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From Forgotten through Friction to the Future: The Evolving Relationship of the Anglophone Caribbean and the Inter-American System of Human Rights

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All its indifference is a different rage.
Derek Walcott.

Introduction

Verónica Gómez wrote in 1998 that: "The incorporation of the Caribbean States within the OAS has been encouraged by their growing representation within the organs of the Organization, including those of the human rights system. However, the OAS is still largely a Latin American organization shaped by the problems and idiosyncrasies of that particular group of States."[1]

While the Inter-American System of Human Rights (hereinafter "the System") has attracted a great deal of analytical attention and comment, especially since the conclusion of the landmark Velásquez Rodríguez case, the relationship between it and the Anglophone Caribbean states[2] has received little attention. The purpose of this study is firstly to trace the evolving relationship between the Caribbean states and the System, and secondly to present a snapshot of how the System currently perceives the Caribbean through its cases, all as a means to

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1 Gómez, Verónica, "The Interaction Between the Political Actors of the OAS, the Commission and the Court" in David Harris and Stephen Livingstone, (eds.), *The Inter-American System of Human Rights,* Oxford, 1998, at pp. 175.

2 Hereinafter the term "the Caribbean" shall be used in reference only to the nations of the Anglophone Caribbean.

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assessing how it can better respond to the human rights situation there given its mandate(s).[3]

The defining features of the Anglophone Caribbean

Is more than knocking out a tune on a sunbeach/package/tour with rum flowing like blood and the body calling for more.

John Agard, *Codicil*.

The Anglophone Caribbean consists of the independent nations of Antigua and Barbuda ("Antigua"), the Commonwealth of the Bahamas ("Bahamas"), Barbados, Belize, the Commonwealth of Dominica ("Dominica"), Grenada, the Cooperative Republic of Guyana ("Guyana"), Jamaica, the Federation of St. Kitts and Nevis ("St. Kitts"), St. Lucia, St. Vincent and the Grenadines ("St. Vincent") and the Republic of Trinidad and Tobago ("Trinidad"). The non-self governing territories of Montserrat, the British Virgin Islands, the Cayman Islands, the Turks and Caicos Islands and Anguilla are not included as they do not fall within the System's jurisdiction. Aruba, Bonaire, Curacao, Saba, Sint Eustatius are not considered here. Also not included are the independent but non-Anglophone nations in and around the Caribbean Sea, including Cuba, the Dominican Republic, Venezuela, Haiti and Suriname, for various reasons. They have different languages and histories and different colonizers, followed often by much longer periods of independence, repeated subjection to United States intervention, and generally a pattern of military authoritarianism unfamiliar to their Anglophone neighbours.[4]

The Caribbean is not homogenous yet its States do have many common factors that often stand in clear contrast to their neighbours. English is their common language accompanied by individual varieties of Creole. Culturally, cricket and home-grown music such as soca,

3 The scope of this study imposes a key limitation. The relationship is analyzed *from the perspective of the System* as a mechanism with specific aims and assumptions without questioning the precepts of international human rights theory. The study does not attempt to address the legitimate questions over the relevance of the human rights mechanism as a means for –or hindrance to– the foremost challenge Caribbean States identify themselves as facing: development.

4 As a result, and for the purposes of convenience alone, the term "Latin America" shall hereinafter refer to the Spanish, French and Dutch speaking countries of the region.

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reggae, steel pan and calypso have formed some level of common cultural identity. The Caribbean nations achieved independence later than their 'Latin' neighbours, only a handful of decades ago and in a relatively short space of time.[5] This resulted in their having a strong "sense of self and the sentiment of nationalism"[6] and, after such prolonged colonial subjugation, a strong desire to keep themselves free of outside involvement in their affairs. Today this is manifested *inter alia* in long-awaited moves toward replacing the Judicial Committee of the Privy Council in the United Kingdom as the highest court for most of the sub-region[7] with the establishment of the Caribbean Court of Justice (CCJ) and Barbados' current stirrings toward becoming a republic.[8] The Caribbean nations all have small populations and territories relative to their mainland neighbours, which has led to economic fragility and significant challenges with regard to corruption and crime,[9] generalized vulnerability and difficulties in making parliamentary democracy function adequately to their needs.[10] Nonetheless, with the exceptions of Guyana, which suffered a 'fraudulent democracy'[11] between 1966 and 1992, and Grenada between 1979 and 1983, parliamentary democracy has continued functioning virtually uninterrupted throughout the region since independence and, unlike in neighbouring States, the military have not played a prominent role in politics.

The Inter-American system of human rights

The Organization of American States (Hereinafter "the OAS"), a political, social and economic organization made up of the independent States of the Americas, was founded in 1948 at the 9th Pan-American Conference in Bogotá in 1948. In 1959, the Inter-American Commission of Human Rights (Hereinafter "the Commission" or "IACHR") was

5 Independence from Britain: Jamaica and Trinidad, 1962; Barbados and Guyana, 1966; the Bahamas, 1973; Grenada, 1974; Dominica, 1978; St. Lucia and St. Vincent, 1979; Belize and Antigua, 1981; St. Kitts, 1983.

6 Knight, Franklin, *The Caribbean: Genesis of a Fragmented Nationalism* (2nd Edition), Oxford University Press, New York, 1990, pp. 303.

7 Guyana ended the right of appeal to the Privy Council in 1980.

8 Associated Press article: *PM Announces Plans to Make Barbados a Republic*, 25 January 2005

9 Griffith, Ivelaw, *The Quest for Security in the Caribbean,* Westview Press, London, 1993; Inter Press Service, "Violence takes its toll: Rising crime statistics cast long shadow over Caribbean", 9 June 2005.

10 *Supra*, n. 6.

11 Latin American Bureau, *Guyana: Fraudulent Revolution*, LAB, London, 1984.

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created within the OAS. It became an organ of the OAS in 1967[12], with the function of promoting "the observance and protection of human rights" and serving "as a consultative organ of the Organization in these matters."[13] Since being revised and expanded in 1967, the Commission's statute has charged the IACHR with three main tasks: processing individual petitions, conducting on-site visits and preparing and publishing special studies and reports.[14] All member States of the OAS fall within the Commission's mandate.

In 1978, the American Convention on Human Rights (hereinafter "the Convention") came into force, creating the Inter-American Court of Human Rights (hereinafter "the Court") which is regulated by its Statute and Rules of Procedure and has both a contentious and an advisory jurisdiction. The Commission and Court, within the rules and limitations governing their functioning, have jurisdiction to make use of a range of instruments: The American Declaration of the Rights and Duties of Man (1948) (hereinafter "the Declaration"); the Convention; the Protocol of San Salvador (1988) on economic, social and cultural rights; the Inter-American Convention to Prevent and Punish Torture (1985); the Inter-American Convention on Forced Disappearances of Persons (1994); the Inter-American Belém do Pará Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990).[15] A regional instrument on Indigenous rights is being developed, although this is taking some time.

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12 Charter of the Organization of American States as amended, 1967, article 51.

13 *Id*. article 112; *Charter of the Organization of American States* as amended at 2005, article 106 (Hereinafter: "OAS Charter").

14 Statute of the Inter-American Commission on Human Rights as amended 1967, Arts. 9 and 9 bis; Statute of the Inter-American Commission on Human Rights, approved by Resolution Nº 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979, Arts. 18, 19 (Hereinafter: "*Commission Statute*").

15 See annexed table of ratifications for each Caribbean State. The low level of Caribbean ratification of Inter-American human rights instruments is immediately apparent and has not gone unnoticed by the System. The President of the Inter-American Court of Human Rights, Dr. Sergio Garcia Ramirez, specifically recognised again the challenge this poses in his presentation "La Corte Interamericana de Derechos Humanos" at the "III Conferencia Nacional sobre Derechos Humanos de Guatemala: Globalización y Derechos Humanos" at the San Carlos University, Guatemala City, Guatemala, 23 August 2005.

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While there are other bodies within the OAS system that impact on the application of the standards of the normative human rights system, such as the Inter-American Indian Institute, the Inter-American Children's Institute and the Inter-American Commission on Women, the Commission and Court form the Inter-American System of Human Rights (the System) *stricto sensu*[16] and only those two bodies shall be considered here.

Caribbean involvement with the system

The relationship between the Caribbean and the System can be divided into three phases.

Phase 1: Forgotten, 1967-1980

The OAS Charter gave no specific criteria for membership beyond statehood[17] and colonial territories within the Americas were, as such, excluded.

Unlike the UN, the OAS did not identify "self-determination"[18] through de-colonization within the hemisphere as a fundamental purpose. As a result, and despite the Organization's stated vision that "the historic mission of America is to offer to man a land of liberty, and a favorable environment for the development of his personality and the realization of his just aspirations" where "American peoples… live together… in peace" "within the framework of democratic institutions,"[19] the OAS did not become involved in the British colonies' struggles for self-government and had no real contact with them until after their relatively late achievement of independence.[20] In the case of Guyana and Belize, for a number of years after independence they were barred from joining the OAS due to Charter stipulations that blocked membership for states that had border disputes with existing

16 Sandoval, Clara, "A Critical View of the Protection of Refugees and IDPs by the Inter-American System of Human Rights: Re-assessing its Powers and Examining the Challenges for the Future", *International Journal of Refugee Law*, Vol. 17(1), 2005, pp. 49.

17 OAS Charter, 1948, article 2; OAS Charter as amended 1967, Article 4.

18 UN Charter, article 1(2).

19 1948 OAS Charter, preamble.

20 Assumption of membership of the OAS: Trinidad - March 1967; Barbados - October 1967; Jamaica June 1969; Grenada - May 1975; Saint Lucia - May 1979; Dominica - May 1979; Antigua and Barbuda - December 1981; Saint Vincent - December 1981; Bahamas - March 1982; St. Kitts - March 1984; Belize - 1991; Guyana - January 1991.

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members.[21] The Charter amendment of 1985 enabled both countries to join the Organization in 1991.[22]

While the IACHR had begun functioning in 1960, the arrival of new English speaking members from 1967 seemingly failed to have any impact. At its creation, it had seen fit to inform member states of its existence and functions and request their cooperation.[23] It did not see fit –or at least it did not report that it had seen fit– to do the same with new member states. In addition, the IACHR's sessional and annual reports ceased to be translated from Spanish between 1968 –the year after the first Caribbean members joined– and 1976, and translation was not carried out again in 1977 and 1982, despite translation being an obvious necessity for achieving its goals.

Despite the general dynamism exhibited by the Commission in its early years, it showed no real recognition of the involvement of the new States in the purview of the System, nor even *mentioned* them in its annual and sessional reports until 1972.[24] In that year, the Commission made brief note of some Trinidadian and Barbadian legislation which it considered relevant under articles XIV, XVI, XX and XXVI of the Declaration, relating to the rights to work and fair remuneration, social security, to vote and to due process of law respectively.[25] It made similar monitoring in 1975, 1977 and 1979 with regard to one or other of the Caribbean member states at the time but there were no further references.

1977 witnessed the first apparent attempt by a Caribbean nation to engage in dialogue directly with the Commission, when Grenada informed the Commission of some of the human rights aspects of its Constitution, adding that any national provisions inconsistent with human rights were there for good reason.[26] In the same year, the Commission went so far as to highlight the fact that Jamaica and

21 Atkins, G Pope, *Latin America and the Caribbean in the International System* (3rd Edition), Westview Press, London, 1999, pp. 221.

22 *Id*.

23 IACHR, "Report on the Work Accomplished During its First Session: October 3 to 28, 1960", OEA/Ser.L/V/II.1, Doc. 32, March 14, 1961, Part VI.

24 Although, interestingly, Guyana, still not a member of the OAS, observed the Inter-American Specialized Conference on Human Rights in 1969.

25 *IACHR Annual Report 1972*.

26 *IACHR Annual Report 1977.*

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Grenada were among the first eleven member states of the OAS to ratify the Convention.[27]

However, despite the mandate given to it by the OAS in 1965 to "conduct a continuing survey of the observance of fundamental human rights in *each of the member states* of the Organisation" with particular reference to articles I, II, III, IV, XVIII, XXV and XXVI of the Declaration[28], there is little evidence that it took that mandate seriously with regard to the Caribbean States between 1967 and 1981. There were no onsite visits to the region and there were no specialized reports. No Commissioners from the Caribbean were appointed despite the representative concept explicit in the Statute's stipulation that "The members of the Commission shall represent all the members of the Organisation of American States and act in its name."[29] Neither were any petitions against Caribbean countries *published* during that period.

IACHR's annual reports during 1967-1981 highlighted the need to consider or take measures regarding, *inter alia*, racial discrimination, equal pay for men and women, inhumane treatment, the right to education and arbitrary detention. There were, for example, reports on trade union freedom and the right to petition in 1970.[30] All of these were issues that feasibly merited attention at the time in the Caribbean as well but didn't receive it to nearly the same extent as neighbouring States.[31]

In addition, the Work Program of the Commission from 1968 concentrated on the right to vote, the right to petition, human rights and the state of siege and fundamental human rights.[32] The decision to focus on these issues was clearly informed more by the situation in Latin America than the democratic states of the Caribbean with their

27 *IACHR Annual Report 1979.*

28 Resolution XXII: "Expanded Functions of the Inter-American Commission on Human Rights", The Second Special Inter-American Conference (Rio de Janeiro, 1965) (Emphasis added). These articles of the Declaration relate to the rights to life, liberty and personal security, to equality before law, to religious freedom and worship, to freedom of investigation, opinion, expression and dissemination, to a fair trial, and to protection from arbitrary arrest.

29 Commission Statute, article 3(b).

30 *IACHR Inter-American Yearbook on Human Rights*, 1969-70, General Secretariat of OAS, Washington DC, 1976.

31 *Id.*

32 *IACHR Yearbook on Human Rights,* 1968, General Secretariat of the OAS, Washington D.C., 1973.

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militaries subjugated to the executives. This emphasis in the Work Plan is understandable given the gravity of the contemporaneous situation in Latin America and the budgetary and other restrictions the Commission faced, but the fact that an emerging Commission report on the right to education specifically focused *only* on Latin America suggests a failure by the Commission to include the Caribbean where it could and should have, and an incapacity to recognize, other than through legislation-watching, that seven new nations had come under its jurisdiction and were to be included in its mandated activities.

Events may not have been so dramatic in the Caribbean as in Latin America but that is not to say the human rights situations were perfect. In actual fact, in Grenada, what has been characterized as a "veritable reign of terror"[33] led by the country's democrat-hero turned pro-Pinochet and Duvalier "ruthless dictator"[34], Prime Minister Eric Gairy –whose police and army received training in 'counter-insurgency' from Pinochet's Chile– was taking place for several years until 1979 and arguably warranted some *comment* at least. The Commission's claim, in 1980-1981, that it had "carefully observed the situation of human rights *in all the member states of the Organization*"[35], at least in retrospect, rings somewhat hollow given the lack of any real attention to the human rights situation in the Caribbean whatsoever for thirteen years.

Phase 2: Peripheral vision, 1980-1993

In its 1980-81 report, for the first time the Commission did show some real interest in human rights developments in a Caribbean country, but only insomuch as the human rights issues involved resembled –in name although not necessarily in fact– the civil and political abuses occurring in Latin America. The Commission questioned the ongoing suspension (since 1979) of the constitution, accompanied by legislation permitting detentions without due process by Maurice Bishop's Jewel Movement in Grenada. It is interesting that Bishop's government, much despised by the United States, should gain such attention when Gairy's had not previously. Whether the attention was the result of political

33 1978 State Department report quoted on http://www.spartacus.schoolnet.co.uk/COLDgrenada.htm; Padilla/Houppert, "The OAS and Human Rights in the Caribbean", in Ivelaw Griffith and Betty Sedoc-Dahlerg, (eds.), Democracy and Human Rights in the Caribbean, Westview Press, Colorado 1997, at pp. 31-50.

34 Encyclopaedia Britannica Online: Gairy, Eric.

35 *IACHR Annual Report 1980-1981,* (Emphasis added).

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strong-arming at the OAS, the System was exhibiting automatic US-like antipathy to progressive left-wing regimes or simply represented a sign that the Commission was at last seeking to look at the Caribbean and had found the type of human rights challenges it recognized and felt able to act upon is unclear. Nonetheless, the mention does mark something of a watershed. The Caribbean was, to some very limited extent, on the Commission's agenda for the first time.

1982 saw a seminar on national, regional and international human rights considerations, co-hosted by the Commission, take place in Kingston, Jamaica with a range of actors from Caribbean countries.[36] Also, for the first time, the Commission reported two individual petitions from the Caribbean, both against Jamaica and both relating to the imposition of the mandatory death penalty after unsatisfactory investigative and judicial processes including ill-treatment at the hands of the police.[37] The Commission also noted Barbados ratification of the American Convention. Unfortunately, the annual report of the Commission, including the cases, was again not translated into English that year. There were to be one or two cases published each year for most of the rest of the decade, all but one involving police brutality and lack of due process leading to the imposition of the death penalty in Jamaica.

In 1982-1983 the Commission intervened "as an agent for peaceful solution" in some cases of suppression of press freedom in Grenada "in order to reach a solution to this case based on respect for human rights, taking into account that the parties in dispute have accepted its participation," while also making note of the government's intention to hold a plebiscite over a new constitution to be followed by elections.[38] The Commission also stated its intention to carry out an on-site visit to the island at the earliest opportunity. This would have been the Commission's first visit ever to the Caribbean but it was postponed in 1984-5 and never actually took place.[39] The Commission's annual reports never give any explanation for this.

In 1983-1984, the Commission included a new theme in its list of human rights issues that needed to be addressed, and specifically mentioned the Caribbean, presumably mindful of the petitions it

36 *IACHR Annual Report 1981-1982*.

37 Jamaica (Case 3102) 25/81; 27 Jamaica (Case 3115) 24/81.

38 *IACHR Annual Report 1982-1983*.

39 *IACHR Annual Report 1984-5*.

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had received from Jamaican citizens: the need to "strengthen" the judiciary.[40]

1986 saw the first Caribbean national elected to the Commission.[41] Since then, there have been five others[42], leaving only a few sessions where at least one of the Commission members has not been from the region. This development impacted immediately on the level of attention that the Commission gave the Caribbean as 1986 saw the first 'visit' to the Caribbean by the Commission, carried out jointly with the Court. The members visited Jamaica, Trinidad, St. Vincent and Barbados with the stated objectives to:

1. Seek additional ratifications of the American Convention on Human Rights by those states which have yet to ratify it;
2. Seek the acceptance of the jurisdiction of the Inter-American Court of Human Rights, and
3. Engage in a discussion with governmental authorities and private human rights organizations regarding the inter-American human rights system.[43]

The visit was a long-overdue first step toward engaging its duties in the Caribbean and the Commissioners claimed to have gained some assurances relevant to their stated goals, although none of these were carried out in the near future. However, much about the visit evinces a lack of Commission commitment to taking the sub-region seriously.

Firstly, while the purposes of the visit were seemingly 'promotional' rather than for monitoring, it is not clear where the visit stands *vis a vis* the Commission's mandate: it wasn't called an *on-site visit,* and is absent from the list of on-site visits on the Commission's website. In the relevant Annual Report, it was ignominiously fitted in the "Activities" section under "Other Activities". The dates of the visit are not stated there and it seems to bear no relation to the sessions –the continuing and cumulative work– of the Commission. On-site visits to Haiti, El Salvador and Suriname in the same year were treated with

40 *IACHR Annual Report 1984-1985*, Chapter V.

41 Oliver Jackman (Barbados) 1986-1993.

42 IACHR Commissioners from the Caribbean to date: Patrick Lipton Robinson (Jamaica) 1988-1995; John S. Donaldson (Trinidad and Tobago) 1994-1997; Henry Forde (Barbados) 1998-1999; Peter Laurie (Barbados) 1999-2001; Clare Roberts (Antigua) 2002-present.

43 *IACHR Annual Report 1986-1987.*

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significantly more seriousness and detail in the same report, with planning, justification, detailed analysis and clear intentions for follow-up included.[44]

Secondly, by 1986, ten Caribbean countries were members of the OAS, a significant portion of the OAS membership that had not yet had any meaningful contact with the Commission. No reason was given as to why the visit was not arranged to include those other members even though it would have seemed the ideal opportunity.[45]

As such, there is something deeply disappointing about the visit. No momentum was created. Even the one human rights issue in the Caribbean that the Commission must have recognised given the petitions it had received –the mandatory death penalty related to due process and fair trial– appears not to have been a theme of the visit. In fact, the visit was dropped from history –whether by design or not– when it even failed to be mentioned in the Commission Yearbook[46] and a visit to Jamaica a decade later was called the first by the Commission itself.[47]

1989-1990 saw Oliver Jackman elected President of the Commission but there was no reference to the region in the Annual Report. The 1991 report failed to mention the fact that Guyana and Belize both joined the OAS in 1991 and thus now fell under the Commission's remit. That year, the Commission held its 22nd regular session in the Bahamas and received an invitation to visit from the Dominican Government. That visit, from 14-16 February 1993, with IACHR represented by Oliver Jackman and a staff attorney is again cited under the "Other Matters: Miscellaneous Activities" section of the report but this time there is no information *whatsoever* beyond the fact that it took place. No report was issued, and again, the visit is not included on the website list of on-site visits.[48]

The seeming lack of attention to the situation of human rights in the Caribbean states in this period is even more perturbing given the fact that the Commission was again highlighting specific rights

44 *Id.*

45 *Id.*

46 *IACHR Inter-American Yearbook on Human Rights 1986,* Martinus Nijhoff, the Netherlands, 1988.

47 *IACHR Annual Report 1994.*

48 *IACHR Annual Report 1992-1993.*

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issues that could have given rise to inclusion, dialogue, comment or engagement in the "Areas in Which Steps Need to be Taken towards Full Observance of the Human Rights Set Forth in the American Declaration… and the American Convention" section of its annual reports. For example, the 1986-1987 report gave an extensive analysis of the need to push for abolition of the death penalty, and children's rights gained increasing coverage by the Commission after 1988, with its 1992-1993 report going into some depth. The adoption of the Protocol of San Salvador in 1988 should have given opportunities for dialogue at the very least. Alternatively, if it had wanted to take a more positive step at engagement, the Commission could have commented on the progressive economic, social and cultural rights provisions already incorporated in the 1980 Guyana Constitution as a starting point.[49] Also, both Guyana and Belize, and arguably other Caribbean states, have indigenous populations facing long standing challenges to their rights,[50] yet in the continuous process of addressing indigenous rights and drafting a regional instrument, the Commission never referred to those nations. The Commission's enactment of its duties toward the Caribbean remained disappointing. Those nations may not have responded to requests for information but the Commission should not have depended on cooperation to observe its mandate.

No further Caribbean cases were published by the Commission between 1989 and 1995.

In its 1994 annual report the Commission recognized that, in the context of the 1993 Vienna World Conference on Human Rights, the "foremost repercussion for the Inter-American system stems from the realization that, while progress has been realized in certain areas of human rights, the challenge is not diminishing. In fact, mandates for action in human rights must be expanded at all levels." Whether this critical self-evaluation also reflected an internal recognition of the need for expansion of geographical –as well as thematic– activities by the Commission is unclear but for the first time, two members of the Commission were from the Caribbean and events in 1994 seem to suggest that they may well have been pushing the Commission's policy to address the region, or alternatively were able to convince Caribbean nations to engage with the Commission by virtue of their being Caribbean themselves.

49 See Ivelaw Griffiths, "Democracy and Human Rights in Guyana" in Griffiths/ Sedoc-Dahlberg, 1997 on inter alia the right to education, see *supra* at n. 33.

50 See *e.g. infra*, n.109.

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Phase 3: Engagement with confrontation, 1994 - present

The Commission requested and received an invitation to carry out its first specifically designated "*on-site visit*" to a Caribbean State –the Bahamas– from May 22nd to 27th, 1994. The motivation for the visit was to consider the situation of Haitian refugees there. In a press release by the Commission at the end of the visit, IACHR highlighted human rights issues including the lack of effective and fair refugee status determination procedures, questions of citizenships for the children of Haitian refugees in Bahamas, the issuance of work permits and social and other discrimination against and stereotyping of Haitians in the Bahamas. The Commission also recognised the efforts made by the Bahamas toward the refugees and noted the need for international assistance to supplement its stretched resources.[51]

Although the Commission had intended to write a specific report on the visit, including recommendations for the Government of Bahamas[52], the findings were not in the end published as a report on the Bahamas, but as a very small section of a 1995 Country Report on Haiti.[53] The crisis had passed by that time so the implied criticisms of the Bahamas in the earlier press release were not included or acted upon.[54] The civil society organisations that the Commission had met with during its visit to the Bahamas were defined specifically as those "who interact with the Haitian refugee population in the Bahamas on a daily basis,"[55] and there is no indication in the documentation that the opportunity of the visit was taken to discuss human rights issues in the country more broadly with them or government. As such, the visit seems to represent more an extension of the Commission's long-standing –although understandable– attention to the situation in Haiti rather than a policy shift toward including the Caribbean in its considerations and activities. It is, however, difficult to know what went on away from the public spotlight. Perhaps the Commission was seeking to initiate dialogue with the Bahamas by taking the opportunity

51 IACHR Press Communiqué 13/94.

52 *Id*.

53 IACHR, *Report on the Situation of Human Rights in Haiti,* 1995.

54 The failure to address the Bahamas obligations to refugees at this point is not insignificant. With recurring crises in Haiti, refugees have faced similar problems repeatedly. See *infra* n. 106.

55 *Supra* n. 51.

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of a slightly less 'personal' theme –that of refugees. Further events that year suggest that this may indeed have been the case.

Early in its 1994 report, the Commission stated that the Solicitor General of Jamaica, Dr. Kenneth Rattray, "met with the Commission and presented matters of mutual interest". It also declared its intention to prepare a comparative document on the situation of prisons in the OAS member states. Then, from the 7th to the 9th of December, 1994, with the stated purpose of examining conditions in prisons and detention centers, the Commission went to Jamaica for the first time since 1986, this time on a fully-fledged "on-site visit". The IACHR itself said that it was the "first visit by the Commission to Jamaica,"[56] an inaccuracy that reflected its lack of a cohesive, evolving policy to that nation and the sub-region up to that point. It met with political leaders, prison officials, juvenile justice officials and members of the legal profession as well as with civil society.[57]

This visit, together with that to the Bahamas, seemed to be sign of a belated but positive 'beginning' to the relationship between the States of the Anglophone Caribbean and the IACHR. It seemed that the Commission was at last displaying commitment to carrying out its mandated duties there, and was seeking to establish sustainable relationships, build trust and cooperation through specific on-site visits in spite of those nations' relatively small sizes and mild human rights situations. It appeared to have realized that in order to promote and protect human rights in the region, more was needed than just protection in the form of the processing of individual petitions. The fact that the Jamaica visit took place as a fundamental and early component in the investigation into prison conditions suggested that the human rights situation in the region might at last be seen to be not just an irritating duty beside more important matters but as an integral part even of the hemispheric work of the Commission.

Such positive attempts at engagement were to continue. The 1996 *Progress Report on the Situation of Migrant Workers and their Families in the Hemisphere* promised (although they haven't been forthcoming) more on-site visits to Jamaica, Belize and the Bahamas.[58] The 1998 *Report on the Rights of Women* had the Caribbean well integrated in its coverage. In the same year, the Commission and the

56 IACHR Press Communiqué 28/94.

57 *IACHR Annual Report 1994.*

58 *IACHR Annual Report 1996.*

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Caribbean Community (CARICOM) held a seminar in Antigua to familiarize *ombudsmen* of the English-speaking Caribbean with the System.[59] In 2001, the Commission convened two two-day seminars in Grenada and Belize respectively to promote the System, attended by Commissioners, government ministers and officials, judges and representatives from the region and beyond in collaboration with Caribbean Human Rights Network, the Inter-American Institute for Human Rights, and the Commonwealth Secretariat.[60] In the same year, Grenada deposited its instrument of ratification of the Convention of Belém Do Pará on women's rights.[61] In addition, as part of a series of training sessions throughout the Americas in 2003, the Commission's Special Rapporteur on the Rights of the Child held training seminars on the promotion and defense of the rights of children and adolescents in the System in Jamaica and Trinidad.[62] Most recently in 2005, Clare Roberts, Commissioner from Antigua and Barbuda was elected as President of the Commission and Special Rapporteur on the Rights of Persons of African Descent, and Racial Discrimination.[63]

However, the promotional and inclusive momentum and determination evinced by the Commission with regard to the Caribbean since 1994 has been tempered –to say the least– by parallel developments over the death penalty.

The number of individual petitions *published* with regard to the death penalty jumped after 1996. Where the Commission seemed to have decided that promotion was going to be the best way forward in the Caribbean –in accordance with OAS directive after 1997[64]– in actual fact, protection, through the processing of cases, came to dominate System -Caribbean relations and brought them to loggerheads. A series of negotiations started, including a meeting between the Commission and senior representatives of Trinidad in February 1998 where Trinidad made clear its position that the Commission would be acting *ultra*

59 *IACHR Annual Report 1997.*

60 IACHR Press releases 1/01, 6/01, 15/01.

61 *IACHR Annual Report 2001.*

62 *IACHR Annual Report 2003.*

63 IACHR Press Release *3/05.*

64 In its *Annual Report 1997,* the IACHR stated that point 1 of OAS Resolution 1489 on the "International Promotion of Human Rights in the Inter-American System" (AG/RES. 1489 (XXVII-O/97), June 5, 1997) was to be taken to mean, *inter alia,* that the IACHR should seek a "more intense push for and proper handling of the job of promotion, without decreasing protection activities…"

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vires if it attempted to alter by its recommendations the domestic law of a State in respect of sentencing, or continued to seek to review the decisions of its courts, and therefore Trinidad could and would go ahead with executions even while petitions were before the system.[65] Trinidad then went on to withdraw from the Convention in May 1998 (effective one year later) and even executed prisoners with their cases before the System as did other States.[66] From 2001, when the Commission started including tables of compliance in its Annual Reports, it was clear that the Caribbean was not responding as desired. All the cases had "partial compliance" or were "pending compliance". None had full compliance.[67]

The resistance of the Caribbean States clearly shook the Commission. It held two internal telephone conferences to decide whether it should continue to approve cases involving the death penalty in Caribbean countries. At the same time, Caribbean States showed commitment to maintaining dialogue. The Heads of Government of CARICOM requested that the OAS Secretary General convene a meeting with the Commission. This took place in October 2000, where there was an "exchange of views on the procedures and jurisprudence of the Commission in relation to the system of petitions, as well as on methods of strengthening understanding and cooperation between CARICOM member States and the Commission."[68] Follow-up meetings took place at two sessions in 2003.[69]

The Commission decided to take a firm stand on the death penalty after 1998 including, for the first time, referring Caribbean cases to the Court. Three were forwarded containing a total of thirty-one alleged victims, all related to the death penalty in Trinidad.[70]

The 122nd session of the Commission in 2005 showed some signs that the death penalty issue was turning a corner as Jamaica was noted

65 See Report Nº 43/98 Haniff Hilaire, Case 11.816.

66 See e.g. Naresh Boodram and Joey Ramiah (Trinidad, case 12.129), Anthony Briggs (Trinidad, Case 11.815); Wenceslaus James (Trinidad, Case 11.814); Trevor Fisher (Bahamas, Case 11.463) and Richard Woods (Bahamas, Case unpublished; see Report 123/99).

67 *IACHR Annual Reports 2001.*

68 *IACHR Annual Report 2000.*

69 *IACHR Annual Report 2003.*

70 Hilaire, Constantine and Benjamin et al. vs. Trinidad and Tobago Case, Judgement on the Merits of 21 June 2002, Inter-American Court of Human Rights Ser. C No. 94 (2002).

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to be considering significant legislative changes regarding it.[71] The battle, however, continues to be hotly and inconclusively fought at national and international levels in the region.[72] Nonetheless, as one of the law firms that regularly petition the System on behalf of death row inmates was cited as stating, any real progress on the issue has not been due to the efforts or findings of the System but others elsewhere.[73]

Notwithstanding, since 2000 there has been a clear new development in the strategy of the Commission with regards to the Caribbean cases it is publishing. It appears to be publishing cases on issues *other* than the death penalty virtually for the first time. Whether it has been enabled to do this by a change in the type of petitions it receives from the Caribbean or by *choosing* to publish other cases is uncertain, given the fact that most petitions received never come into the public domain.[74] Nonetheless, this development has two advantages. Firstly, it will help defuse the death penalty stand-off by creating dialogue on challenges the States and the System have similar desires to address, such as the efficiency of the judicial system. Secondly, it is a belated attempt by the Commission to fulfil its own mandate by moving on from its virtually mono-thematic relationship with the Caribbean since 1981 to address the broader range of human rights issues that exist in the Caribbean.

The death penalty cases

Even a brief review of the literature available on the human rights situation in the Caribbean shows that what has, at least until now, absolutely dominated discussion and analysis has been the issue of the death penalty. The regional developments with regard to capital punishment itself do not need to be specifically reviewed here because what is clear from the vast literature on the subject is that what has created the most notable controversy and change has been the rulings of the Privy Council in cases such as Pratt and Morgan vs. Jamaica (1993), Reyes vs. the Queen (2002), Lambert vs. the Queen (2004), Roodal vs. The State (2004) and others rather than the jurisprudence of the Inter-American System. However, it is worth considering the

71 IACHR Press release N° 8/05.

72 See e.g. Trinidad Guardian, "State forced to hold on hanging… Mercy Committee's meeting postponed," 14 June 2005; United Nations Press Release: "UN Expert on Arbitrary Killings Appeals to Barbados to Stop Execution," 12 February 2005.

73 See *IACHR Annual Report 2002*.

74 It is estimated that the Commission receives over a thousand petitions a year and publishes fewer than a hundred.

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developing approach of the System to the cases in order to understand its newer approaches.

During the 1980s, all except one of the cases published regarded the death penalty and Jamaica, and it is clear that there were further such cases that were not put into the public domain.[75] Those petitions were all very similar, appear to have been carried out without legal assistance and consequently were lacking in information, evidence and references to specific articles of the Convention. They alleged innocence, unfair trial and wrongful conviction but did not focus on the application of the death penalty itself.[76] The Commission's response was nothing more than to request transcripts from the State and publish respective reports which found no violations, demonstrating considerable inertia. It found no violations –deciding on the *merits*– without actually making any real effort to elicit the required information from the unassisted petitioners or understand the circumstances of what was alleged to have been occurring.

In hindsight at least, given that the claims were remarkably similar to those that were to come later in the late 1990s, if the Commission felt unable to tackle the problem, it should have ruled negatively on *admissibility* on technical grounds of lack of a *prima facie* case rather than deny the substance of the allegations altogether in reports that bundled admissibility and merits incomprehensibly into one. Alternatively, it could have 'sat on' the cases, and bided its time as what it should have recognized as a pattern developed. The only death penalty case where a violation was found in the 1980s was the only (apparent) one where the victim had legal representation file the petition.[77] In that case, however, the Commission shied away from considering all the violations at hand –which feasibly included, based on the articulation of the facts in the petition, articles 4(1), 4(2), 4(6), 5(1), 5(2), 7, 8, 10, and 24 of the Convention[78]– stating that its function was "not… to act as a quasi-judicial fourth instance and to review the holdings of the

75 The Commission stated in Resolution Nº 60/82 over Case 3552 regarding Davlin Morris (Jamaica) on 23 November 1982, that the case "is illustrative of a number of virtually identical resolutions adopted by the IACHR this year," and lists seven others that were not published.

76 See e.g. Jamaica (Case 3102) 25/81, Jamaica (Case 3115) 24/81, Jamaica (Case 3552) 60/82; Jamaica (Case 7604) 60/62, Jamaica (Case 9054) 13/84; Jamaica (Case 7505) 27/86; etc.

77 See Jamaica (Case 9190) 28/86 Clifton Wright.

78 These relate to the rights to life, to humane treatment, to personal liberty, to fair trial, to compensation, and to equal protection of the law.

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domestic courts of the OAS member states." From the late 1990s, it was eventually to take the opposite approach[79] and interestingly, at least two of the petitioners from the 1980s cases, assisted by legal counsel, were later to have cases reviewed by the Privy Council and/or the UN Human Rights Committee who did find substance in their claims.[80]

In the later series of death penalty cases, the Commission found various combinations of violations of the rights to life, to humane treatment, to fair trial, to equal protection, to protection for mothers and children, to residence and movement, to health and to protection from arbitrary arrest.[81] As a result, what the Commission can be seen to be observing in the Caribbean States are: failure to bring suspects swiftly before a judge, detention conditions that do not meet international standards and represent inhuman and cruel treatment, lack of access to legal counsel, lack of due process, lack of fair trial, indiscriminate sentencing, lack of effective remedies, lack of access to justice, lack of access to legal aid for the indigent, all rendering remedies ineffective. The 31-victim consolidated case decided by the Court, Hilaire, Constantine and Benjamin *et al*, made similar findings.

Snapshot: the Caribbean through the lens of the Inter-American system cases

Wad some power the Giftie gie us.
To see ourselves as others see us.
Robert Burns, quoted by Val T McComie (Barbados),
Then Deputy Secretary General of the OAS

Parenthesis: Early non-death penalty cases

Between 1981, the year of the first published Caribbean case, and 2000, there were only two *public* cases that did not involve the death penalty, both involving Grenada.[82]

79 See e.g. the Commission's extended arguments to overcome the 'fourth instance formula' accusation in Report 38/00, Case 11.743 ("Heightened Scrutiny Test", at parag. 64) and Report 41/00 ("Standard of Review", at parag. 169).

80 See e.g. Jamaica (Case 9054) *13/84* Earl Pratt; Jamaica (Case 7505) 27/86 Lynden Champagnie.

81 Articles I, II, XVII, XVIII, XI, XXV, and XXVI of the Declaration or Articles 1, 4, 5, 8, and 25 of the Convention.

82 Grenada-Einstein Louison (Case 9597) 35/88; Grenada 2/96 10.325 Steve Clark.

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The first, published in 1999, involved the seizure of the passport of an ex-minister of the Bishop Government by the new government. In a report of a few paragraphs, the Commission reported the facts, did *not* outline the alleged violations and then concluded that the matter had been resolved domestically. If the Commission played any role in the settlement is unstated. As no cases with similar facts were published, it seems unlikely that the Commission chose the case as representative of a pattern of abuses in the country or region, and the reason for publishing it at all remains a mystery given the Commission's limited time and resources.

The second case involved the seizure by the State of a set of left-wing political books sent by US-based *Pathfinder* publishers to a local activist. Grenada's response to the allegations was limited to stating its right to impound seditious materials. Based on a six year delay while the case was before the Grenada High Court, the Commission found that domestic remedies had been exhausted, presumably in accordance with Article 46(2)c, and a violation of Article 13 of the Convention.[83] It found against a violation of Article 2, however. [84]

A third case, relating to the 1980s but resolved in 1999, is worth mentioning here although the respondent was not a Caribbean State but the United States. US intervention in the Americas has a long history and the present era of "regime change" as a US foreign policy tool in the context of the so-called "war on terror" makes the finding of the case noteworthy. In Coard *et al* vs. United States, involving the detention of Grenadian political leaders and civilians in Grenada by United States forces during and after the 1983 invasion of Grenada, the Commission found that the American Declaration can be applicable extra-territorially.[85]

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83 The right to freedom of thought and expression.

84 Domestic legal effects.

85 The Commission found that, "under certain circumstances, the exercise of its (the Commission's) jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination –without distinction as to race, nationality, creed or sex.' Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state– usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under

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The Commission found violations of articles I, XVII and XXV of the Declaration due to the failure of the US forces to ensure adequate judicial review of the treatment of those it had detained during its military intervention *in Grenada*.

The new Caribbean cases in the system

As noted, until 2000 the System had failed –with the relatively unimportant exceptions of the Grenada cases just discussed– in its public casework to address human rights issues in the Caribbean apart from in relation to the death penalty. Whether there was more going on 'behind the scenes' or not, whether there was simply a lack of other petitions being filed or whether the Commission simply took no interest in non-death penalty would take further investigation to clarify. However, since 2000 a noticeable change has occurred. The relevant cases are discussed briefly here.

Judicial processes and access to remedies

Arguably, the 1990s and current death penalty cases centred around an almost moral –although increasingly legally well argued by the Commission– debate on capital punishment itself, with other issues taking a relatively secondary role. In this decade, the Commission has chosen to again address the 'secondary' issues involved by publishing three cases,[86] including one at the merits stage, regarding individuals not facing the death penalty but rather incarceration. In the case of *Whytley Myrie*, the Commission found violations of Articles 1(1), 5(1), 5(1), 8 and 25 of the Convention with regard to conditions of detention, the trial judge's failure to direct the trial appropriately, the failure to provide him with competent and effective counsel and the failure to provide effective access to bring a Constitutional Motion.[87] The key recommendation of the Commission was a retrial with due safeguards. More such findings and recommendations –and their diffusion by the

the specific circumstances, the State observed the rights of a person subject to its authority and control."

86 Report 72/03 Whitley Myrie Petition 729/2001 (Jamaica) 2003 Admissible; Report 753/02 Fabian Moses (Jamaica) 2004, Admissible; Report 518/01-Derrick Tracey (Jamaica) 2004, Admissible; Report 41/04 Whitley Myrie Case 12.417 Merits (Jamaica) October 12, 2004.

87 See id. Report 41/04 –the obligation to respect rights and specifically the rights to humane treatment, to fair trial and to judicial protection–.

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media– will go a long way to overcoming resistance to the System in the Caribbean and the very widespread criticism that "human rights are criminals rights."

Corporal punishment

The case of Winston Caesar involves the issues such as conditions of incarceration, and delays in trial of the death penalty cases but also highlights a 'new' issue before the System in the Caribbean: the application of corporal punishment (in this case flogging), alleged to represent a violation of article 5(1) and 5(2) –the right to humane treatment– of the Convention. Progress on this case is not revealed in the recent documents of the Commission but if it does reach the merits stage, it might have an impact well beyond the criminal justice system in the area of children's rights as such practices are widely accepted, although increasingly hotly debated in the region.[88]

Violence against women

One key case worth noting in this section despite its central issue being that of the death penalty is that of *Indravani Pamela Ramjattan*.[89] It presented a wide range of potential implications that never reached the merits stage because the alleged victim's sentence was commuted. Ms. Ramjattan, a mother of six, had faced intense abuse –characterised as "a reign of terror"– at the hands of her common-law husband, having been forced to live with him since the age of seventeen by her parents.[90] She and two males were found responsible for his murder despite the fact that she was six months pregnant at the time and was allegedly in another room when the fatal blows were struck. All three were given the mandatory death sentence in Trinidad. The petition on behalf of Ms. Ramjattan before the Commission alleged similar violations of the Convention as other death penalty cases (Articles 4, 5 and 8 –life, humane treatment and fair trial), due to common procedural problems including delay in being brought to trial, not being informed of the

88 For example, UNICEF Barbados finds that "Children living in both single parent, as well as nuclear family households are subject to corporal punishment as the main form of discipline, as it is considered as a cultural norm in the region." See http://www.unicef.org/barbados/overview.html.

89 Report 92/98, Case 11.837 (Trinidad and Tobago) 1998, Admissibility.

90 *Id.*

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charges and the lack of transparency of access to mercy. However, it was the first time that *violence against women*, and specifically *domestic violence*, had been an issue in a Caribbean case before the System. This in a region that, like others, suffers a "persistent scourge of violence against women,"[91] and recognises the problem as being grave.[92] The fact that Ms. Ramjattan was prevented from seeing her young children while awaiting trial and during conviction also raises other issues about the criminal justice system. A further regional innovation in this petition was the allegation of a violation of Article 11 of the Convention[93] although on what grounds exactly was not revealed in the report. In addition, a regional precedent was set with the alleged violations of the Belém do Pará Convention on women's rights contained in the petition, again unspecified in the report. The merit of those allegations will never be known and, as a result, serious gender-related issues that the commutation of sentence did not resolve either for the alleged victim or the wider society will not *for now* be addressed despite their importance.

Disappearances

While politically motivated disappearances and extra-judicial killings have not been a characteristic of the Caribbean, in recent years, a few allegations have been made in Guyana regarding them.[94] A case declared admissible in 2001 involves a person taken into custody by police never to be seen again and alleges violations of Articles II, XI, XVIII, XXV, and XXVI of the Declaration.[95] It is the first published case against that Caribbean state.[96] The Commission reacted rapidly to this case, familiar as it was with disappearances, issuing precautionary measures. However, the merits have not been published and the alleged victim has not reappeared. In an era where the security forces are

91 CARICOM Press release 62/2005, 7 March 2005.

92 See e.g. http://www.caricom.org/womenlegislation.htm.

93 The right to privacy.

94 Ronald Gajraj, Guyanese Home Minister, was recently linked with the activities of a 'death squad' although cleared of any charges by an inquiry. See also United Nations Office of the High Commissioner for Human Rights, Technical Cooperation Project, Guyana, *Quarterly Report* (Period covered: July-October 2004).

95 The rights to equality before the law, to health and well-being, to fair trial, protection from arbitrary arrest, and due process.

96 Report 80/01, Franz Britton aka Collie Wills, Case 12.264 (Guyana).

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feeling so frustrated in their fight against crime, particularly in Jamaica, Guyana and Trinidad, this case may become more relevant as time goes on.

Freedom of expression

Inevitably, there may be some concerns regarding freedom of expression in the Caribbean,[97] and in 2001 the Commission declared admissible a case regarding the issue in St. Lucia. The victim alleged violations of Articles I, II, IV, V, XIII, XIV, XVII, XVIII, XXIII and XXIV of the Declaration[98] and the Commission found all allegations admissible except those regarding articles I, II and IV. Unfortunately, no explanation for the excluded allegations was given which somewhat weakens the case of the Commission if it aims to establish its credibility in its new-found engagement in Caribbean human rights.

A second case, filed by System familiar Claudio Grossman, on behalf of a newspaper proprietor in Jamaica with regard to excessive libel fines imposed by the Government of Jamaica for publication of allegations of corruption against an ex-Government minister was declared admissible in 2004.[99] The admissible allegations concerned violations of Articles 1, 2 and 13 of the Convention. The case is set to be a prominent one given the petitioner's legal counsel, the number of amicus briefs submitted from a variety of leading organizations and the subject matter.[100]

Security force abuses

Jamaica has become infamous for alleged abuses and excesses by its security forces and its failure to address the problem.[101] A recent study

97 See e.g. the case of the Trinidadian journalist arrested for photographing police handcuffing children or the current dispute between the Guyanese Government and a broadcaster that criticised it at http://www.hardbeatnews.com/newsdetails.php?aaad=3120 and http://www.hardbeatnews.com/newsdetails.php?aaad=3135.

98 The rights to life, liberty and security, to equality before the law, to freedom of investigation, opinion, expression and dissemination, to protection of honour, personal reputation, and private and family life, to residence and movement, to work and fair remuneration, to recognition of juridical personality and civil rights, to fair trial, to property, and of petition.

99 Report 65/04, Petition P28/04 Dudley Stokes (Jamaica).

100 *Id.*

101 See for example, Jamaicans for Justice, *Pattern of impunity: A report on Jamaica's investigation and prosecution of deaths at the hands of agents of the state*, 2004.

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of Guyana links the colonial history of violence to current security force excesses.[102] Violations by the police are also a pertinent issue in other Caribbean States. This situation is unlikely to improve in the short term due to the immense challenges crime is posing across the region, leading the Governments to take ever more extreme internal security measures.[103]

In System death penalty cases from the Caribbean since 1981, police abuses have been a recurring aspect of the facts, yet have never been addressed as a separate issue from prison conditions as inhuman treatment under Convention article 5, despite the System's extensive use of the *iura novia cuna* principle elsewhere that could have allowed the Commission to develop the petition in such a direction given the correct facts here.[104] In 2003, for the first time, the Commission declared admissible a case alleging violations of Articles 4, 5, 8 and 25 specifically on this issue.[105] Given the situation, this could represent an important case that may be significant in reinforcing Caribbean efforts to address the problem.

Refugees

As noted above, refugee rights issues have been a recurring problem. While events in the Bahamas made this most visible to the System, it is also an issue elsewhere. The Commission backed away from addressing the issue after its 1994 visit to that State, which was clearly an error given the recurring nature of the problem as a result of ongoing instability in Haiti and Cuba. In 2002, the Commission declared admissible a case involving Haitian and Cuban nationals claiming refugee status detained in the Bahamas.[106] The Commission decided to consider the alleged violations of articles I, II, V, VI, VII,

[102] Mars, Joan R., *Deadly Force, Colonialism and the Rule of Law: Police Violence in Guyana*, Westport, Connecticut. Greenwood Press, 2003.

[103] In Jamaica, for example, the government in March 2005 decided to use the army for internal security operations against gang violence. See *Jamaica Observer* article, "We are at war", 18 March 2005.

[104] See e.g. IACHR Report 125/99, Case 12.086.

[105] Report 8/03, Petition 191/02 Michael Gayle (Jamaica). These articles refer to the rights to life, humane treatment, fair trial and judicial protection.

[106] Report 6/02, Petition 12.071 (Bahamas).

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XVII, XVIII, XXV, and XXVII of the Declaration.[107] As the problems are clearly ongoing,[108] and the situation of Haiti and Cuba remain unstable, the Commission's recommendations could play an important part in protecting refugee rights in the future.

Indigenous rights

Of the Caribbean States, Guyana and Belize in particular share with their Latin American neighbours populations that include significant numbers of indigenous peoples facing ongoing marginalization, poverty and a range of related human rights abuses.[109] An important Commission case was decided in 2004 relating to the rights of Mayans in Belize.[110] The Commission found triple violations of the right to property enshrined in Article XXIII of the Declaration. It found that by granting logging and oil concessions to third parties in the absence of effective consultations and consent of the Maya people and by failing to provide them with the protections necessary to exercise their property rights fully and equally with other members of the Belizean population, the State had failed to take effective measures to recognize the Mayans' communal title right to the lands that they traditionally occupy. It also found that Belize had violated Declaration article XVIII by rendering domestic judicial proceedings ineffective through unreasonable delay.[111] After centuries of marginalisation, and facing ever-increasing encroachment by foreign companies and other challenges, this decision has a potentially huge impact. Guyana is in the process of legislating on 'Amerindian' rights and the Commission should engage in constructive, effective monitoring of this process.

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[107] Rights to life, liberty and personal security, to equality before the law, to protection of honour, personal reputation, and private and family life, to a family and to protection thereof, to protection for mothers and children, to recognition of juridical personality and civil rights, to fair trial, to protection from arbitrary arrest, and of asylum.

[108] See e.g. Reuters, "20 hurt in Bahamas prison riot-report", 9 December 2004.

[109] See e.g. Guyana National Development Strategy, Chapter 22. (http://www.guyana.org/NDS/chap22.htm#Top); Susan Noe, "Land Rights of the Garifuna of Belize: A Preliminary Analysis Under Domestic and International Law", November 2001, available at http://www.du.edu/intl/humanrights/garifuna.pdf.

[110] Report 40/04; Case 12.053 (Belize) Merits.

[111] *Id.*

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Other challenges

From the above, we can see that the Caribbean cases before the System project a far broader picture of human rights challenges in the Caribbean than even five years ago. To have cases involving judicial and criminal process, prison conditions, freedom of expression, police abuses, disappearances, indigenous rights, refugee rights, corporal punishment and of course the mandatory death penalty represents a strong move forward by the Commission with regard to its duties toward the peoples of the Caribbean.

It is, of course, beyond the scope of this study to map comprehensively the other human rights issues of the region that the System is not addressing. A few specific issues do, however, warrant mention.

HIV/AIDS is recognized as a serious challenge in the Caribbean,[112] probably more so than in the rest of the hemisphere,[113] and implies a range of human rights issues including the right to freedom from discrimination and the right to health. It will be interesting to see if the Commission, having begun to address the issue elsewhere,[114] can find a role to play on it in the Caribbean. Certainly, in its monitoring function if not through its petitions, it ought to. Inter-related with this is another area yet to be addressed; that of homophobia (which is in turn connected to attacks on human rights defenders) which, given the sensitivity of Caribbean people to the issue, may be a matter on which the Commission could play a role.[115]

A recent OAS conference highlighted the challenge of human trafficking in the Caribbean region, a phenomenon that is also yet to receive attention by the System.[116]

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112 See e.g. CARICOM: *Regional Issues* at http://www.caricom.org/.

113 *Id.*

114 Report 29/01, Case 12.249, 2001.

115 See e.g. Human Rights Watch: *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic,* 2004. The sensitivity of the issue of sexual orientation is illustrated, for example, by the fact that the Guyanese Parliament refused to pass *Constitution (Amendment) (No. 2) Bill 2003* (known as Act 10) until all references to sexual orientation under non-discrimination were removed. For details on this, see Arif Bulkan, "Democracy in Disguise: Assessing the Reforms to the Fundamental Rights Provisions in Guyana," *Georgia Journal of International and Comparative Law,* 32 Ga. J. Int'l & Comp. L. 613, 2004.

116 OAS press release: "Human Trafficking in Caribbean Countries the Focus of OAS Meeting," 14 March 2005.

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The Caribbean nations are in the process of throwing off the last vestiges of colonialism by seeking to replace the Privy Council with the Caribbean Court of Justice as the court of last resort for the region. This development, while clearly positive, poses a range of potential challenges for human rights in the region[117] and the System may well seek to assert a monitoring role for itself given the implied obligation of article 2 of the Convention that States should not adopt legislation or take measures that might result in a *weakening* of the rights and freedoms contained in the Convention.

An interesting aspect of some of the death penalty cases before the Court was that the victims had been convicted of crimes such as murder "in the furtherance of terrorism." The System has never questioned this definition but in the post-9/11 era when the States of the OAS –including Caribbean States– are taking legislative and other steps against 'terrorism', such a phrase takes on new meaning and proposes a range of human rights issues that are another area that the System should be cognizant of.[118]

A brief word should also be said about the 2005 appointment of Clare Roberts as *Special Rapporteur on the Rights of Persons of African Descent and Racial Discrimination* by the System.[119] In the context of Latin America, this is a long-awaited and much needed step in addressing the gross marginalization of citizens of African descent. For Belize too, which has seen the increasing marginalisation of the Afro-Belizean population with the growing dominance of *mestizos* and increasing socio-economic challenges,[120] and Jamaica where there is a marked parallel between colour and class, the appointment is a positive sign. However, for much of the Caribbean there is a complication. People of East Indian descent make up a substantial part of some of the populations there. In Guyana and Trinidad, tensions between African descendants and East Indian descendants have been long-running issues and have, since 2002, contributed to an unprecedented level of activity by the UN that begun in 2001, including a visit by the UN Special

117 See e.g. Jamaicans for Justice, Brochure on the Privy Council and the Proposed Caribbean Court of Justice," at "http://www.jamaicansforjustice.org/court2.htm.

118 See e.g. Caribbean Net News: "Trinidad and Tobago Passes Anti-Terror Bill," 21 February 2005, available at http://www.caribbeannetnews.com/2005/02/21/passes.shtml

119 OAS Press Release, "IACHR Creates Special Rapporteurship on the Rights of Persons of African Descent and Racial Discrimination," 25 February 2005.

120 Minority Rights Group (Ed.), *No Longer Invisible: Afro-Latin Americans Today*, Minority Rights Publications, London 1995, pp. 225-234.

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Rapporteur on Racism[121] and the appointment of a Human Rights Advisor to work with UNDP in Guyana from June 2004. However, unlike the case of Latin America, the problem is not so simply one of racism being directed against Afro-Caribbeans –although this is often the case– but of *mutual* suspicion and animosity.[122] There are also other minorities throughout the region. Guyana, for example, prides itself on being the home of six distinct races. As such, the idea implicit in the new Rapporteurship that racism is co-equivalent to discrimination against *Afro-descendants* may be over-simplistic, not entirely appropriate beyond *Latin America* and may well fuel mistrust or worse unless adequate care is taken. Thought must be given to the complex social, political and economic inter-relationships that make up Caribbean life.

Conclusion: to the future

We have seen that at first the relationship between the Inter-American System of Human Rights and the Anglophone Caribbean was non-existent, with the System concentrating on the Latin American and Suriname situations. Initial attempts at developing relations by the System were half-hearted and ineffective. Then came an era of engagement that immediately caused confrontation due to the concentration of the System on the sensitive and complex death penalty issue. In the last five years, the System has shown considerable commitment to establishing a broader relationship with the Caribbean in accordance with its mandate to "promote the observance and protection of human rights" in *all* the States of the OAS. However, much remains to be done. The Caribbean is still signally absent from the monitoring sections of the Commission's annual reports and the current policy for selecting States for attention will continue to exclude Caribbean States unless changed.[123] Caribbean compliance with the System is also extremely low.

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[121] E/CN.4/2004/18/Add.1, 8 January 2004.

[122] For example, some Indo-Guyanese express concern at the fact that none of the judges of the CCJ are of non-Afro-Caribbean background: Stabroek News (Guyana): There is no Judge of Indian Origin in the Caribbean Court of Justice," Friday, 11 "February 2005.

[123] *IACHR Annual Report 1997*, "First: States ruled by governments that did not reach power by means of popular elections using secret, honest, regular and free vote, in accordance with internationally accepted rules of law; second: States where the free exercise of the rights embodied in the American Convention or in the American Declaration have been suspended in full or in part, by means of imposition of exceptional measures such as state of emergency, state of siege

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The System must continue to broaden its actions on petitions with regard to the Caribbean but more importantly, it must establish its own credibility in the sub-region by promoting co-operation, promotion and monitoring and overcoming impressions such as the one that human rights are "criminals' rights". This at a time when the demand for effective action to combat rising crime is making violations more likely.

Despite the positive sign that increasing numbers of Caribbean petitions are filed by Caribbean –as opposed to foreign– individuals and organisations, due to small populations and limited resources, Caribbean civil society has a limited capacity to monitor and promote human rights or access the System's remedies. The Commission must be *unprecedentedly* pro-active in both considering the Caribbean separately, through monitoring, public information, on-site visits, diplomacy and any other tools at its disposal, and integrating it into all its regional activities such as special studies and Rapporteur reporting, all in order to maximise the impact of national efforts. At the same time, the System must comprehend that the Caribbean is a very different place to Latin America and be responsive to that fact. The people of the Caribbean deserve that the activities of the System, both with regard to human rights in general and in choosing specific areas for attention, cease to be shaped almost entirely by the situations and perspectives of the Spanish, French and Dutch-speaking States of the hemisphere, as Verónica Gómez noted it still was in 1998.

or other; third: States against which there is proof that they have committed widespread and grave violations of rights secured in the American Convention, in the American Declaration, or in other applicable instruments, that have suspended rights whose effect may not be interrupted, and have committed summary executions, tortures and forced disappearances of persons; and fourth: States that are in a process of transition with respect to any of the three aforementioned situations. Based on these criteria, the Commission included in Chapter V of its most recent annual report a section on the status of human rights in several member states."

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Annex: Table of Ratifications of Inter-American Human Rights Instruments by Anglophone Caribbean States

	American Convention (1969)	Protocol of San Salvador (ESCs) (1988)	Inter-American Convention on Forced Disappearances (1994)	Inter-American Convention to Prevent and Punish Torture (1985)	Convention Belém do Pará (Women's Rights) (1990)	Protocol to the American Convention to Abolish the Death Penalty
Antigua and Barbuda	X	X	X	X	1998	X
Bahamas	X	X	X	X	1995	X
Barbados	1982	X	X	X	1995	X
Belize	X	X	X	X	1996	X
Dominica	1993	X	X	X	1995	X
Grenada	1978	X	X	X	2001	X
Guyana	X	X	X	X	1996	X
Jamaica	1978	X	X	X	2005	X
St. Kitts and Nevis	X	X	X	X	1995	X
St. Lucia	X	X	X	X	1995	X
St. Vincent and the Grenadines	X	X	X	X	1996	X
Trinidad and Tobago	1991. Denounced 1998	X	X	X	1996	X

X = Not ratified (As of July 17th, 2005).

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