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Amicus Curiae Brief before the Inter-American Court of Human Rights in the matter of *Ronald Ernesto Raxcacó Reyes*

Interest of Amicus-Curiae

1. On 1 June 2005, Amnesty International lodged written observations, in the case of *Ronald Ernesto Raxcacó Reyes v. Guatemala*.¹
2. Amnesty International, 1 Easton Street, London WC1X 0DW, United Kingdom, is a company limited by guarantee. Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seek to protect. It is concerned solely with the impartial protection of human rights. Amnesty International has a varied network of members and supporter around the world. At the latest count, there were more than 1.8 million members, supporters and subscribers in over 150 countries and territories in every region of the world. Amnesty International is a democratic, self-governing movement. Major policy decisions are taken by an International Council made up of representatives from all national sections.
3. Amnesty International has extensive experience in submitting *amicus curiae* briefs and other third-party submissions in international and national courts to assist them in resolving fundamental questions of international law. For example it has intervened before the European Court of Human Rights in a number of cases,² and the Inter-

¹ This *amicus curiae* brief has been drafted for Amnesty International by Student Attorneys Ana Laura Olman and Kelleen Corrigan, under the supervision of Professor Janie Chuang, International Human Rights Law Clinic, Washington College of Law, American University, and subsequently revised and approved by the International Secretariat of Amnesty International.

² Amnesty International has intervened as *amicus curiae* in the following cases before the European Court of Human Rights: *Acar v. Turkey* (Application No. 26307/95), 6 May 2003 (preliminary issue) 8 April 2004; *Aydin v. Turkey* (Application No. 28293/95; 29494/95; 30219/96) 10 July 2001; *Asenov and Others v. Bulgaria* (Application No. 24760/94), 18 October 1998; *Kurt v. Turkey* (Application No. 24276/94) 25 May 1998; *Chahal v. United Kingdom* (Application No. 22414/93), 15 November 1996; *Akdivar and Others v. Turkey* (Application No. 21893/93), 19 June 1996; *McCann and Others v. United Kingdom* (Application No. 18984/91), 29 September 1995; *Murray v. United Kingdom* (Application No. 18731/91), 28 October 1994; *Brannigan and McBride v. United Kingdom* (Application No. 14553/89 and 14554/89), 26 May 1993; *Soering v. United Kingdom* (Application No. 14038/88), 7 July 1989.

American Court of Human Rights (“The Court” or “Inter-American Court”).³ In addition, Amnesty International has made a number of submissions to national courts, including the United Kingdom House of Lords⁴ and the United States Supreme Court.⁵ Amnesty International submits that it is thus well placed to assist the Court with a wider international perspective.

4. Amnesty International considers that the death penalty is the ultimate cruel, inhuman and degrading punishment and that it violates the right to life. It is irrevocable and can be inflicted on the innocent. It has never been shown to deter crime more effectively than other punishments. As an organization dedicated to the protection and promotion of human rights, Amnesty International works for an end to executions and the abolition of the death penalty everywhere.
5. Amnesty International would like to state clearly, that for the purposes of the presentation of this *amicus curiae*, it is not intended to enter into aspects of torture, ill-treatment, or inhuman and degrading treatment which may be transcendental to the case as a result of the death sentence, nor the possible violations of judicial guarantees. However, this does not in any way mean that the organization considers that the Honourable Court should not tackle these issues according to the practises of the Court.

³ For example, Amnesty International has intervened as *amicus curiae* in the following cases before the Court: *Case of Velasquez-Rodriguez*, Judgment of 19 July 1988; *Case of Godinez-Cruz*, Judgment of 20 January 1989; *Case of Fairen-Barbi and Solis-Corrales*, Judgment of 15 March 1989; *Case of Benavides Cevallos*, Judgment of 19 June 1998. Amnesty International has also intervened in the following advisory opinions of the Inter-American Court of Human Rights: “*Habeas Corpus in Emergency Situations (Art. 27(2) and 7(6) American Convention on Human Rights)*” (OC-8/87 of January 30, 1987); “*Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*” (OC-9/87 of October 6, 1987), “*The Right to Information on Consular Assistance, in the framework of the guarantees of the Due Process of Law)*” (OC-16/99 of October 1, 1999) and the pending request by the IACHR for an Advisory Opinion from the Inter-American Court in the matter of “*Legislative Measures Concerning the Mandatory Imposition of The Death Penalty And Related Matters)*”, OC-20.

⁴ The appeal to the House of Lords of the judgment by the English High Court of Justice, Queen’s Bench Division on 18 October 1998 in the cases, *In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum (Re: Augusto Pinochet Ugarte)* and *In the Matter of an Application for Leave to Move for Judicial Review between: The Queen v. Nicholas Evans et al. (Ex Parte Augusto Pinochet Ugarte)*.

⁵ E.g., *Clark v. Martinez*, 125 S.Ct. 716 (2005); *Jama v. INS*, 125 S.Ct. 694 (2005); *Roper v. Simmons*, 125 S.Ct. 1183 (2005); *U.S. v. Alvarez-Machain et al.*, 124 S.Ct. 2739 (2004); *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003); *INS v. Doherty*, 502 U.S. 314, 112 S.Ct. 719 (1992); *Standford v. Kentucky*, 492 U.S. 361; 109 S.Ct. 2969 (1989); *Jean, et al. v. Nelson, INS, et. al* No. 84-5240, 475 U.S. 846, 105 S. Ct. 2992 (1985).

Summary of Guatemalan legislation relevant to the application of the death penalty⁶

6. On May 25, 1978, Guatemala ratified the American Convention on Human Rights (“the American Convention” or “the Convention”)⁷ and thus agreed to be bound by the treaty. It further ratified the International Covenant on Civil and Political Rights (ICCPR)⁸ on 5 May 1992. At the time of the ratifications of both instruments, article 201 of the Guatemalan Penal Code (1973) provided for death penalty in kidnapping cases, only when the person died as a result of the kidnapping.⁹ In all other kidnapping cases the responsible was punished with an eight to fifteen year prison sentence.
7. Guatemala’s legislature revised article 201 of the Penal Code several times during the 1990s. Under the 1985 Constitution, the death penalty cannot be imposed on women, people over 60, those guilty of political crimes or related common crimes, or people extradited under the condition that the death penalty will not be applied or when a conviction is based on circumstantial evidence. A sentence can be imposed only after all appeals are exhausted. The Constitution states that Congress can abolish the death penalty.¹⁰
8. In spite of the opinion of this Honourable Court in 1983¹¹ that an extension of the death penalty would violate the Convention, Guatemala’s Congress modified the

⁶ See Amnesty International, *Guatemala: The return of the death penalty*, AMR 34/011/1997, 9 May 1997.

⁷ American Convention on Human Rights “Pact of San Jose, Costa Rica”, adopted 22 November 1969, entry into force 18 July 1978, in accordance with article 74.2 of the Convention. OAS, Treaty Series, No. 36.

⁸ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

⁹ In 1978 the existing legislation established that kidnapping of a person with the purpose of obtaining ransom, exchange of third persons, or with any other illicit purpose of equal or analogous characteristics and significance will be punished with eight to fifteen years of prison. The responsible will be subject to the death penalty when the kidnapped person dies as a result of the kidnapping. “Artículo 201. (Plagio o secuestro) El plagio o secuestro de una persona con el objeto de lograr rescate, canje de terceras personas y otro ilícito de igual o análoga entidad, se castigará con la pena de ocho a quince años de prisión. Se impondrá la pena de muerte al responsable, cuando con motivo o en ocasión del plagio o secuestro, falleciera la persona secuestrada.” Decree 17-73, 5 July 1973.

¹⁰ Political Constitution of the Republic of Guatemala, 31 May 1985, article 18.

¹¹ Inter-American Court, *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.

legislation through Decree 38-94 in April 1994,¹² applying the death penalty on all cases where the victim was younger than twelve or over 60, or when, as a result of the kidnapping, the kidnapped person suffered serious injury, permanent psychological trauma or death.

9. By introducing Decree 14-95 in March 1995¹³, the death penalty was extended to cover anyone convicted of kidnapping, including accomplices, those attempting to conceal such crimes or any other participants that have threatened to kill the kidnapped person.
10. In July 1995, Decree 48-95 was introduced, making extrajudicial executions by members of the security forces or members of "subversive and terrorists bands" punishable by the death penalty when the victim is under 12 years of age or more than 60 years old, among other reasons. Forced disappearance was also made punishable by the death penalty, when the victim, as a consequence of forced disappearance, suffers serious injury, permanent psychological trauma or death.¹⁴
11. In 1996, following a rising feeling of public insecurity caused by a large number of kidnapping, armed robberies and mob lynchings, the death penalty was widely

¹² The changes in the law of 1994 stated that kidnapping with the purpose of obtaining ransom, remuneration, or exchange of third persons, or with any other illicit or lucrative purpose of equal or analogous characteristics and identity will be punished with 25-30 year prison sentence. Death penalty will be imposed in the following cases: a) If the victim is a minor younger than 12 years old or persons over 60 b) in the case where as a result of the kidnapping the kidnapped person is seriously injured, or suffers permanent physical or psychological trauma or dies. ("ARTICULO 201 (Plagio o Secuestro) El Plagio o Secuestro de una persona con el objeto de lograr rescate, remuneración, canje de terceras personas, así como cualquier otro propósito ilícito o lucrativo de iguales o análogas características e identidad, se castigará con la pena de veinticinco a treinta años de prisión. Se impondrá la pena de muerte en los siguientes casos: a) Si se tratare de menores de doce años de edad, o personas mayores de sesenta años. b) Cuando con motivo u ocasión del plagio o secuestro, la persona secuestrada resultare con lesiones graves o gravísimas, trauma psíquico o psicológico permanente o falleciere. [...]")

¹³ The subsequent changes in 1995 found that kidnapping of one or more persons with the purpose of obtaining ransom, exchange of persons or any other decision made against the wishes of the victim or with any other similar purpose, will be subject to the death penalty. In this case no attenuating circumstance will be considered. Accomplices and those who try to conceal the crime or any other participant in the kidnapping, that have threatened to kill the kidnapped person, will be subject to the death penalty. ("Artículo 201.- Plagio o secuestro. A los autores materiales del delito de plagio o secuestro de una o más personas con el propósito de lograr el rescate, canje de personas o la toma de cualquier decisión contraria a la voluntad del secuestrado o con cualquiera otro propósito similar o igual, se les aplicará la pena de muerte. En este caso no se apreciará ninguna circunstancia atenuante.[...] A los cómplices, encubridores o cualesquiera otros participantes en la comisión del plagio o secuestro que hubieren amenazado causar la muerte del secuestrado se les aplicará la pena de muerte.")

¹⁴ Decree 33-96 of 21 June 1996. *See* also Decree 48-92 Law on drug Trafficking.

condoned by several sectors of Guatemalan society as a means of combating common crime. Those opposing the death penalty have included some local human rights groups and the Catholic Church. Since the executions which were carried out in September 1996, Congress has approved new legislation changing the method of execution from firing squad to lethal injection, thereby expressing their intention for the death penalty to remain in use as a penal punishment.

12. After the most recent amendment on 21 October 1996, through Decree 81-96,¹⁵ Article 201 now imposes the death penalty for everyone convicted of kidnapping regardless of whether the victim suffers any harm at all, and does not allow the judge to consider attenuating circumstances of the case. As it stands today, article 201 of the Penal Code prescribes the death penalty as the only sanction available for those found guilty of kidnapping, regardless of the victim's fate.
13. In 1993, the Guatemalan Constitutional Court ruled that no established procedure existed which guaranteed that a request for pardon or amnesty would be processed. The Constitutional Court did, however, state that in keeping with Guatemala's obligations under the American Convention, the President would nevertheless review all such requests.¹⁶ But this was never the reality. Through Decree 32-2000, of 1 June 2000, the law relating to the right to seek pardon from 1892¹⁷ was suspended, and Guatemala no longer has any procedure in place which guarantees a condemned individual the right to apply for clemency, amnesty, or commutation of sentence. This law had established the mechanism and processes for requesting an amnesty or pardon from the President of the Republic. After the derogation any applications for such relief may be only arbitrarily reviewed because of the absence of an established procedure.

¹⁵ The current provisions, as revised in 1996 find that material or intellectual authors of kidnapping one or more persons with the purpose of collecting ransom, exchange of persons or any other decision made against the wishes of the victim or with any other similar purpose, will be sentenced to death, and when this cannot be imposed, [the convict] will be sentenced to prison for a period of 25-50 years. In this case, no attenuating circumstances will be considered. Accomplices will be sanctioned to 20-40 years of imprisonment. Those sentenced to prison for the crime of kidnapping will not be subject to reduction of sentence due to any reason. ("ARTICULO 201. Plagio o secuestro. A los autores materiales o intelectuales del delito de plagio o secuestro de una o más personas con el propósito de lograr rescate, canje de personas o la toma de cualquier decisión contraria a la voluntad del secuestrado o con cualquier otro propósito similar o igual, se les aplicará la pena de muerte y cuando ésta no pueda ser impuesta, se aplicará prisión de veinticinco a cincuenta años. En este caso no se apreciará ninguna circunstancia atenuante. Los cómplices o encubridores serán sancionados con pena de veinte a cuarenta años de prisión. A quienes sean condenados a prisión por el delito de plagio o secuestro, no podrá concedérseles rebaja de pena por ninguna causa.")

¹⁶ Guatemala Constitutional Court, Advisory Opinion, 323-93 of 22 September 1993.

¹⁷ National Legislative Assembly Decree 159, 19 of April 1892.

Submissions by Amnesty International

Summary of the case

14. Ronald Ernesto Raxcacó Reyes participated in the kidnapping of Pedro Alberto de León Wug, a minor, on 5 August 1997. On 6 August 1997, the minor was found and liberated by the National Civil Police, during which Ronald Ernesto Raxcacó Reyes, and four others were detained and charged with the crime of kidnapping. On 14 May 1999, the Sixth Criminal Judgment Tribunal (*Tribunal Sexto de Sentencia Penal, Narcoactividad y delitos contra el Ambiente*) sentenced Ronald Ernesto Raxcacó Reyes to death for the crime of kidnapping.
15. Ronald Ernesto Raxcacó Reyes and the others appealed the judgment, and the appeal was declared admissible on 9 July 1999. On 13 September 1999, the Appeals Tribunal dictated its sentence, rejecting the appeal. Ronald Ernesto Raxcacó Reyes and the others presented an appeal to the Supreme Court, which was declared inadmissible by the Criminal Chamber of the Supreme Court on 20 July 2000. On 28 June 2001, the Constitutional Court rejected the *amparo* presented by Ronald Ernesto Raxcacó Reyes on 25 August 2000 against the decision by the Supreme Court.
16. There is no procedure, provided by Guatemalan law, to apply for clemency, amnesty, or commutation of sentence.

Relevant provisions of international human rights law and standards

American Convention on Human Rights

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

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

Article 4 Right to Life

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

International Covenant on Civil and Political Rights

Article 6

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

Safeguards guaranteeing protection of the rights of those facing the death penalty¹⁸

¹⁸ Approved by Economic and Social Council resolution 1984/50 of 25 May 1984.

Safeguard 7.

Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

Mandatory imposition or execution of death sentence is contrary to the obligations to protect the right to life under the American Convention on Human Rights

17. Mandatory death sentences eliminate the determination of an appropriate punishment by precluding factual issues by law. A decision that is not taken on reason and nature of the crime and “in the absence of a reasoned consideration of the circumstances of the case in respect of which the decision is made” may be arbitrary and may lead to a violation of Article 4(1) of the Convention.¹⁹ The Inter-American Commission on Human Rights (the “Commission”) stated that in this respect, the mandatory death penalty can be regarded as arbitrary within the ordinary meaning of that term and in the context of the Convention as a human rights instrument. It further stated that:

“[i]n Jamaica, for example, the decision to impose the death penalty on a person for the crime of capital or multiple non-capital murder through a mandatory sentence is not based upon a reasoned consideration of a particular defendant’s case or upon objective standards that guide courts in identifying circumstances in which the death penalty may or may not be an appropriate punishment. Rather, the penalty flows automatically once the elements of the offenses of capital or multiple non-capital murders have been established. The death penalty is also imposed regardless of the relative degree of gravity of the offense or culpability of the offender.”²⁰

18. In *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (“*Hilaire*”), this Honourable Court considered a Trinidad statute – the Offences Against the Person Act 1925 – which required the imposition of a mandatory sentence of death on all those convicted of murder. The Court found, unanimously, that this statute:

“automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of

¹⁹ Inter-American Commission on Human Rights (also referred to as IACHR) Report N° 47/01, Case 12.028, *Donnason Knights v. Grenada*, April 4, 2001, para. 77. IACHR Report N° 49/01, Cases 11.826 (*Leroy Lamey*) 11.843 (*Kevin Mykoo*), 11.846 (*Milton Montique*), 11.847 (*Dalton Daley*) v. *Jamaica* (hereafter *Lamey et al v. Jamaica*), April 4, 2001, para. 130, ²⁰ IACHR Report N° 38/00, Case 11.743, *Rudolph Baptiste v. Grenada*, April 13, 2000, para. 85.

seriousness. Consequently, this Act prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different. In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely, human life, and is arbitrary according to the terms of Article 4(1) of the Convention.”²¹

The Court went on to conclude that:

“because the Offences Against the Person Act submits all persons charged with murder to a judicial process in which the individual circumstances of the accused and the crime are not considered, the aforementioned Act violates the prohibition against the arbitrary deprivation of life, in contravention of Article 4(1) and 4(2) of the Convention.”²²

19. The result of the Court’s clear and unqualified judgment in *Hilaire* is that any individual on whom a mandatory sentence of death is imposed suffers a violation of his/her Convention rights. And it is now settled law that the imposition of a mandatory penalty of death, also applicable to the present case and the crime of kidnapping, involves a violation of the Convention, and in particular Article 4.
20. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions (“the Special Rapporteur”) stated in his report to the UN Commission on Human Rights in March 2005 that legislation that provides for mandatory death penalty in certain circumstances makes the judge unable to take into account the specific circumstances and reasons advocating a lesser punishment for the offender, such as life imprisonment. Nor does it “reflect differing degrees of moral reprehensibility of such capital crimes”. He notes the recent judgment of the Privy Council in response to a ruling by the Court of Appeals of Barbados. The Court of Appeal observed that the maintenance of the mandatory death penalty “will ... not be consistent with the current interpretation of various human rights treaties to which Barbados is a party”.²³
21. This view was further developed in the minority judgment reaching the same conclusion:

²¹ Inter-American Court, Judgment of 21 June 2002, Ser. C No. 94 (2002), at para. 103.

²² *Id* at 108.

²³ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions (hereafter referred to as Report by the Special Rapporteur), E/CN.4/2005/7, 22 December 2004, p. 63, citing *Boyce and Joseph v. The Queen*, Privy Council Appeal No. 99 of 2002, Judgement of 7 July 2004, para. 6.

“[T]he jurisprudence of the Human Rights Committee, the Inter-American Commission and the Inter-American Court has been wholly consistent in holding the mandatory death penalty to be inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment. ... The appellants submitted that ‘No international human rights tribunal anywhere in the world has ever found a mandatory death penalty regime compatible with international human rights norms’, and this assertion has not been contradicted.”²⁴

The obligation to bring national legislation into line with the American Convention on Human Rights

22. The fact that the mandatory death penalty violates the Convention imposes obligations on states parties. These flow from the requirements of articles 1 and 2, stating that States parties must ‘respect’, and must ‘give effect’ to the rights contained in the Convention. Those rights have now been authoritatively interpreted so as to preclude the imposition of the mandatory death penalty in any circumstances. Accordingly, any state party which maintained in force such legislation would be failing to ensure, *inter alia*, respect for the right not to be arbitrarily deprived of life. The very existence of such legislation would trigger the obligation in article 2 to take legislative measures to bring the state party’s legal system into conformity with the full requirements of the Convention.
23. According to the Honourable Court, passing a subsequent domestic law that violates an international treaty can give rise to international responsibility. In advisory opinion OC-14/94, the Court stated that “the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty,”²⁵ and warned that domestic law could not serve as an excuse for a state to breach its international obligations.²⁶

²⁴ *Boyce and Joseph v. The Queen*, Ib., para. 81 (3) cited in Report by the Special Rapporteur E/CN.4/2005/7, 22 December 2004, para. 64.

²⁵ Inter-American Court, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, Advisory Opinion, OC-14/94, 9 December 1994, para. 50.

²⁶ *Id* at. para 54. All obligations of a State under international law must be complied with in good faith and is considered to be a general principle of law. These rules have been applied by this Honourable Court, as well as by the Permanent Court of Justice and by the International Court of Justice and codified through article 26 and article 27 of the Vienna Convention on the Law of Treaties 1969. *See* further United Nations, Treaty Series, vol. 1155, p.331: Article 26 - *Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith. Article 27 - *Internal law and observance of treaties*: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

The prohibition of the extension of the applicability of the death penalty after the ratification of the American Convention on Human Rights, with particular reference to Article 4(2)

24. Article 4(2) states that for States that have not already abolished the death penalty, “the application of such punishment shall not be extended to crimes to which it does not presently apply”. The object and purpose of the text of article 4 of the American Convention is to protect the right to life. States are thereby bound to interpret their obligations under article 4 in light of respect for the right to life. The treaty established a clear intention to abolish the death penalty, by stating that it should only be imposed for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. This language indicates that the application of the death penalty must be narrowly defined, and is only permitted in very specific situations and only for States that had not already abolished the death penalty. The American Convention on Human Rights explicitly states in Article 4(3) that “no States may reestablish the death penalty once it has been abolished”.
25. Guatemala was one of the fourteen States (out of the 19 States) at the American Convention’s preparatory conference that signed a document declaring “a firm hope of seeing the application of the death penalty eradicated,” reinforcing the Convention’s purpose of narrowly limiting the death penalty with the goal of eventual abolition. Even though the Convention does not conclusively forbid the death penalty, the declaration stated that “[t]he undersigned [...] solemnly declare our firm hope of seeing the application of the death penalty eradicated...”²⁷
26. Guatemala moreover originally held a reservation to Article 4(4) of the Convention, but withdrew it after the Court issued its Advisory Opinion on “*Restrictions to the Death Penalty*” (OC 3/83), further proving the State’s intent and commitment to eventually abolish the death penalty within its jurisdiction.²⁸
27. As pointed out in its advisory opinion “*Restrictions to the Death Penalty*” of September 1983, invoking the Vienna Convention’s canons of interpretation, this Honourable Court, interpreted the meaning of the wording “[t]he application of such

²⁷ OAS Doc. OEA/Ser.K/XVI/1.2, p. 467.

²⁸ At the time of ratification, Guatemala adopted a single reservation in relation to provision 4(4) of the Convention. In 1983, the Inter-American Court of Human Rights offered a Consultative Opinion on Guatemala’s reservation to Article 4(4) of the Convention did not extend to any other provision of the Convention, and does not permit Guatemala to extend the death penalty. *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, at para. 71. In 1986, Guatemala withdrew that reservation making its obligations under the Convention mirror the duties that are detailed in the text of the treaty.

punishment shall not be extended to crimes to which it does not presently apply” contained in Article 4(2). It stated that:

“there cannot be the slightest doubt that Article 4(2) contains an absolute prohibition that no State Party may apply the death penalty to crimes for which it was not provided previously under the domestic law of that State. No provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4(2), **in fine**.”²⁹

The Court further noted that the preparatory work of the American Convention supports the literal interpretation of Article 4.

28. In its “Fifth Report on the Situation of Human Rights in Guatemala” the Commission applauded decisions of several Guatemalan courts that had looked at the “juridical good sought to be protected” in each of the two cases (kidnapping with and without a resultant death) and imposed prison sentences, not death, because of the obligations under international law. The Commission further noted that Article 46 of the Guatemalan Constitution, which gives international human rights obligations primacy over domestic law, was passed by congress *after* Guatemala’s ratification of the American Convention, and therefore legislators were fully aware that Article 46 would apply to the Convention.³⁰ It further stated that the death “penalty must be subject to the strictest scrutiny in all respects” due to its irrevocability.³¹
29. In light of the general international position to protect the right to life, and the corresponding requirement to strictly limit the scope and application of the death penalty, international human rights obligations also support the interpretation that only the most restrictive application of the death penalty is permissible, with the intent toward eventual abolition. Other international agreements similarly manifest an intention toward abolition of the death penalty and implementation of the punishment in only the most extreme cases. One of the most significant of these is the ICCPR, to which Guatemala became a party in 1995. Article 6(2) states that for countries which have not already abolished the death penalty, a “sentence of death may be imposed only for the most serious crimes” and “not contrary to the provisions of the present Covenant...”
30. The Special Rapporteur expressed concern in his report to the UN Commission on Human Rights in 1996, relating to the fact that the Congress in Guatemala had

²⁹ Inter-American Court, *Restrictions to the Death Penalty*, para. 59.

³⁰ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala* (Fifth Report on Guatemala), OEA/Ser. L/V/II.111, Apr. 6, 2001, Chapter. V, para. 69.

³¹ IACHR, *Fifth Report on Guatemala*, Chapter V, para. 58.

approved the extension of the death penalty to anyone convicted of kidnapping, including accomplices who threaten to kill victims of kidnapping.³²

31. The former Independent Expert on the situation of human rights in Guatemala stated in her report to the UN Commission on Human Rights in 1996, at the time of legislative changes and adoptions of Decree No. 58-95 and Decree No. 48-95 which introduced torture, extrajudicial executions and enforced disappearances in the Criminal Code, that although the incorporation of these offences was welcome, the description of the criminal acts were not in conformity with Guatemala's international obligations.

"The 'members of groups or gangs organized for purposes of terrorism, insurgency, subversion or any other criminal purpose' are considered to be active subjects of these offences, and furthermore the new provisions constitute a means of extending application of the death penalty (Decree No. 14-95 extended the death penalty to the offence of kidnapping, thus amending article 201 of the Criminal Code), in flagrant breach of the provisions of article 4 of the American Convention on Human Rights." ³³

32. In his report to the UN Commission on Human Rights, the Special Rapporteur, stated that Article 6 of the ICCPR has become a rule of customary international law. The Special Rapporteur further affirmed that "legislation providing for capital punishment for crimes which were previously not subject to the death penalty" is a violation of the ICCPR and other international instruments.³⁴ He has deplored reinstatements and expansions of the scope of the death penalty and has stated that these developments "are in clear violation of the international trend towards abolishing the death penalty."³⁵ The Special Rapporteur has further stated: "The scope of application of the death penalty should never be extended..."³⁶

33. In addition, the UN Human Rights Committee, in its general comment on article 6 noted that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure," and that "the article also refers to abolition in terms which strongly suggest that abolition is desirable."³⁷

³² Report by the Special Rapporteur, E/CN.4/1996/4, 25 January 1996, para. 210.

³³ Report by the Independent Expert on the situation of human rights in Guatemala, E/CN.4/1996/15, 5 December 1995, para. 63.

³⁴ Report by the Special Rapporteur, E/CN.4/1993/46, 23 December 1992, para. 678-9.

³⁵ Report by the Special Rapporteur, E/CN.4/1996/4, 25 January 1996, para. 544.

³⁶ Report by the Special Rapporteur, E/CN.4/1994/7, 7 December 1993, para. 677.

³⁷ General Comment by the Human Rights Committee, CCPR, No. 6(16), A/37/40, Annex V (1982), para. 6.

It also established that “[e]xtension of the scope of application of the death penalty raises questions as to the compatibility with article 6 of the Covenant.”³⁸

The right to apply for amnesty, pardon, or commutation of sentence for those condemned to death guaranteed in Article 4(6) of the American Convention

34. Article 4(6) of the Convention states that “[e]very person who is condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.”

35. According to the Commission:

“the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention, when read together with the State's obligations under Article 1(1) of the Convention, must be read to encompass certain minimum procedural protections for condemned prisoners, if the right is to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners to apply for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution. It also entails the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. In order to provide condemned prisoners with an effective opportunity to exercise this right, a procedure should be prescribed and made available by the State through which prisoners may file an application for amnesty, pardon or commutation of sentence, and submit representations in support of his or her application. In the absence of minimal protections and procedures of this nature, Article 4(6) of the American Convention is rendered meaningless, a right without a remedy. Such an interpretation cannot be sustained in light of the object and purpose of the Convention.”³⁹

36. In the Fifth Report on Guatemala, the Commission stated that:

³⁸ Preliminary Observations of The Human Rights Committee on the Third Periodic Report of Peru Submitted under Article 40 of the Covenant, CCPR/C/79/Add.67, 25 July 1996, para. 15.

³⁹ *Lamey et al v. Jamaica* para. 159. See also *Rudolph Baptiste v. Grenada*, para. 121, *Donnason Knights v. Grenada*, para. 110, , IACHR Report N° 41/00 Cases 12.023 (*Desmond Mckenzie*) 12.044 (*Andrew Downer And Alphonso Tracey*), 12.107 (*Carl Baker*), 12.126 (*Dwight Fletcher*), and 12.146 (*Anthony Rose*) v. *Jamaica*, April 13, 2000, para. 228.

“While the derogation of Decree 159 has left the process to petition for clemency confused, it cannot be read to mean that this recourse simply no longer exists, because it is required by international law.”⁴⁰

In keeping with the Court’s interpretation strictly limiting the imposition of the death penalty,⁴¹ and reading this provision in conjunction with article 8 (Right to a Fair Trial) and article 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects), article 4(6) must be read as an absolute obligation on States to ensure that every individual who is sentenced to death has the **affirmative** opportunity to appeal that conviction and apply for relief and not merely technically permitting the prisoners to apply for pardon, amnesty or commutation of sentence upon being sentenced to death.

37. Other international instruments also guarantee condemned individuals the right to relief within international law. Article 6(4) of the ICCPR declares that “[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.” In countries where the availability of pardon, amnesties or commutation of sentences is used in a discriminatory manner and subjected to political influence, it may constitute an arbitrary application of the death penalty, and constitute a violation of Article 6(1).
38. In his report to the UN Human Rights Commission, the Special Rapporteur also noted that trials in cases which lead to the imposition of the death penalty must conform to the highest standards and that all safeguards for a fair trial must be present, particularly “the right to appeal and to seek pardon or commutation of the sentence”⁴² and that “[a]ppeals for clemency should provide effective opportunities to safeguard lives.”⁴³
39. Furthermore, Safeguard 7 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty⁴⁴, referring to clemency, provides that “[a]nyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.” Given the irrevocability of capital punishment, such processes are integral in protecting the right to life as enshrined within international law.

⁴⁰ IACHR, Report on Guatemala, para. 63.

⁴¹ Inter-American Court, *Restrictions to the Death Penalty*, para. 59.

⁴² Report by the Special Rapporteur, E/CN.4/1993/46, 23 December 1992, para. 680.

⁴³ Report by the Special Rapporteur, E/CN.4/1998/68, 23 December 1997, para. 118.

⁴⁴ See *supra* note 18.

40. In resolution 1989/64, adopted on 24 May 1989, the UN Economic and Social Council recommended that UN member states provide for "mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence".

Conclusion

41. On May 25, 1978, the date that Guatemala ratified the American Convention, article 201 of the Penal Code allowed the death penalty to be imposed for kidnapping *only* when the kidnapped person died as a result of the crime. Decades after ratifying the Convention, and without any reservation to Article 4(2), Guatemala revised Article 201 and now imposes the death penalty in all cases of kidnapping. After the revisions in 1994, 1995 and 1996 the current version of Article 201 states that the death penalty will apply to all the material or intellectual authors of any kidnapping, *without the requirement that the kidnapped individual is killed or suffer any kind of trauma*. The death penalty is now imposed on *all* kidnappers. This impermissibly widens the scope of applicability of the death penalty in Guatemala, thus constituting a clear violation of the letter and spirit of Article 4(2) of the American Convention.
42. The Guatemalan legislature has effectively eliminated the legal mechanism which **guarantees** all condemned persons to apply for an amnesty, pardon, or commutation of sentence. The absence of a procedure therefore clearly violates article 4(6) and article 2 of the American Convention, which guarantees this right to all persons who are sentenced to death. Individuals who have been sentenced to death in Guatemala have been denied both *de jure* and *de facto* access to any procedure which guarantees them the right to apply for an amnesty, pardon, or commutation of sentence.
43. In the light of existing international law, Amnesty International therefore argues that the Guatemalan state has violated its obligations according to the Convention, by expanding the application of the death penalty and failing to guarantee the right to seek pardon, amnesty or commutation of sentence. It cannot use domestic law to justify in compliance with its international obligations and has further failed to bring Guatemalan national legislation into line with its international obligations and to comply with its obligation to respect and ensure the rights protected by the Convention, according to articles 1.1 and 2.