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**ORGANIZATION OF AMERICAN STATES  
INTERAMERICAN COMMISSION ON HUMAN RIGHTS**

**FINAL ARGUMENTS  
BOYCE ET AL. V. BARBADOS  
AT THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

**I. INTRODUCTION**

1. Like the *Case of Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, the present case places before this Court the application of capital punishment through mandatory sentencing, this time in Barbados. Messrs Boyce, Joseph, Atkins and Huggins were found guilty of murder and sentenced to death through the application of laws that do not comply with basic international norms of due process and fairness. The imposition of the death penalty in these cases was arbitrary and in violation of the right to life and humane treatment. Because the law of Barbados immunizes laws enacted prior to the Constitution from Constitutional challenge or scrutiny, the courts in Barbados are prevented from establishing that the mandatory death penalty contravenes fundamental rights and freedoms otherwise guaranteed under the Constitution and the American Convention. Furthermore, the victims have been detained since 1998 and 1999, respectively, in conditions that are inhuman, and were read warrants of execution even after they had filed notice that they would file further legal appeals, and even during the pendency of their petitions before the Inter-American Commission.

2. The State of Barbados has unequivocally rejected the Commission's conclusions and recommendations in this case and, moreover, has specifically rejected the findings of the Commission and this Honorable Court on the issue of the mandatory death penalty as having "no basis in law". Accordingly, it is only through a judgment issued against Barbados by this Court that the State's fundamental obligations under the American Convention on Human Rights and the corresponding human rights of the victims in this case can be decisively defined and ensured.

3. The Commission and the Court have established that the automatic imposition of the death penalty without consideration of the individual circumstances of the offence or the offender is incompatible with the rights to life, humane treatment and due process. That jurisprudence, which was itself informed by developments in national legal systems, has had tremendous influence on the approach taken by other national tribunals and international bodies. This case forms part of that evolving jurisprudence on the issue of mandatory sentencing for the death penalty at the national, regional and international levels.

4. Although, to date, the death sentence of Messrs Boyce and Joseph has been commuted to life in prison and Mr. Atkins has passed away, the case

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presents multiple questions of pressing importance: for Mr. Huggins, insofar his death sentence has not been formally commuted; and for the three surviving victims, insofar as it refers to the conditions in which they have been and continue to be held. Moreover, the present case must serve to further affirm the incompatibility of legislation that allows the imposition of the death penalty as an automatic penalty with the American Convention and lead to an order of measures of non-repetition.<sup>1</sup>

5. The Commission has already argued in detail the facts and the law that sustain its allegations in the present case.<sup>2</sup> Thus, in the instant brief, the Commission will only refer to the most significant issues that may merit consideration by the Court.

## II. PRELIMINARY EXCEPTIONS

6. The State filed a preliminary objection regarding the admissibility of the case based on an alleged non exhaustion of domestic remedies. As the IACHR has demonstrated,<sup>3</sup> the application filed in the present case is admissible and the preliminary objection should be dismissed.

7. The Commission decided in Report No. 03/06 of February 28, 2006, that Barbados had "implicitly or tacitly waived any challenge with regard to the exhaustion of remedies"<sup>4</sup> considering the fact that the State had provided no observations regarding the exhaustion of domestic remedies in the case of Messrs Boyce and Joseph, and given the absence of any observations from the State regarding precisely which domestic remedies had not been exhausted by Messrs Huggins and Atkins. The Commission has provided detailed arguments, supported

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<sup>1</sup> While the death sentences of certain petitioners in the instant case were commuted pursuant to the Privy Council's 1994 ruling in *Pratt and Morgan v. Jamaica* (holding that the execution of a prisoner after he had spent five or more years on death row constituted "inhuman or degrading punishment or treatment"), persons convicted of murder after 2002 will not be afforded the same protection. By passing the Constitutional (Amendment) Act of 2002, the legislature of Barbados ensured that "any delay in executing a sentence of death imposed on a person in respect of a criminal offence under the law of Barbados of which he has been convicted" will not be held to constitute inhuman or degrading punishment or treatment. Constitutional (Amendment) Act of 2002 (No. 14) section 2, Official Gazette, 2002-09-05, No. 74, pp. 1-3, Appendix A.2 of the Application.

<sup>2</sup> See IACHR Application of The Inter-American Commission On Human Rights Before The Inter-American Court Of Human Rights, Case 12.480, *Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins (Boyce Et Al.) v. Barbados*, June 23, 2006 [hereinafter "Application"]; IACHR Observations of the Inter-American Commission on Human Rights to the Preliminary Objection Submitted by the State of Barbados in Case 12.480, *Boyce et al. v. Barbados*, before the Inter-American Court of Human Rights, February 21, 2007 [hereinafter "Observations to the Preliminary Objection"]; and IACHR Observations of the Inter-American Commission on Human Rights on the Supplementary Written Submissions of the Alleged Victims, Case 12.480, *Boyce et al. v. Barbados* before the Inter-American Court of Human Rights, April 25, 2007.

<sup>3</sup> See IACHR, Observations to the Preliminary Objection.

<sup>4</sup> See Annex E.1 to the Application, IACHR, Report 03/06, *Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins, Barbados*, adopted February 28, 2006, para. 68.

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on the case law of the system, that sustain its request that the Court does not review this decision.

8. However, if the Court should decide to reexamine this matter and determine what the scope of the preliminary objection of lack of exhaustion of domestic remedies that was submitted by the State before the Commission was,<sup>5</sup> the Court should take into account that although the Commission requested observations from the State regarding the admissibility and merits of the petition on three occasions,<sup>6</sup> Barbados never provided observations regarding the exhaustion of domestic remedies in the case of Messrs Boyce and Joseph, and in the case of Messrs Huggins and Atkins, never elaborated on what domestic appeals "remain[ed] to be exhausted and that they [were] effective."<sup>7</sup>

9. The Commission first requested observations when it transmitted a copy of the petition to Barbados via a September 17, 2004 communication. The State submitted observations on December 16, 2004 expressing in general terms that "Barbados does not concede any of the human rights violations alleged in the Petitioner's claim, and reserves the right to contest all aspects of this claim, including its admissibility" and "denie[d] that her form of capital punishment violates any of the rights contained in the American Convention on Human Rights [...]". With respect to the precautionary measures requested by the Commission, it informed that the alleged victims had not been executed but that it could not "delay the execution [...] beyond the time period specifically provided for in the case of Pratt v. Attorney-General for Jamaica [...] and other relevant subsequent case law". Finally, the State textually said that:

It should be noted that there has not been an exhaustion of local remedies in respect of Michael Huggins and Frederick Atkins as there has been no order transmitted from the Judicial Committee of the Privy Council relating to their domestic appeals.<sup>8</sup>

10. On January 26, 2005 the Commission requested observations for a second time and the State reiterated its earlier general statement that it did not concede "any of the human rights violations alleged in the Petitioner's claims and subsequent responses, and reserves the right to contest all aspects of these claims, including their admissibility" via a February 16, 2005 communication. The State did not reiterate its affirmations regarding Messrs Huggins and Atkins.

11. On July 25, 2005, the Commission repeated its request for observations on both the admissibility and the merits of the case for a third time. It

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<sup>5</sup> I/A Court H.R., Boyce et. al., Communication Ref. 12.480/134 of July 17, 2007.

<sup>6</sup> See Annex E.2 to the Application, IACHR's communications of September 17, 2004, January 26, 2005 and July 25, 2005.

<sup>7</sup> I/A Court H.R., *Case of Velasquez-Rodríguez v. Honduras*, Preliminary Objections, Judgment of June 26, 1987, Series C No. 1, para. 88.

<sup>8</sup> See Annex E.2 to the Application, Communication of December 16, 2004 (two pages). A copy of it is provided for the convenience of the Court.

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received no response from the State prior to the adoption of its February 28, 2006 report. Therefore, the Commission stated in Report 03/06:

Given the absence of any observations from the State regarding precisely which domestic remedies have not been exhausted by Messrs Huggins and Atkins, and considering the fact that the State has provided no observations regarding the exhaustion of domestic remedies in the case of Messrs Boyce and Joseph, the Commission finds that the State implicitly or tacitly waived any challenge with regard to the exhaustion of remedies by the alleged victims in domestic proceedings.<sup>9</sup>

12. Ten months after the publication of this report and only when the case had been referred to the Court, the State of Barbados argued that the petitioners had failed to exhaust domestic remedies with respect to the conditions of their detention, the cruelty of hanging as a form of execution, and the cruelty involved in reading warrants of execution.<sup>10</sup> Alternatively, it proposed that all such claims should be severed from the Application.<sup>11</sup>

13. With respect to conditions of the petitioners' detention, the State argued that the petitioners never lodged complaints with the Visiting Committee pursuant to the Prison Rules of 1974 or with the Advisory Board pursuant to the Prisons Act.<sup>12</sup> With respect to all three alleged bases for non-exhaustion, the State submitted that the petitioners never filed claims in Barbadian courts alleging that the conditions of their detention, the cruelty of hanging as a form of execution, or the cruelty involved in reading warrants of execution constituted cruel and inhuman treatment, which is prohibited by the Constitution of Barbados.<sup>13</sup> Finally, the State argued that none of the exceptions to the rule regarding exhaustion provided by Article 46(2) of the American Convention are applicable.<sup>14</sup>

14. Had the State raised these objections to the Commission during the fourteen-month period in which the petition was under review, the Commission would have examined the merits of the objections. The State, however, chose to abstain from presenting substantive arguments until more than two years after the petition was filed. As the Commission stated in Report 03/06, the right to present an objection of non-exhaustion of domestic remedies can be waived, either expressly or implicitly, and once such a waiver is affected, it is irrevocable.<sup>15</sup>

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<sup>9</sup> IACHR, Report No. 03/06, *Boyce et al. v. Barbados*, adopted Feb. 28, 2006, appendix E.1 to the Application, at paras. 56-57, 68.

<sup>10</sup> *Boyce et al. v. Barbados*, Case No. 12.480, Submissions of the State of Barbados, 18 December 2006 [hereinafter "Submissions of the State of Barbados"], para. 4.

<sup>11</sup> *Id.* at para. 6.

<sup>12</sup> *Id.* at para. 4.

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

<sup>14</sup> *Id.* at para. 5.

<sup>15</sup> I/A Court H.R., *In the matter of Viviana Gallardo et al.* Series A No. G 101/81, Decision of November 13, 1981, para. 26.

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Because the State waived its right to object to the admissibility of this case at the permissible stage, it is barred by the well established doctrine of *estoppel*<sup>16</sup> from availing itself of this defense at a later stage in the proceedings.

### III. FACTS

15. With the exception of prison conditions, the basic facts of the present case are not in dispute.

16. There is no controversy regarding the fact that all of the victims in the present case were tried by Barbados for the crime of murder, were convicted, and were sentenced to death by hanging under section 2 of the State's *Offences Against the Person Act 1994*, which prescribes the death penalty as the automatic and mandatory punishment for that crime. It is not in dispute that, as a consequence of Section 26 of the Constitution of Barbados -- referred to as a "savings clause" because it immunizes pre-constitution laws from constitutional challenge -- the domestic courts cannot declare these mandatory death sentences to be invalid. Nor is it in dispute that the State read warrants of execution to each of the victims before their appeals before the national courts and the Inter-American Commission were completed.

17. The Commission will refer in detail to the issue of prison conditions when addressing the violation of Article 5 of the American Convention below.

### IV. THE LAW

18. In the instant brief, the Commission will focus on:

A) Violations of the American Convention due to the mandatory nature of the death penalty in Barbados; and

B) Violations of the American Convention due to the prison conditions and the reading of warrants of execution to the victims.

A. Violations of Articles 4(1), 4(2), 5(1), 5(2) and 8(1) of the American Convention in conjunction with Articles 1(1) and 2 due to the mandatory nature of the death penalty in Barbados

19. The core contention of the Commission in this case is that the imposition of the sentence of death absent any judicial consideration of the individual circumstances of the crime or the perpetrator places Barbados in breach of its international obligations under the American Convention.

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<sup>16</sup> As the Court has determined: "International practice indicates that when a party in a case adopts a position that is either beneficial to it or detrimental to the other party, the principle of estoppel prevents it from subsequently assuming the contrary position. Here the rule of *non concedit venire contra factum proprium* applies." I/A Court H.R., *Neira Alegría et al., Preliminary Objections*, Judgment of December 11, 1991, Ser. C No. 13, para. 29.

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20. As a preliminary matter, the Commission notes that the State of Barbados has argued before the Court that its mandatory capital punishment is consistent with its inter-American treaty obligations because of the reservation it made to Articles 4(4), 4(5) and 8(2)(e) of the American Convention. As the Commission has already indicated in its written submission,<sup>17</sup> it considers that this argument lacks foundation, primarily because the reservation in question refers expressly to provisions not at issue in the present case<sup>18</sup> and has an object and purpose not relevant to the questions presently before the Court. As the Court is aware from the written pleadings, the Commission has not taken a position on the validity or invalidity or potential scope of the reservation entered by Barbados because it considers that the reservation is not relevant to the determination of the claims presented in this case.

21. The State argues generally that, while the American Convention restricts the death penalty it does not prohibit it, and that the penalty for murder in Barbados is in no way inconsistent with the terms of Article 4 of the Convention. It is the contention of the State that both the Commission and Court have misinterpreted the terms of Article 4 so as to effectively create standards that are *ultra vires*.<sup>19</sup>

22. In this respect, the parties agree that this case requires the determination of the meaning and content of Article 4 and related provisions of the American Convention. In this regard, it is worth noting what this case is not about. It is not about the prohibition or abolition of the death penalty.

23. Article 4 does not require abolition, rather, it requires that the conventional rules concerning the death penalty be interpreted as "imposing

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<sup>17</sup> See IACHR Observations of the Inter-American Commission on Human Rights on the Supplementary Written Submissions of the Alleged Victims, Case 12.480, *Boyce et al. v. Barbados* before the Inter-American Court of Human Rights, April 25, 2007, paras. 10-19.

<sup>18</sup> The text of the reservation made by Barbados refers specifically to Articles 4(4), 4(5) and 8(2)(e) of the American Convention in the following terms:

In respect of 4(4) the Criminal Code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point in as much as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4).

In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court of Appeal, might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over, or over 70 years of age, may be executed under Barbadian law.

In respect of 8(2)(e) Barbadian law does not provide, as a minimum guarantee in criminal proceeding, any inalienable right to be assisted by counsel provided by the state. Legal aid is provided for certain scheduled offences such as homicide and rape.

<sup>19</sup> Submissions of the State of Barbados, para. 109.

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restrictions designed to delimit strictly its application and scope."<sup>20</sup> As the Court and Commission have indicated in numerous instances Article 4 of the Convention imposes three types of limitations on the application of capital punishment by states parties that have not abolished it:

First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed;

Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses; and

Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.<sup>21</sup>

24. Precisely as the Court indicated in its advisory opinion number 16: "Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."<sup>22</sup>

25. Subsequent case law of the system, most particularly the Hilaire case, but including a series of individual cases before the Commission with respect to a range of countries has demonstrated what these limitations mean in practice *vis-à-vis* the rights of specific individuals.

26. Accordingly, this case is not about prohibition or abolition of the death penalty, but rather about the restrictions that apply under Article 4 and related provisions of the American Convention when a state party seeks to impose that penalty.

27. The State argues that the manner in which the Court and the Commission have interpreted and applied the American Convention with respect to the mandatory death penalty finds no basis in either the text of the Convention or a

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<sup>20</sup> I/A Court H.R., *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 57.

<sup>21</sup> I/A Court H.R., *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 55. See also IACHR, *Desmond McKenzie et al. v. Jamaica*, Case 12.023, Report 41/00, April 13, 2000, para. 189; IACHR, *Dave Sewell v. Jamaica*, Case 12.347. Report N° 76/02, December 27, 2002, para. 90; IACHR, *Donnason Knights v. Grenada*, Case 12.028, Report N° 47/01, April 4, 2001, para. 69. IACHR, *Rudolph Baptiste v. Grenada*, Case 11.743, Report No 38/00, April 13, 2000, para. 77. IACHR, *Case 12.067, Michael Edwards, Case 12.068, Omar Hall, Case 12.086, Brian Schroeter And Jeronimo Bowleg v. The Bahamas*, Report N° 48/01, April 4, 2001, para. 133.

<sup>22</sup> I/A Court H.R., *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 136.

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proper reading of its object and purpose and is *ultra vires*.<sup>23</sup> In this regard, the Commission reiterates that, while Article 4 in fact contains no textual reference to the mandatory death penalty, both the Court and Commission have interpreted the relevant provisions of this Article according to the rules of interpretation provided by international law and keeping in mind the distinct character of human rights treaties, and concluded that the reference to "arbitrary" in Articles 4(1) of the Convention and the reference to "the most serious crimes" of Article 4(2) of the American Convention renders the kind of mandatory death penalty that exists in Barbados incompatible with such provisions. This is the reasoning that lies beneath the Court's decision in the *Hilaire et al. Case*, and it is the reasoning adopted by a variety of national courts and international bodies in addressing the mandatory death penalty.

28. The State has argued that the capital punishment is only applied to the most serious offences: 1) Because it is only applied to the crimes of murder and treason; and 2) because capital punishment has been specifically excluded for a number of crimes that would normally fall under the definitions of murder or treason. It has also argued that a full range of statutory and common law defenses and justifications is available to prevent capital punishment.<sup>24</sup>

29. However, these factors are considered in determining whether a jury may find a defendant guilty of murder and not the nature of punishment that is appropriate once the offender is found guilty of that offense. Moreover, these factors also do not encompass circumstances pertaining to the nature of the offense, or personal circumstances such as the character and record of the accused, which, as submitted above, are essential for a rational, humane and fair determination as to whether the death sentence is a necessary and appropriate punishment in the circumstances of a particular crime.

30. Article 4(1) of the American Convention prohibits the arbitrary deprivation of life, and subsection (2) specifies that the death penalty may only be imposed for the most serious crimes. The facts of the case demonstrate that the imposition of the death penalty in the case of Messrs. Boyce, Joseph, Atkins and Huggins was arbitrary precisely because the death penalty is not limited to crimes of the utmost seriousness.

31. In Barbados, The Offences Against the Person Act provides the punishment for various crimes and offences that involve the death of the victim, such as murder, manslaughter, aiding suicide and infanticide.<sup>25</sup>

32. The definitions of murder and manslaughter are not provided in the Act but in the common law. Thus, "the crime of murder is committed when a

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<sup>23</sup> Submissions of the State of Barbados, pp. 23-68 and 93-113.

<sup>24</sup> Submissions of the State of Barbados, pp. 103-106.

<sup>25</sup> See Appendix A.4, Offences Against the Person Act 1994-18, Laws of Barbados, §§ 2, 6, 12, 14.



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person of sound mind and discretion unlawfully kills any reasonable creature in being under the Queen's peace, with intent to kill or cause grievous bodily harm,"<sup>26</sup> and manslaughter is generally understood as the unlawful killing of a human being without malice aforethought. Therefore, the difference between murder and manslaughter generally turns on the presence or absence of specific intent to kill or cause grievous bodily harm (*mens rea*).

33. But that is not always the case in Barbados since witnesses King and Seale confirmed that a person may be found guilty of murder and sentenced to death whether or not he or she had the intent to kill or cause grievous bodily harm and whether or not he or she actually participated in the act of killing, such as in the case of joint enterprise.<sup>27</sup>

34. Moreover, Barbados does not have a classification between different types of murder that could provide different kind of punishments.<sup>28</sup> These classifications with their different punishments are provided under the notion that not all murders are equal; that even when a killing is committed with the intention to kill or cause grievous bodily harm, and no common law exceptions or defenses (such as self-defense, provocation or insanity) are available, there might be other circumstances of the crime or of the offender that should be taken into account when determining the punishment.

35. Such is the difference between a murder committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another (known in some legislations as contracted murder) and a murder where there is no such arrangement; a murder committed by poison and a murder not committed by it; a murder committed lying in wait and a murder not committed in those circumstances; a murder committed when the victim is a police officer acting in the course of his duties and a murder where the victims does not have those characteristics; a murder caused while committing or attempting to commit another crime such as the hijacking of an aircraft, a sexual assault, the kidnapping and forcible confinement of a person or a hostage taking, and a murder where no other crime is committed or attempted. The lack of consideration of distinctions like these is what caused this Court to determine in the *Hilaire, Constantine and Benjamin et al. case* that the Offences Against the Person Act of 1925 of Trinidad and Tobago "disregards the fact that murder may have varying degrees of seriousness."<sup>29</sup>

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<sup>26</sup> Coke's Institutes, 3 Co. Inst. 47.

<sup>27</sup> The principle of joint enterprise states that where two or more persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise. This includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise. House of Lords case of *R v Powell*; English [1999] AC 1 HL.

<sup>28</sup> No such classification is provided in the Offences Against the Person Act and Witnesses King and Seale confirmed that it does not exist in Barbados.

<sup>29</sup> I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, Ser. C No. 94, paras. 103.

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36. But under section 2 of the Offences Against the Person Act of Barbados,<sup>30</sup> a person found guilty of murder must be sentenced to death. The only exceptions are persons under 18 years of age and pregnant women.<sup>31</sup> The fact that the Offences Against the Person Act provides other punishments for other crimes or offences that involve the death of the victim,<sup>32</sup> does not change the fact that once a person is found to be guilty of murder by a jury in Barbados, the judge has no discretion to impose other punishment than death by hanging.

37. Moreover, although intent and culpability might be taken into account by the Prosecutor's Office when deciding which crime to charge someone who has committed a killing with, and which plea to offer -as indicated by the testimony of Mr. Seale-, and although the jury can take into account circumstances such as whether there was provocation on the part of the person killed and thus find the offender guilty of manslaughter instead of murder -section 5 of the Act-, the judge is the only actor in the criminal system who cannot take into account intent and culpability in sentencing someone who has been found to be guilty of murder by a jury because the sentence is automatic.

38. This Court has already determined in the *Hilaire, Constantine and Benjamin et al. case*<sup>33</sup> that a law that submits all persons convicted of a crime to a judicial process in which the death penalty is the automatic punishment, and where the individual circumstances of the accused and the crime are not considered by the judge in establishing the degree of culpability and individualizing the sentence, contravenes the prohibition against the arbitrary deprivation of life under Article 4 of the American Convention.

39. The present case provides a particularly graphic illustration of why the nature of the charge brought is not a valid basis upon which to impose the automatic penalty of death. Mr. Joseph and Mr. Boyce were charged along with two other men in the death of a young man. All four were offered the chance to plead guilty to the lesser charge of manslaughter. The other two men took the plea and were sentenced to twelve years in prison, while Mr. Joseph and Mr. Boyce opted to stand trial, were found guilty of murder and sentenced to death. The factual basis of the case against the four men did not vary, but the charge and

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<sup>30</sup> See Appendix A.4, Offences Against the Person Act 1994-18, Laws of Barbados.

<sup>31</sup> See Juvenile Offenders Act, Section 14, Annex 22 of Submissions of the State of Barbados, and Sentence of Death (Expectant Mothers) Act, Cap. 153, Annex 27 of Submissions by the State of Barbados.

<sup>32</sup> Section 6 of the Offences Against the Person Act establishes life in prison as the punishment for manslaughter, but Messrs. King and Seale indicated that a judge may take various factors into account and impose a lighter sentence. In contrast, this judicial discretion is not available for individuals found guilty of the crime of murder. Section 12 of the Act establishes imprisonment for a term of 14 years for aiding suicide and Section 14 establishes that infanticide may be punished as manslaughter.

<sup>33</sup> I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, Ser. C No. 94, paras. 102-108. Regarding the imposition of the mandatory death penalty for the crime of kidnapping see I/A Court H.R., *Raxcacó Reyes v. Guatemala*, Judgment of September 15, 2005, Ser. C No. 133, paras. 54-90.

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sentence imposed did. Mr. Seale's testimony provided an important explanation of the discretion that prosecutors have when deciding which charges to bring and which pleas to offer; a discretion that has as its ultimate consequence which sentence will be imposed and/or how many years in prison a person will serve. In contrast, judges have no discretion in deciding on the ultimate consequence for the liberty and life of a person found guilty of murder: it is left to them only to impose automatically the sentence dictated by the Statute, which is to suffer death by hanging.

40. In summary, the Commission maintains that the death penalty as applied in Barbados is arbitrary because it can be applied to cases that are essentially unlike in terms of culpability, while it is not necessarily applied in cases that are in fact alike as a matter of fact and law.

41. The facts of this case also demonstrate that the mandatory imposition of the death penalty for murder contravenes the prohibition of cruel, inhuman or degrading punishment under Article 5. The terms of Article 5 require persons to be treated as individuals and afforded the dignity inherent in that status, particularly when the interest at stake is the right to life. The documentary and testimonial proof before the Court has amply confirmed that the death penalty regime in Barbados provides no opportunity for judges to evaluate the individual circumstances of the offence or offender in pronouncing sentence. The Court heard testimony to the effect that judges and juries may receive information about the circumstances of the offence or offender in determining whether an accused is guilty of murder or of some other offense, but there is no mechanism to receive such information with respect to the sentence. It is automatic.

42. It is instructive to note that, as witness Seale testified, there is a well developed procedure employed in issuing a sentence for the crime of manslaughter that often involves an adjournment in order to seek information and receive reports concerning the individual circumstances of the defendant. There is, however, no such procedure in place for the crime of murder. The imposition of the death sentence is automatic.

43. Furthermore, the facts of this case demonstrate that mandatory death sentences cannot be reconciled with the right to due process established in Art 8 of the American Convention understood in conjunction with the requirements of Article 4 of the same treaty. Under the provisions of the American Convention, persons convicted of murder must have the possibility of being heard by a court imposing sentence with respect to any mitigating circumstances and whether the sentence is a permissible punishment. However, that possibility does not exist under the law of Barbados. There is no hearing as to character or past record, no consideration as to culpability, or the gravity or seriousness of the offence.

44. Moreover, a person convicted for murder has no possibility of appealing the sentence of death. He or she may appeal the conviction but not the sentence. The law in Barbados effectively immunizes the sentence of death from

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any review by a higher court, thereby violating the right of defense and the right to appeal.

45. As indicated in the application,<sup>34</sup> domestic judicial review proceedings in respect of a criminal conviction in Barbados, including a conviction for the crime of murder, may take two forms: a criminal appeal against conviction, or a Constitutional Motion under Section 24 of the Constitution. In both procedures, an appeal lies from the first instance court to the Court of Appeal of Barbados. Until April 8, 2005, a further appeal was available with special leave to the Judicial Committee of the Privy Council in London.<sup>35</sup> From then on, the Caribbean Court of Justice (CCJ) is the final appellate court for the country.<sup>36</sup>

46. The Criminal Appeal Act of Barbados, CAP 113A, 1 L.R.O. 2002, provides that convictions and certain sentences can be appealed from the High Court to the Court of Appeal.<sup>37</sup> Section 3(3)(c) of this Act provides that a sentence specifically fixed by law, such as a the death penalty fixed for the crime of murder in Section 2 of the Offences Against the Persons Act, may not be appealed.

47. The Act also provides that a person who is convicted of murder must give notice of his intent to appeal the conviction within 14 days of the date when the sentence was passed (Section 19(1)(b) of the Act).

48. Specific rules of procedure governing appeals to the Privy Council are contained in Barbados (Procedure and Appeals to Privy Council) Order 1966 (S.I. 1966 No. 1456).<sup>38</sup> As in the Court of Appeal, the Privy Council cannot hear challenges to the sentence of death; however, they can examine the legal and factual bases of a murder conviction.

49. Since the establishment of the Caribbean Court of Justice (CCJ) in 2005, the Privy Council will no longer serve as the court of last resort for Barbados.

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<sup>34</sup> See Application, para. 41.

<sup>35</sup> See Appendix A.1 of the Application, Constitution of Barbados, s. 88. See also Barbados Independence Order 1966 (S.I. 1966 No. 1455), section 11 and Schedule, available at [<http://www.barbados.gov.bb/bdsconst.htm>].

<sup>36</sup> See Appendix A.3 of the Application, Constitution (Amendment) Act 2003-10. See also Appendix A.9 of the Application, Caribbean Court of Justice Act, 2003-9; and Appendix A.10 of the Application, Caribbean Court of Justice, Barbados Rediffusion Services Ltd. v. Astra Mirchandani et al., CCJ Appeal No. CV 1 of 1005, BB Civil Appeal No. 18 of 2000, para. 4.

<sup>37</sup> Section 3(1) of the Act establishes that "a person convicted of an offence on indictment may appeal to the Court against his conviction". Section 3(2) establishes the circumstances in which the appeal is without leave of the Court and Section 3(3) the circumstances in which the appeal requires the leave of the Court. Section 3(3)(c) included an appeal against the sentence passed on conviction "not being a sentence specifically fixed by law". Available at: [<http://www.caricomlaw.org/docs/Criminal%20Appeal.pdf>].

<sup>38</sup> See Judicial Committee of the Privy Council at [<http://www.privy-council.org.uk/output/Page33.asp>].

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Article XXV section 4 of the Caribbean Court of Justice Agreement of 2001<sup>39</sup> allows the CCJ to grant special leave to hear the appeal of any criminal or civil matter of a contracting party. A notice of appeal must be filed within 21 days of a grant of special leave from the CCJ itself or from the court ordering the conviction.<sup>40</sup>

50. Finally, a person convicted of murder may request that his or her death sentence be commuted by the Governor-General of Barbados in the exercise of the prerogative of mercy established in Section 78(3) of the Constitution of Barbados. This is not an appeal, as indicated by the State in its Reply,<sup>41</sup> but a discretionary power granted to the Executive branch of government, which may be exercised by the Governor-General of Barbados who is appointed by and serves as the representative of Her Majesty the Queen, the Head of State of Barbados.<sup>42</sup> The Privy Council of Barbados, also called the Mercy Committee, which advises the Governor-General on the exercise of the prerogative of mercy in death penalty cases, is likewise part of the Executive branch,<sup>43</sup> consisting of such persons "as the Governor General, after consultation with the Prime Minister, may appoint by instrument under the Public Seal."<sup>44</sup> The Commission has not have access to public records that might indicate who serves in this Committee.

51. The State has argued that the need for individualized treatment is fully satisfied by a system of laws which provides for individualized consideration before a Mercy Committee because the "various factors and mitigating circumstances related to the person that might be relevant to imposition of a lesser punishment are assessed by the Barbados Privy Council when exercise the prerogative of mercy."<sup>45</sup> Barbados has argued that emphasis upon individualized consideration only at the judicial sentencing phase is in itself arbitrary.<sup>46</sup>

52. The Commission submits, as this Court has concluded in the past, that the prerogative of mercy process is not equivalent to and cannot be a substitute for a determination of the appropriate sentence by the court that tries and convicts a defendant. That responsibility is clearly judicial in nature and must be fulfilled by a competent, independent and impartial tribunal as prescribed under Article 8(1) of the Convention. In this respect, this Court has clearly held that the

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<sup>39</sup> See Appendix A.11 of the Application, Agreement Establishing the Caribbean Court of Justice.

<sup>40</sup> See Rule 11.1 of the CCJ (Appellate Jurisdiction) Rules of 2005, available at: <http://www.caribbeancourtjustice.org/rules/ccjapprules.pdf>.

<sup>41</sup> See Submissions of the State of Barbados, para. 271 at p. 107.

<sup>42</sup> See Appendix A.1 of the Application, Constitution of Barbados, s. 28.

<sup>43</sup> This fact has been accepted by the State in its Reply, para. 271 at p. 107.

<sup>44</sup> See Appendix A.1 of the Application, Constitution of Barbados, s. 76(1). The removal of its members as well as the duration of their appointment is established in Section 76(3)(a), (b) and (c).

<sup>45</sup> Submissions of the State of Barbados, para. 288 at p. 111.

<sup>46</sup> Submissions of the State of Barbados para. 257 at p. 102.

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process through which the punishment for an individual convicted of a capital crime is individualized is a part of the prosecutorial procedure before the courts and must be judicial in nature. The Court has received testimony confirming that the Mercy Committee is not judicial in nature. For example, it does not include judges, it does not hold hearings with the person whose fate is being decided, and it is not composed of members who operate on the basis of independence. The Judicial Committee of the Privy Council has similarly held in the Reyes Case that the exercise of the prerogative of mercy is an inadequate substitute for a judicial process that determines the appropriate sentence after a conviction for murder.<sup>47</sup>

53. Moreover, the Court has established that Article 4(6) of the American Convention requires that "individual mercy petitions provided for in the Constitution should be exercised through fair and adequate procedures"<sup>48</sup> such as those set forth in *Neville Lewis et al. v. Attorney General of Jamaica*. Accordingly, "the State has a duty to implement a fair and transparent procedure by which an offender sentenced to death may make use of all favorable evidence deemed relevant to the granting of mercy."<sup>49</sup>

54. As declared by witness King, historically, the Mercy Committee's meetings have been secret; there are no oral hearings. Barbados' Constitution mandates that the Committee take the trial judge's report into account and after the *Neville Lewis* decision, it is also required to review written submissions and other documents presented by the victims. The appellant has a right to make such written submissions and recommendations. Mr. King stated that if a person provides negative evidence to the Mercy Committee, there is no way to cross-examine that person; however, he added that the accused may read and respond in writing to all written submissions that the Committee receives. The Committee does not provide reasons for its decisions, and when Mr. King requested the minutes of the meeting that the Committee held regarding the petitioners, his request was refused. Once a decision is reached, its substance cannot be appealed or reviewed. There is theoretically judicial review of the *procedure* followed by the Mercy Committee, meaning that if the Committee failed to review certain documents, a court could examine this irregularity.

55. As to Messrs. Boyce and Joseph, Mr. King testified that they were invited on one or two occasions to make representations and submit documents to the Mercy Committee, but they decided that based on the *Neville Lewis* decision, this was inappropriate until their proceedings at the Inter-American system were complete. In this case, the CCJ found that the Mercy Committee should not meet on issues of clemency unless all legal remedies had been exhausted, including

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<sup>47</sup> Reyes v. The Queen [2002] UKPC 11.

<sup>48</sup> I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, Ser. C No. 94, paras. 186.

<sup>49</sup> I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, Ser. C No. 94, paras. 188.

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representations before international bodies, unless the Governor-General believed that clemency should be exercised.<sup>50</sup>

### **The incompatibility of the current legal regime with the Convention**

56. Part of the importance of the present case is that it makes manifest two crucial respects in which the legal regime of Barbados obstructs its compliance with its inter-American obligations.

57. First, as indicated above, Section 2 of the Offences Against the Person Act 1994 prescribes the death penalty as the automatic and mandatory punishment for murder. Pursuant to this provision, once an individual is convicted for murder, neither the trial court nor the appellate courts in Barbados may evaluate whether the death penalty is an appropriate punishment in the particular circumstances of the offender or the crime. This is incompatible with Articles 4, 5 and 8 of the American Convention, as well as Article 1(1), and the failure of Barbados to amend or invalidate section 2 of the Offences Against the Person Act so as to bring its laws into compliance with the American Convention constitutes a *per se* violation of Article 2 of the Convention. This Honorable Court reached a similar conclusion in the *Hilaire Case* in relation to a similarly phrased provision.

58. Second, as a consequence of Section 26 of the Constitution of Barbados, which immunizes pre-constitution laws from constitutional challenge even if those laws are inconsistent with fundamental rights protected under the Constitution, the domestic courts cannot declare these mandatory death sentences to be invalid even though they violate such rights protected under the Constitution and the American Convention.

59. In the Case of Boyce and Joseph v. The Queen, a majority of the Judicial Committee of the Privy Council held that section 26 of the Constitution of Barbados precludes domestic courts from holding the mandatory death penalty to be inconsistent with the fundamental rights and freedoms under section 11 to 23 of the Constitution, including the right under section 15 not to be subjected to torture or to inhuman or degrading punishment or other treatment. The Privy Council reached this conclusion notwithstanding the fact that it had previously held, and continues to hold, that the existence of the mandatory death penalty is inconsistent with the right to humane treatment under section 15 of the Constitution of Barbados. In effect, then, section 26 of the Constitution of Barbados permits the State to maintain and apply legislation that is manifestly contrary to the rights under the Constitution of Barbados and the American Convention. In this regard, this Court has previously held in the *Hilaire Case* that the Savings Clause in the 1976 Constitution of Trinidad and Tobago (together with Trinidad & Tobago's Offences

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<sup>50</sup> See CCJ Appeal No CV 2 of 2005, AG of Barbados v Joseph & Boyce, 8 November 2006, Joint Judgment of The Rt Honourable Mr Justice de la Bastide and The Honourable Mr Justice Saunders, para. 143.

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Against the Person Act) did not comply with Article 2 of the Convention. We are asking the Honorable Court to apply those same considerations in the present case.

**B. Violations of Articles 5(1) and 5(2) of the American Convention, in conjunction with Article 1(1), due to the prison conditions and reading of warrants to the victims**

**Prison Conditions**

60. The inter-American system evaluates the treatment of prisoners starting from the point that the state is the guarantor of the rights of any person detained by virtue of the fact that they are within its complete custody. The State is therefore obliged to ensure that the rights of the prisoner are only restricted to the extent this corresponds to the penalty and no further.

61. Article 5 of the American Convention sets forth a series of basic standards in this regard, standards that are complemented by a series of other standards that include, among others the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners.<sup>51</sup>

62. In the present case, the documentary and testimonial evidence before this Court has confirmed that the victims have not been treated with due respect for their humanity. Prof. Coyle, the expert witness who declared at the public hearing, has confirmed that they have been and remain detained in conditions which must simply be characterized as inhuman, and that these conditions are incompatible with Article 5.

63. Messrs Boyce, Joseph, Atkins and Huggins were detained in Glendairy Prison, Bridgetown, Barbados, the nation's sole prison, from their arrest or detention until it was destroyed in a fire in March of 2005. They were moved, along with nearly one thousand prisoners, to a "temporary" prison constructed at Harrison Point, where they are currently detained.

64. At Glendairy Prison, Baroness Stern's report concluded that death row prisoners, such as Messrs Boyce, Joseph, Atkins and Huggins, were held in single cells which offered no natural lighting and little, if any, ventilation; that they were deprived of adequate sanitation and that they had to use a "slop bucket" to urinate and defecate in, which was emptied only twice a day; and that they were locked in their cells at least 23 hours a day, and received a maximum of 30 minutes

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<sup>51</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (Nº 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (Nº 1) at 35, U.N. Doc E/5988 (1977).



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exercise per day.<sup>52</sup> This was confirmed by Messrs Boyce, Joseph, Atkins and Huggins' affidavits.<sup>53</sup> Prof. Coyle's expert testimony confirmed that the conditions at Glendairy were inhuman and that he had seen in the years after 1994 "no evidence to suggest that there had been significant improvements" between then and 2005 when it closed, "indeed given the increased levels of overcrowding I would have found that quite unlikely."<sup>54</sup>

65. Moreover, as Prof. Coyle confirmed on his visit of July 6, 2007, at Harrison Point Temporary Prison, Messrs Boyce, Joseph and Huggins are housed in cages. He declared, referring to the Prison in general, that

"the main distinguishing feature of Harrison Point is that within the outer shell of each of [the] secure blocks, the prisoners are held in a series of cages which are subdivided to hold anything between one and twenty men. The walls and the ceilings of these cages consist of grilled bars [...] Many of the cages throughout the Prison were severely overcrowded and I was given to understand that the vast majority of the prisoners remain in these cages for 23 to 24 hours each day."

66. Prof. Coyle confirmed that Messrs Boyce, Joseph and Huggins, who are being held at the maximum security unit, also called "J Block", are being held in single cages that are similar to the ones described above in what he referred as "a prison within a prison". He detailed that "due to the bars, the prisoners have no privacy, either from each other or from the Prison staff". Prof. Coyle, who has ample experience in these matters, had never seen similar cages anywhere else.

67. The expert also confirmed that the victims are only let out of their cages to have access to a bathroom in the morning, for exercise at best twice a week<sup>55</sup> and for "virtual" visits with family members for 15 minutes twice a month.

68. In respect of light and ventilation, Prof. Coyle declared that what natural light and ventilation there is, is provided by five narrow windows which are high in one wall, which makes the unit "dark", "depressing", "hot" and "oppressive", in spite of the artificial light which is provided by fluorescent tube kept on 24 hours a day. As to the sanitary arrangements, Prof. Coyle declared that

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<sup>52</sup> See Appendix C.3 of the Application, Report of Baroness Vivien Stern 1994 visit to Glendairy Prison. See also Affidavit by Baroness Vivien Stern, June 15, 2007. Prof. Coyle, who also visited the Prison in 1994, declared to have read this affidavit and to agree with its content.

<sup>53</sup> See Appendix D.2 of the Application, Affidavits of Messrs Boyce, Joseph, Atkins and Huggins, August 17, 2004.

<sup>54</sup> Prof. Coyle declared that when he visited Glendairy Prison it had over 700 prisoners, and that he understood that when it closed it was holding around 1000 prisoners. The Commission has provided documentary evidence of this with its application, para. 72.

<sup>55</sup> This conclusion was made by the expert, Prof. Coyle, on the basis of what the Assistant Superintendent of Prisons had informed him (on average two to three times a week), what the prisoners had told him in the presence of Prison staff (at most once a week and sometimes less than that), and what made sense arithmetically (Monday through Friday with prisoners exercising alone each time).

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there is a bathroom that could be sufficient for the number of prisoners in that unit if they had regular access to it, which they do not have. The same situation applies to the exercise yard. This lack of regular access to the bathroom and the exercise yard has also been confirmed by the affidavits of the victims.<sup>56</sup>

69. In respect to contact with family members, the expert confirmed what the victims had already declared in their affidavits: that "there are no visits from family members in Harrison Point Temporary Prison". Prof. Coyle explained that instead, "there are video conferencing facilities between Harrison Point and Glendairy Prison. Families go to Glendairy, they sit in front of a small video screen, there are three similar video screens in Harrison Point Prison, in three booths, and the prisoners sit in front of the screens, so in effect they can see each other on the screen and can talk via microphones." There are three of these screens for over 1000 prisoners. This means that "many men and women in Harrison Point, including the three alleged victims, have not directly seen their families for over two years, the obverse of course is also true; the families, be they children, parents or partners, have not directly seen their relatives who are in prison."

70. In conclusion, Messrs Boyce, Joseph and Huggins have spent almost all of the last two and a half years locked in those cages in the conditions described above, and Mr. Atkins until his passing on October 30, 2005. Prof. Coyle confirmed that the conditions at Harrison Point, some of them singly and all of them conjointly, were, and continue to be, inhuman and therefore a violation of Article 5 of the Convention.<sup>57</sup> Thus, a finding of this Court in that regard, and the reparations that it can order, will have a concrete impact in the everyday lives of the victims.

#### Reading of warrants to the victims

71. The Commission now turns to the reading of the warrants for execution prior to the completion of all the victims' appeals, and during the time in which they had filed petitions before the Inter-American Commission.

72. The Court has received affidavit evidence from the victims in this case explaining what it was like to have warrants for their execution read to them while they were still pursuing different mechanisms of appeal.<sup>58</sup>

73. The State has argued that: a) there is no legal right to petition the IACHR under Barbadian law; b) the IACHR cannot issue binding decisions, only recommendations; c) the right to petition the Commission does not include the further right to extend the petition process for an unlimited or indefinite duration.

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<sup>56</sup> See Appendix D.2 of the Application, Affidavits of Messrs Boyce, Joseph, Atkins and Huggins, August 17, 2004; see also Affidavits of Messrs Boyce, Joseph and Huggins, June 1, 2007.

<sup>57</sup> Prof. Coyle also referred to the general conditions at Harrison Point Temporary Prison. He declared that at the time of his visit, it held 990 male prisoners and 49 female prisoners.

<sup>58</sup> See Appendix D.1 of the Application, Affidavits of Messrs Boyce, Joseph, Atkins and Huggins, August 17, 2004.

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74. In this regard, the Commission notes that the Caribbean Court of Justice determined in the case brought by Mr. Joseph and Mr. Boyce that the failure of the Barbados Privy Council to await the outcome of the proceedings they had instituted before the Inter-American Commission was a violation of their right to protection of the law. The majority of that Court held that the respondents had a legitimate expectation that they would have a reasonable time to complete those proceedings.<sup>59</sup> The Commission considers that it is fundamental that litigants be able to complete their appeals at the national level, as well as petition processes before it before any execution could be carried out. Once the State of Barbados ratified the American Convention and accepted the jurisdiction of the Inter-American Court, it accepted that individual claimants would be able to exercise the right of petition expressly provided for.

## V. CONCLUSION

75. The decision of the Inter-American Court in the Hilaire Case is firmly situated as part of a larger effort to harmonize international and national law applicable to the death penalty. As part of this effort, the mandatory death penalty has been found to be unconstitutional in Saint Lucia (*The Queen v. Hughes*), Dominica (*Balson v. The State*), Belize (*Reyes v. The Queen*), the Bahamas (*Bowe v. The Queen (Bahamas)*), and Grenada (*Coard et al. v. Grenada*).<sup>60</sup>

76. In the case of *Watson v. The Queen (Jamaica)*, decided in 2004, the Judicial Committee of the Privy Council declared that in light of 1982 amendments to the Offences Against the Person Act, the mandatory death penalty was no longer immunized from Constitutional challenge, and found that penalty unconstitutional on the basis that it constituted inhumane punishment. The JCPC indicated with respect to the claimant that: "To deny him the opportunity, before sentence was passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate was to treat him as no human being should be treated and to deny his basic humanity, which was the core of the right which section 7 sought to protect."<sup>61</sup>

77. Developments in our region have in turn helped support advances in countries outside the region. For example, in deciding the Case of Kafantayeni et al. v. Attorney General in 2005, the High Court of Malawi cited a Commission

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<sup>59</sup> CCJ Appeal No CV 2 of 2005, *AG of Barbados v Joseph & Boyce*, 8 November 2006, Joint Judgment of The Rt Honourable Mr Justice de la Bastide and The Honourable Mr Justice Saunders, para. 143.

<sup>60</sup> Saint Lucia (*The Queen v. Hughes*, Appeal No. 91 of 2001, [2002] UKPC 12, affirming *Regina v Hughes* [2002] 2 AC 259), Dominica (*Balson v. The State*, Appeal No. 26 of 2004, [2005] UKPC 2), Belize (*Reyes v. The Queen*, [2002] UKPC 11; [2002] 2 AC 235), the Bahamas (*Bowe v. The Queen (Bahamas)*, Appeal No. 44 of 2005, [2006] UKPC 10), and Grenada (*Coard et al v. Grenada*, Appeal 10 of 2006, [2007] UKPC 7).

<sup>61</sup> *Watson v. The Queen (Jamaica)*, Appeal 36 of 2003, [2004] UKPC 34, para. 22.

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report as well as a number of other decisions from the region in finding the mandatory death penalty unconstitutional.<sup>62</sup>

78. The UN Human Rights Committee has also declared the mandatory death penalty to constitute an arbitrary deprivation of life "in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence."<sup>63</sup>

79. The Commission notes as well that the UN Human Rights Committee recently analyzed the situation in Barbados and declared it to be incompatible with its obligations under the Civil and Political Rights Covenant. In its Concluding Observations of March 29, 2007, the UN Committee expressed that it "remains concerned that the State party's laws make the imposition of the death penalty mandatory in respect of certain crimes, thus depriving the sentencing court of any discretion in imposing the penalty in the light of all the circumstances of the case."<sup>64</sup>

80. The Commission wishes to emphasize how very important it is that the interpretation of the American Convention and the other principal human rights treaties continue to be harmonized in this fundamental area of the right to life.

81. Developments in national and international law informed the decision of the Inter-American Court in the Hilaire Case. That decision has in turn contributed to the movement toward the progressive integration of international human rights standards into the domestic legal order of various states. This progressive integration is precisely what is necessary for human rights treaties to find their full effect.

82. At the same time, it is equally important to note that other jurisdictions are moving not toward this progressive integration but toward harsher legislation or practices. While the following is not applicable to the present case, it may be noted that in 2002 Barbados enacted changes to its Constitution seeking to bar persons sentenced to death from challenging the penalty as contrary to the right to humane treatment because of the mandatory nature of the sentence or the conditions of detention. It may further be noted that these modifications seek to impose time limits on petition processes before such bodies as the Inter-American Commission and Court beyond which executions may be carried out notwithstanding.

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<sup>62</sup> See appendix 2, Case of Kafantayeni et al. v. Attorney General in 2005, High Court of Malawi, Constitutional Case No. 12 of 2005, at p. 9 citing IACHR, *Edwards v. The Bahamas*, Report No. 48/01, April 4, 2001.

<sup>63</sup> CCPR, Communication No. 1421/2005, *Francisco Juan Larrañaga v. The Philippines*, Views adopted 24 July 2006.

<sup>64</sup> CCPR, Views adopted 29 March 2007, UN Doc. CCPR/C/BRB/CO/3/CRP.1, para. 9.

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83. It is, accordingly, crucial that the Inter-American Court and the system as whole not retreat but rather continue to move forward with this shared challenge under international law.

## VI. PETITION

84. Based on the application submitted in the present case and the previous analysis, the Inter-American Commission requests the Court to conclude and declare that the State of Barbados is responsible for violations of Articles 4(1), 4(2), 5(1), 5(2) and 8(1) of the Convention, in conjunction with Article 1(1) and 2 the same treaty, relating to the mandatory nature of the death penalty imposed upon the victims; the victims' conditions of detention and the reading of warrants of execution to the victims while their complaints were pending before the inter-American human rights system; and the failure to bring their domestic legislation (section 2 of the Offences Against the Person Act 1994 of Barbados and section 26 of the Constitution of Barbados) into compliance with the rights and freedoms protected under the American Convention.

85. The Commission considers that the circumstances of the present case clearly demonstrate the need for guarantees of non-repetition that are more structural in nature, and reiterates its request that the Court order that the State:

adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed in contravention of the rights and freedoms guaranteed under the Convention, including and in particular Articles 4, 5, 8 and 1(1);

that the State adopt the measures necessary to ensure that its Constitution and laws are brought into compliance with the American Convention by ensuring that acts in violation of national law or the American Convention are not immune from judicial scrutiny and protection;

and that the State implement the measures necessary to ensure that the conditions of detention in which the victims are held comply with the standards of humane treatment mandated by Article 5 of the Convention.

86. The Commission takes note that the representatives of the victims in the present case have indicated that they do not seek monetary compensation on their behalf, but rather non-monetary reparation.

87. The Commission has also taken note that the representatives have waived legal fees, but do seek an award of costs and expenses. Consistent with its past practice, the Commission supports an award of such costs and expenses as were reasonable and necessary in the presentation of this case both at the national level and before the inter-American system.

Washington, D.C.  
August 13, 2007

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**ANNEXES**

1. Barbados, Communication of December 16, 2004 to the Inter-American Commission on Human Rights.
2. Case of Kafantayeni et al. v. Attorney General in 2005, High Court of Malawi, Constitutional Case No. 12 of 2005.