised and updated version](#).”

witnesses of the execution.⁷⁹ Likewise, the Human Rights Committee has considered that public executions are incompatible with human dignity.⁸⁰

107. United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty establish that “when the death penalty may be carried out it must be done in a way to keep to a minimum the suffering of prisoners.”⁸¹ The Special Rapporteur on Torture, referring to the Safeguards, has indicated that there is no categorical evidence to show that any of the execution methods currently used to implement the death penalty comply with the prohibition of torture and cruel, inhumane and degrading treatment and added “even if the safeguards were observed, all currently used methods of execution can inflict pain and excessive suffering.”⁸²

108. The Human Rights Committee has applied this test of “least physical and mental suffering possible” to determine if the method to execute the sentence constitutes cruel, inhumane or degrading treatment. In the Case of Ng. v. Canada, the Committee considered that execution by gas chamber may cause prolonged suffering and agony and does not result in instantaneous death since asphyxiation by cyanide gas may take more than 10 minutes. It concluded that this method of execution does not pass the test of “least physical and mental suffering as possible” and constitutes cruel and inhumane treatment inhumane contrary to article 7 of the International Covenant on Civil and political rights.⁸³

109. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has indicated with respect to the methods for the execution of the death penalty that “the extraordinary power conferred on the State to end a person’s life through a firing squad, hanging, lethal injection or other means to kill, poses a dangerous risk of abuse. This power can be kept under control only through the public supervision of the public punishment. It is a commonplace that due process serves to protect the accused. However, due process is also a mechanism through which society ensures that the punishments inflicted on their behalf are fair.”⁸⁴

110. Also, various States have indicated, within the frame of high level discussions on the question of the death penalty before the United Nations Human Rights Council, that methods of execution such as stoning, beheading, electrocution, or shooting inflict excruciating pain and therefore constitute inhuman or degrading treatments.⁸⁵

⁷⁹ Office of the High Commissioner for Human Rights, “UN Special Rapporteurs condemn ongoing executions in Iran”, 28 June 2012.

⁸⁰ Human Rights Committee cited in: International Bar Association, The Death Penalty under International Law: A background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty, p.6.

⁸¹Economic and Social Council, Safeguards guaranteeing protection of the rights of those facing the death penalty.

⁸² A/HRC/30/18, Human Rights Council, Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, para.32; also see: Office of the High Commissioner for Human Rights “Despite progress in abolishing the death penalty, thousands remain on death row.”

⁸³ Human Rights Committee, Case of Ng. v. Canada, Decision of November 5, 1993, Communication No. 469/1991, paras.16(2) and 16(4.)

⁸⁴ A/HRC/30/18, Human Rights Council, Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, para. 50.

⁸⁵ A/HRC/27/26, Summary of the high-level panel discussion on the question of the death penalty, Human Rights Council, 30 June 2014, para.25.

2. Case analysis

111. The Commission will now analyze, in light of the previous standards, whether the method of execution employed in the instant case was compatible with the right to humane treatment and the prohibition of torture.

112. First, as regards to the compatibility of the method of execution of the death penalty with the test of the least possible suffering, the Commission recalls that Roberto Girón and Pedro Castillo Mendoza were executed on September 13, 1996 by shooting firearms, in a public event broadcasted nationally. In addition, as Pedro Castillo Mendoza did not die as a result of the shots from the firing squad, one of the members of said squad has to fatally shoot him with a separate shot.

113. The Commission emphasizes, on the one hand, that execution through firearms can lead to prolonged agony and suffering, as was exemplified in the present case with Pedro Castillo Mendoza, who did not die during the discharge of bullets and had to receive a “coup de grâce”. As indicated in the section on proven facts, the State subsequently repealed the method of execution for the death penalty provided for in the legislation by means of Decree 100-96 and replaced it with the lethal injection procedure so that the Execution is carried out “in the most humane manner possible” and to ensure “the minimum suffering” of the person to whom the punishment is intended. In the same vein, the Commission takes into account that the method of execution by a firing squad did not generate the least suffering possible, and there were other alternatives to this punishment that generated less suffering.

114. In addition, the Commission considers that the transmission by national television of the executions of the alleged victims contributed to an increase in the level of suffering of their executions. While public oversight of executions may pursue legitimate purposes such as ensuring that the least possible suffering occurs or that the State implements the procedure as provided in the regulations, the Commission emphasizes that in the Guatemalan context the televised transmission of the executions was not directed towards this end, and that this purpose can be achieved by different means that do not convert a judicial execution into a type of public spectacle.

115. Secondly, as regards to the compatibility of the method of execution with the prohibition of torture, the Commission goes on to consider whether that method constituted torture or other inhuman or degrading treatment in the light of the constituent elements of torture.

116. According to the jurisprudence of the inter-American system, in order for a conduct to be classified as torture, the following elements must concur: (i) that it is an intentional act committed by a State agent or with his authorization or acquiescence; (ii) that causes intense physical or mental suffering and (iii) that is committed with any aim or purpose⁸⁶.

117. The Commission recalls as regards the first and third element that it was a penalty established by law for the purpose of punishing two persons for the commission of the crime of aggravated rape, therefore both elements are present in this case. As regards the third element, the Commission considers it pertinent to recall that several factors are relevant to the analysis: (i) 20 guards participated in the shooting by firing the alleged victims with firearms, a method which, as indicated, does not guarantee a death without Agony, for this depends on the bullets impacting vital organs of the alleged victim, and even in this case death may not occur instantaneously; (ii) it is a proven fact that Pedro Castillo did not die during the discharge of bullets from the Squad so a guard came up to give him a “coup de grâce”; (iii) the executions were televised to expose the alleged victims to public scorn. The IACHR considers that these elements taken together suggest that the method of execution generated intense physical and mental suffering for the alleged victims, in violation of the prohibition of torture provided for in articles 1 and 6 of the CIPST and articles 5.1 and 5.2 of the American Convention.

⁸⁶ CIDH, Informe No. 5/96, Caso 10.970, Fondo, Raquel Martin Mejía, Perú, 1 de marzo de 1996, sección 3. análisis y Corte IDH. Caso Bueno Alves Vs. Argentina. Fondo, Reparaciones y Costas. Sentencia de 11 de mayo de 2007. Serie C No. 164, párr. 79.

118. Taking into account the aforementioned reasons, the IACHR concludes that the method used for the execution of the death penalty constituted cruel, inhumane and degrading treatment in violation of the rights enshrined in Articles 5(1) and 5(2) of the American Convention in connection to Articles 1(1) and 2 of the same to the detriment of Roberto Girón and Pedro Castillo Mendoza. In addition, the State is responsible for the violation of Articles 1 and 6 of the ICPPT.

D. Right to Life⁸⁷ and the imposition of the death penalty sentence and its execution

119. Both the Inter-American Commission and Court have indicated that the imposition of the death penalty must adhere to the provisions of Article 4(2) of the American Convention, which means that it can only be imposed for the most serious crimes⁸⁸ and cannot be extended to offences for which it was not intended at the time of ratification of the American Convention.⁸⁹ Also, it follows from the text of the Convention and prior interpretation by the IACHR with regard to death penalty that sentencing in procedures within the framework of processes that violate due process also results in a violation of Article 4(2) of the American Convention.⁹⁰

120. The Commission has already established in this report that in the criminal process which ended with the death penalty sentence for Roberto Girón and Pedro Castillo Mendoza: (i) the right to a defense in the initial stages of the procedure and in some of the proceedings that had a decisive impact in the decision was violated; and (ii) the right to adequate technical assistance was violated. In addition, the Commission established that the death penalty was implemented by method which was legally established to be, and by its own nature was, cruel, inhumane and degrading treatment.

121. In light of the above, the Commission concludes that the death penalty sentencing and its execution was in breach of the American Convention and, therefore, resulted in an arbitrary deprivation of life, in violation of Articles 4(1) and 4(2) of the Convention, in connection with the duties set forth in Articles 1(1) and 2 of the same to the detriment of Roberto Girón and Pedro Castillo Mendoza.

VII. CONCLUSIONS

122. The Commission concludes that the Guatemalan State is responsible for the violation of the rights enshrined in Articles 4(1), 4(2), 5(1), 5(2), 8(2), 8(2)(c), 8(2)(e) and 25(1) of the American Convention in connection with the duties set forth in Articles 1(1) and 2 of the same to the detriment of Roberto Girón and Pedro Castillo Mendoza. In addition, the Commission concludes that the State is responsible for the violation of Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture.

⁸⁷ Article 4 of the American Convention reads, in the relevant:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolish the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

⁸⁸ I/A Court H.R., Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights.) Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 54.

⁸⁹ IACHR, The Death Penalty in the Inter-American System of Human Rights: From Restrictions to Abolition, OEA/Ser.L/V/II.Doc.68, December 31, 2011, para.88.

⁹⁰ See IACHR, The Death Penalty in the Inter-American System of Human Rights: From Restrictions to Abolition, OEA/Ser.L/V/II.Doc.68, December 31, 2011.

VIII. RECOMMENDATIONS

123. In light of the aforementioned conclusions,

THE INTER-AMERICAN COMMISSION RECOMMENDS THAT THE STATE OF GUATEMALA,

1. Repair in full the human rights violations found in this report, both in the material and immaterial aspects. The reparation measures must include fair compensation as well as measures of satisfaction and rehabilitation in consultation with the next of kin of Messrs. Roberto Girón and Pedro Castillo Mendoza. Once it has exhausted all possible efforts to locate the relatives and if the State is unable to locate them, the IACHR recommends that the pecuniary component of the reparation be deposited with the Legal Aid Fund.

2. The Commission notes and values the 17 years that have elapsed without judicial authorities sentencing the death penalty and, also, that commutation of the sentence has been ordered for more than a decade with regards to convicted persons. In addition, the Commission takes note and values that the Executive Branch has taken measures to prevent the reenactment of the death penalty in Guatemala. In this regard, the Commission notes that, due to such actions by both the Executive and the Judiciary, 17 years have elapsed without death penalty sentencing or executions in Guatemala. The Commission understands that, in practice, the Guatemalan State has advanced towards the tendency to abolish the death penalty, which is consistent with the spirit of the American Convention on this matter. Taking into account its practice for almost two decades, the Commission recommends that the State of Guatemala adopts the necessary measures so that law in Guatemala is made consistent with its practice of moving toward the abolition of the death penalty.