

**APPLICATION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS BEFORE
THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

CASE 12.480

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**LENNOX BOYCE, JEFFREY JOSEPH, FREDRICK BENJAMIN ATKINS
AND MICHAEL HUGGINS (BOYCE ET AL.)**

V.

BARBADOS

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission", "the Commission", or "the IACHR") submits to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," or "the Court,") an application in Case 12.480 of Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins (hereinafter "the victims") versus the Republic of Barbados (hereinafter "the State," or "Barbados"), in keeping with the terms of Article 51 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention").

2. The Inter-American Commission asks the Court to determine the international responsibility of the State of Barbados, which has incurred in the violation of Articles 4 (1) and (2) (Right to Life), 5 (1) and (2) (Right to Humane Treatment), and 8 (Right to a Fair Trial), in conjunction with Article 1 (1) (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") to the detriment of Messrs. Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins.

3. All of the victims were convicted of murder and sentenced to death on February 2, 2001 (Messrs Boyce and Atkins), July 21, 1999 (Mr. Atkins), and July 19, 2001 (Mr. Huggins) pursuant to Barbados' Offences Against the Persons Act 1994, which prescribed capital punishment as the mandatory punishment for the crime of murder. As a consequence of a "savings" clause in the Constitution of Barbados, the domestic courts cannot declare these mandatory death sentences to be invalid even though they violate fundamental rights protected under Barbados' Constitution and the American Convention. In addition, during the course of their criminal proceedings and following their convictions, the victims were held in the Glendairy prison in Bridgetown, Barbados under deplorable conditions and the State read warrants of execution to each of the victims while their complaints were pending before the inter-American system. Most recently, on May 31, 2005, the death sentences of Messrs Boyce and Joseph were commuted to life imprisonment by the Barbados Court of Appeal. However, the State has appealed this decision to the Caribbean Court of Justice and at the time of the filing of this application, the appeal is pending. With respect to Mr. Atkins, he passed away in a hospital in Barbados on October 30, 2005 from causes that are as yet unknown.

4. The present case has been processed pursuant to the American Convention and is submitted before the Court according to Article 33 of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "the Rules of Procedure of the Court"). Also, a copy of report 03/06 prepared in compliance to Article 50 of the Convention¹ is attached to this application, as Annex E.1. This report was adopted by the Commission on February 28, 2006 and was transmitted to the State on March 23, 2006, with a period of two months for it to adopt the recommendations contained therein. The State replied on May 22, 2006, denying that it had violated any of the rights stated in the report. Considering that the State did not adopt its recommendations and according to Articles 51 (1) of the Convention and 44 of the Rules of Procedure of the IACHR, the Inter-American Commission decided to submit the case to the jurisdiction of the Inter-American Court on June 16, 2006.

5. It is important for this Honorable Court to deliberate and rule upon the issues raised in this Application for three principal reasons. First, the case involves the application of capital punishment through mandatory sentencing. In light of this Honorable Court's previous pronouncements on this issue in cases involving the Republic of Trinidad and Tobago and the Republic of Guatemala, the Application demonstrates that Barbados is manifestly failing to properly respect the most fundamental right protected under the American Convention, the right to life. The Commission therefore submits that the matter warrants consideration by the full range of protective mechanisms in the inter-American human rights system, including the contentious jurisdiction of the Inter-American Court. Second, the State of Barbados has clearly and unequivocally rejected the Commission's conclusions and recommendations in this case and, moreover, has specifically rejected the findings by 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 binding judgment issued against Barbados by this Honorable 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. Finally, as will be demonstrated in this proceeding, a "savings clause" under the Constitution of Barbados prevents the courts in Barbados from declaring the mandatory death penalty to contravene fundamental rights and freedoms otherwise guaranteed under the Constitution and the American Convention. Therefore, this Honorable Court constitutes the only forum available for the victims to obtain effective and binding recourse for protection against acts that violate their fundamental rights recognized by the constitution and laws of their state and by the American Convention on Human Rights.

II. PURPOSE OF THE APPLICATION

6. The purpose of the present application is to ask the Court to conclude and declare that the State of Barbados is responsible for violations of:

¹ See Annex E.1, IACHR, Report 03/06, Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins, Barbados, adopted February 28, 2006.

a) Articles 4(1), 4(2), 5(1), 5(2) and 8(1) of the Convention, in conjunction with Article 1(1) of the Convention, relating to the mandatory nature of the death penalty imposed upon the victims;

b) Articles 5(1) and 5(2) of the Convention, in conjunction with Article 1(1) of the Convention, relating to the victims' conditions of detention and the reading of warrants of execution to the victims;

c) Article 1(1) of the Convention with respect to the reading of warrants of execution to the victims while their complaints were pending before the inter-American human rights system;

d) Article 2 of the Convention in relation to section 2 of the Offences Against the Person Act 1994 of Barbados and section 26 of the Constitution of Barbados, for failing to bring their domestic legislation into compliance with the rights and freedoms protected under the American Convention.

7. As a result of the abovementioned, the Inter-American Commission requests that the Court order the State to:

1. Maintain the commutation of the death sentences of Messrs Boyce and Joseph, and award compensation to them in respect of the remaining violations of their rights under the American Convention as concluded above;

2. Grant Mr. Huggins an effective remedy which includes commutation of sentence in relation to the mandatory death sentence, and compensation in respect of the remaining violations of his rights under the American Convention as concluded above;

3. Grant an effective remedy to the estate or next-of-kin of Mr. Atkins, which includes compensation in respect of the violations of his rights as concluded above;

4. 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 and 8;

5. Adopt such legislative or other measures as may be necessary to ensure that the Constitution of Barbados conforms with Article 2 of the American Convention, that is to say, to adopt and to integrate into its domestic legal system such measures as are necessary to allow the

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provisions of the Convention to be effectively complied with and put into actual practice;

6. Adopt such legislative or other measures as may be necessary to ensure that the conditions of detention in which the alleged victims are held comply with the standards of humane treatment mandated by Article 5 of the Convention.

III. REPRESENTATION

8. According to Articles 22 and 33 of the Rules of Procedure of the Court, the Commission has designated Commissioner Paolo Sergio Pinheiro, and Mr. Santiago A. Canton, Executive Secretary of the IACHR, as its delegates in this case. Mr. Ariel E. Dulitzky, Deputy Executive Secretary of the IACHR, Victor Madrigal Borloz, Brian Tittlemore and Manuela Cuví Rodríguez, have been appointed to serve as legal advisors.

IV. JURISDICTION OF THE COURT

9. According to Article 62 (3) of the American Convention, the Inter-American Court has jurisdiction over any case concerning the interpretation and application of the provisions of the Convention that are submitted to it, provided that the State Parties to the case recognize or have recognized the jurisdiction of the Court.

10. The State of Barbados ratified the American Convention on November 27, 1982, and accepted the contentious jurisdiction of the Court on June 4, 2000. Therefore, the Court has jurisdiction to hear this case.

V. PROCESSING BY THE INTER-AMERICAN COMMISSION

11. On September 3, 2004, the Commission received a petition from Messrs. Saul Lehrfreund and Parvais Jabbar of the London, United Kingdom law firm of Simons Muirhead & Burton (the "Petitioners") on behalf of Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins. At the time of the petition, all of the alleged victims were under the sentence of death at Glendairy Prison in the State of Barbados². The Commission transmitted the pertinent parts of the petition to the State by communication dated September 17, 2004, with a request that the State supply information with respect to the communication within two months as established with the Commission's Rules of Procedure, Article 30(3)³.

² See Annex E.2, Petitioners, Petition dated September 3, 2004. By letter dated September 4, 2004, the Petitioners informed the State of Barbados that they had filed the application with the Commission. The State acknowledged receipt of such letter by note dated September 15, 2004 and in the same note informed the Petitioners that warrants of execution had been issued with dates of execution fixed for 21st September, 2004. See same annex.

³ See Annex E.2, IACHR, Communication to the State and the Petitioners, September 17, 2004.

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12. Since death warrants had been issued for the execution of two of the petitioners, Messrs Boyce and Joseph, the Commission further notified the government that it was in the process of applying for provisional measures on their behalf to the Inter-American Court of Human Rights⁴. On the same day, the Inter-American Court of Human Rights granted the provisional measures for Messrs Boyce and Joseph, and ordered stays of their executions⁵.

13. With regard to Messrs Atkins and Huggins, the Commission requested precautionary measures on their behalf to preserve their lives and integrity pursuant to Article 25(1) of its Rules of Procedure, so as not to hinder the processing of their complaint before the Inter-American System⁶.

14. On November 22, 2004, the Commission requested information from the Petitioners on the status of the warrants of execution issued on September 15, 2004 in respect of Messrs. Boyce and Joseph⁷. By letter of November 24, 2004, the Petitioners advised the Commission that the warrants of executions for Messrs Boyce and Jeffrey had been stayed pending the determination of constitutional proceedings case challenging the reading of the execution warrants, arguments of which were concluded at the High Court of Barbados on November 15, 2004⁸.

15. By note dated December 16, 2004, the State replied to the Commission's note of October 6, 2004. The state noted that Barbados could not delay the execution of the sentences of the alleged victims beyond the time period specifically provided for in the case of *Pratt v. Attorney-General for Jamaica*, and advised that the domestic remedies had not been exhausted in the case of Messrs Atkins and Huggins⁹. The State's response was forwarded to the Petitioners in a letter dated December 20, 2004, with a one month period granted to submit observations¹⁰.

16. By letters of December 22, 2004 and February 15, 2005, the Petitioners requested the Commission to grant a hearing at its 122nd period of regular sessions¹¹. By

⁴ See Annex E.2, IACHR, Communication to the State of Barbados of September 17, 2004.

⁵ See Inter-American Court of Human Rights, Case of Boyce and Joseph v. Barbados, Order of the President of the Inter-American Court of Human Rights of September 17, 2004, Urgent Measures. See also Order of the Inter-American Court of Human Rights of November 25, 2004, Provisional Measures Requested by the Inter-American Commission on Human Rights regarding the State of Barbados, Case of Boyce and Joseph v. Barbados.

⁶ See Annex E.2, IACHR, Communication to the State of Barbados of September 17, 2004.

⁷ See Annex E.2, IACHR, Communication to the Petitioners of November 22, 2004.

⁸ See Annex E.2, Petitioners, Communication of November 24, 2004, attaching copies of the submissions of the Applicants and Respondent in the High Court of Barbados.

⁹ See Annex E.2, State of Barbados, Communication of December 16, 2004, citing *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1 (Judicial Committee of the Privy Council).

¹⁰ See Annex E.2, IACHR, Communication to the Petitioners, December 20, 2004.

¹¹ See Annex E.2, Petitioners, Letters of December 22, 2004 and February 15, 2005.

letters of February 2, 2005 and February 17, 2005, the Commission declined to grant the request for a hearing¹².

17. By letter of January 26, 2005, the Commission notified the Petitioners and the State that pursuant to Article 37(3) of the Commission's Rules of Procedure, the Commission had opened a case number 12.480, but had deferred its treatment of admissibility until the debate and decision on the merits of the matter. The Petitioners were requested to provide any observations within a period of two months from the date of the receipt of the communication. On the same day, the observations of the Petitioners, which were submitted to the Commission on January 13, 2005 in response to the State's December 16, 2004 submission, were forwarded to the government. The government was requested to provide a response within a period of thirty days¹³.

18. On February 10, 2005, the Petitioners advised the Commission that a warrant of execution had been read to Mr. Frederick Atkins on February 9, 2005, for his execution of February 14, 2005. The Petitioners asked the Commission to seek provisional measures from the Inter-American Court of Human Rights to stay the pending execution of Mr. Atkins¹⁴. The provisional measures previously granted in favour of Messrs Boyce and Joseph were amplified by the Court on February 11, 2005 in favour of Mr. Atkins¹⁵.

19. On February 16, 2005, the State wrote to the Commission, reiterating its position of December 16, 2004¹⁶.

20. On May 19, 2005 the Petitioners wrote to the Commission stating that an execution warrant had been read to Mr. Huggins for his execution on May 23, 2005. The Petitioners asked the Commission to request provisional measures from the Inter-American Court of Human Rights on behalf of Mr. Huggins to stay his pending execution¹⁷. On May 20, 2005, following an application by the Commission, the Inter-American Court of Human Rights amplified the provisional measures, previously granted in respect of the other alleged victims to incorporate Mr. Huggins¹⁸.

¹² See Annex E.2, IACHR, Communications of February 2, 2005 and February 17, 2005.

¹³ See Annex E.2, IACHR, Communications to State and Petitioners of January 26, 2005.

¹⁴ See Annex E.2, Petitioners, Letter of February 10, 2005.

¹⁵ See Inter-American Court of Human Rights, Case of Boyce et al. v. Barbados, Order of the President of the Inter-American Court of Human Rights of February 11, 2005, Expansion of Provisional Measures requested by the Inter-American Commission on Human Rights.

¹⁶ See Annex E.2, State of Barbados, Communication No. 130/D15-4 of February 16, 2005.

¹⁷ See Annex E.2, Petitioners, Letter of May 19, 2005.

¹⁸ See Inter-American Court of Human Rights, Case of Boyce et al. v. Barbados, Order of the President of the Inter-American Court of May 20, 2005, Urgent Measures. See also Order of the Inter-American Court Of Human Rights of June 14, 2005, Expansion of Provisional Measures Requested by the Inter-American Commission on Human Rights Regarding the State of Barbados, Case of Boyce et al. v. Barbados.

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21. On June 10, 2005, the Petitioners advised the Commission that the Court of Appeal of Barbados had commuted the death sentences of Messrs Boyce and Joseph to life imprisonment¹⁹.

22. By communication to the State of July 25, 2005, the Commission reiterated its request for observations on the admissibility and merits of the petition²⁰.

23. By letter of July 28, 2005, the Petitioners advised the Commission that the State had applied for leave to appeal to the Caribbean Court of Justice to challenge the decision of the Court of Appeal of Barbados to commute the death sentences of Messrs. Boyce and Joseph²¹.

24. On February 28, 2006, during its 124th period of sessions, the IACHR considered the positions of the parties and approved the admissibility and merits report 03/06, pursuant to Articles 46, 47 and 50 of the American Convention and Articles 31, 32, 33, 34 37(3) and 42 of its Rules of Procedure, among others. In such report, the IACHR concluded that the case was admissible²². It also concluded, in relation to the merits, that the State of Barbados had violated:

- a) Articles 4(1), 4(2), 5(1), 5(2) and 8(1) of the Convention, relating to the mandatory nature of the death penalty imposed upon the alleged victims;
- b) Articles 5(1) and 5(2) of the Convention, relating to the alleged victims' conditions of detention [...];
- c) Articles 1, 5(1) and 5(2) of the Convention, relating to having the writ of hanging read to the alleged victims and in the case of Messrs Boyce and Joseph on more than one occasion;
- d) Articles 2, relating to the savings clause, and the fact that it prevents Barbados' domestic courts from giving effect to the principle that mandatory death penalty is unconstitutional;
- e) Article 8, relating to the fact that a mandatory death penalty precludes the consideration of the individual circumstances of each case²³.

25. Based on the analysis and conclusions of such report, the Inter-American Commission considered that the State should adopt the following recommendations:

¹⁹ See Annex E.2, Petitioners, Letter of June 10, 2005.

²⁰ See Annex E.2, IACHR, Communication to the State of July 28, 2005.

²¹ See Annex E.2, Petitioners, Letter of July 28, 2005.

²² See Annex E.1, IACHR, Report 03/06, Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins, Barbados, adopted February 28, 2006, para. 80.

²³ See Annex E.1, IACHR, Report 03/06, Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins, Barbados, adopted February 28, 2006, para. 117.

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1. Maintain the commutation of the death sentences of Messrs Boyce and Joseph, and award compensation to them in respect of the remaining violations of their rights under the American Convention as concluded above;

2. Grant Mr. Huggins an effective remedy which includes commutation of sentence for in relation to the mandatory death sentence, and compensation in respect of the remaining violations of his rights under the American Convention as concluded above;

3. Grant an effective remedy to the estate or next-of-kin of Mr. Atkins, with an effective remedy, which includes compensation in respect of the violations of his rights as concluded above;

4. 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 and 8;

5. Adopt such constitutional or legislative measures as may be necessary to ensure that the Constitution of Barbados conforms with Article 2 of the American Convention, that is to say adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice;

6. Adopt such legislative or other measures as may be necessary to ensure that the conditions of detention in which the alleged victims are held comply with the standards of humane treatment mandated by Article 5 of the Convention²⁴.

26. On March 23, 2006, the Inter-American Commission, pursuant to the terms of Article 43(2) of its Rules of Procedure, forwarded the report on admissibility and merits to the State and granted it a period of two months to inform on the measures adopted to comply with the recommendations contained therein. On the same date, according to Article 43(3) of its Rules of Procedure, the Commission notified the Petitioners the adoption of the report and its transmittal to the State and asked them to provide their position in relation with the referral of the case to the Inter-American Court²⁵.

27. On April 21 and 25, 2006, the Petitioners informed the Commission that they were of the opinion that the case should be sent to the Court and submitted the information and documentation requested by the Commission²⁶.

28. The State replied on May 22, 2006, contesting the accuracy of certain facts as alleged in the Petition and denying that it had violated any of the rights stated in the

²⁴ See Annex E.1, IACHR, Report 03/06, Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins, Barbados, adopted February 28, 2006, para. 118.

²⁵ See Annex E.2, IACHR, Letters of March 22, 2006 and fax transmittal of March 23, 2005.

²⁶ See Annex E.2, Petitioners, Letters of April 21 and 25, 2006.

report. The State expressed that it was thus "unable to comply with any of the Recommendations contained in paragraph 118 of the Report"²⁷.

29. Considering that the State did not adopt its recommendations and according to Articles 51 (1) of the Convention and 44 of the Rules of Procedure of the IACHR, and taking into account the position of the Petitioners, on June 16, 2006 the Inter-American Commission decided to submit the case to the jurisdiction of the Inter-American Court.

VI. CONSIDERATIONS OF FACT

A. Relevant domestic legislation and jurisprudence

30. Several legislative provisions under the laws of Barbados and related domestic jurisprudence are relevant to the issues raised in the present Application.

1. Offences Against the Person Act 1994 of Barbados

31. 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*,²⁸ which prescribes the death penalty as the automatic and mandatory punishment for murder in the following terms: "Any person convicted of murder shall be sentenced to, and suffer, death."²⁹

32. Pursuant to this provision, once an individual is convicted of the crime of 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 and his or her crime. Death is the compulsory punishment to be imposed by the courts.

2. Savings Clause under the Constitution of Barbados

33. Section 26 of the Constitution of Barbados prevents the courts in Barbados from holding laws that were enacted or made before the date when the Constitution came into force, November 30, 1966, are inconsistent with the fundamental rights and freedoms prescribed under sections 11 to 23 of the Constitution of Barbados. Section 26 reads:

26. 1. Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question -

²⁷ See Annex E.2, State of Barbados, Communication of May 22, 2006.

²⁸ See Appendix A.4, Offences Against the Person Act 1994-18, Laws of Barbados.

²⁹ See Appendix A.4, Offences Against the Person Act 1994-18, Laws of Barbados, s. 2.

a. is a law (in this section referred to as "an existing law") that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;

b. repeals and re-enacts an existing law without alteration; or

c. alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent.

2. In subsection (1)(c) the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in subsection (1) "written law" includes any instrument having the force of law and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.³⁰

34. Section 26 is referred to as a "Savings Clause", because it immunizes pre-constitution laws from constitutional challenge even if those laws are inconsistent with fundamental rights and freedoms enshrined in the constitution.

35. In its decision in the case of *Boyce and Joseph v. The Queen*, a 5 to 4 majority of the Judicial Committee of the Privy Council, then the highest appellate court for Barbados, specifically held that the mandatory death penalty under section 2 of the Offences Against the Person Act could not be held by the domestic courts to be inconsistent with the right under section 15(1) of the Constitution not to be subjected to inhuman or degrading punishment because the law was an "existing law" within the meaning of section 26 of the Constitution of Barbados.³¹

3. Prerogative of Mercy under the Constitution of Barbados

36. Section 78(3) of the Constitution of Barbados provides the Governor-General of Barbados with the power to exercise the prerogative of mercy in respect of persons who have been sentenced to death. According to the provision, when a person has been sentenced to capital punishment, the Governor-General is required to have a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council of Barbados, in order for the Privy Council to advise the Governor-General on the exercise of the prerogative of mercy in respect of the condemned person. The relevant provisions of the Constitution read as follows:

78. 1. The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -

³⁰ See Appendix A.1, Constitution of Barbados, s. 26.

³¹ See Appendix B.2, *Lennox Boyce & Jeffrey Joseph v. The Queen (Barbados)* [2004] UKPC 32, Privy Council Appeal No. 99 of 2002, Judgment of July 7, 2004 (JCPC), paras. 1-6.

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a. grant to any person convicted of any offense against the law of Barbados a pardon, either free or subject to lawful conditions;

b. grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offense;

c. substitute a less severe form of punishment for that imposed on any person for such an offense; or

d. remit the whole or part of any punishment imposed on any person for such an offense or any penalty or forfeiture otherwise due to the Crown on account of such an offense.

2. The Governor-General shall, in the exercise of the powers conferred on him by subsection (1) or of any power conferred on him by any other law to remit any penalty or forfeiture due to any person other than the Crown, act in accordance with the advice of the Privy Council.

3. Where any person has been sentenced to death for an offense against the law of Barbados, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him on the exercise of the powers conferred in him by subsection (1) in relation to that person.

4. The power of requiring information conferred upon the Governor-General by subsection (3) shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.³²

37. Section 78 was amended in 2002 to add two new subsections that permit condemned prisoners to make written representations in respect of the exercise of the prerogative of mercy and to permit the establishment of time limits for condemned individual to consult any person or body of persons outside of Barbados in relation to his or her offence:

78(5) A person has the right to submit directly or through a legal or other representative written representation in relation to the exercise by the Governor-General or the Privy Council any of their respective functions under this section but is not entitled to an oral hearing.

(6) The Governor-General, acting in accordance with the advice of the Privy Council, may by instrument under the Public Seal direct that there shall be time-limits within which persons referred to in subsection (1) may appeal to, or consult, any person or body of persons (other than Her Majesty in Council) outside Barbados in relation to the offence in question; and, where a time-limit that applies in the case of a person

³² See Appendix A.1, Constitution of Barbados, s. 78.

by reason of such a direction has expired, the Governor-General and the Privy Council may exercise their respective functions under this section in relation to that person, notwithstanding that such an appeal or consultation as aforesaid relating to that person has not been concluded.³³

38. As in most other Commonwealth jurisdictions, the prerogative of mercy is a discretionary power granted to the Executive branch of government, exercised through 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.³⁴ The Privy Council of Barbados, which advises the Governor-General on the exercise of the prerogative of mercy in death penalty cases, is likewise part of the Executive branch, consisting of such persons "as the Governor General, after consultation with the Prime Minister, may appoint by instrument under the Public Seal."³⁵

39. On September 12, 2000, the Judicial Committee of the Privy Council issued a judgment in the case *Neville Lewis et al. v. The Attorney General of Jamaica* in which it found that an individual's petition for mercy under the Jamaican Constitution was open to judicial review and that the procedure for mercy must be exercised by procedures that are fair and proper. The Privy Council held in this respect that a condemned individual should be given sufficient notice of the date on which the Jamaican Privy Council will consider his or her case, afforded an opportunity to make representations in support of his or her case, and receive copies of the documents that will be considered by the Jamaican Privy Council in making its decision.³⁶

B. Judicial Proceedings in Barbados for the Crime of Murder

40. Under the domestic criminal law of Barbados, trials for murder under the Offences Against the Person Act take place before a Judge and Jury in the High Court division of the Supreme Court of Barbados.³⁷ As noted above, where a defendant is found guilty of the crime of murder, the Offences Against the Person Act mandates that a sentence of death be imposed.

41. Domestic judicial review proceedings in respect of a criminal conviction, 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

³³ See Appendix A.2, Constitution (Amendment) Act, 2002-14 (29 August 2002), s. 4.

³⁴ See Appendix A.1, Constitution of Barbados, s. 28.

³⁵ See Appendix A.1, Constitution of Barbados, s. 76(1).

³⁶ See Appendix A.13, *Neville Lewis et al. v. The Attorney General of Jamaica and The Superintendent of St. Catherine District Prison*, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (12 September 2000)(J.C.P.C.), at p. 23.

³⁷ See Appendix A.8, Criminal Procedure Act of Barbados, s. 7.

Judicial Committee of the Privy Council in London.³⁸ On February 14, 2002, Barbados signed the Agreement Establishing the Caribbean Court of Justice³⁹ and subsequently amended its Constitution effective April 8, 2005 to render the Caribbean Court of Justice as the final appellate court for the country.⁴⁰

42. The Caribbean Court of Justice (CCJ) is the regional judicial tribunal established by the Agreement Establishing the Caribbean Court of Justice⁴¹ under the 2001 Revised Treaty of Chaguaramas⁴² of the Caribbean Community (CARICOM). The Court was created in 2003 and inaugurated on April 16, 2005 in Port of Spain, Trinidad & Tobago.

43. The Court has both original and appellate jurisdiction. Respecting its appellate jurisdiction, for those States that ratify the Agreement Establishing the CCJ, the Court becomes the final court of appeal in both civil and criminal matters from common law courts within the jurisdictions of member states of the community, in most instances replacing the jurisdiction of the Judicial Committee of the Privy Council.⁴³ As of the date of this application, two countries, Grenada and Barbados, have accepted the appellate jurisdiction of the CCJ.

B. Facts regarding Lennox Boyce and Jeffrey Joseph

44. Mr. Lennox Richardo Boyce was born on 22 November, 1977. He is a Barbadian national. His occupation, prior to conviction, was a handyman. He was detained at Her Majesty's Prison, Glendairy, Barbados, West Indies on or about April 11, 1999 until it was destroyed in a fire in 2005. He is currently detained at Harrison Point Prison, St Lucy, Barbados.

45. Mr. Jeffrey Joseph was born on 22 March, 1975. He is a Barbadian national. His occupation, prior to conviction, was as an unskilled worker: maintenance, porter and fisherman. He was detained at Her Majesty's Prison, Glendairy, Barbados, West Indies on or about April 11, 1999 until it was destroyed in a fire in 2005. He is currently detained at Harrison Point Prison, St Lucy, Barbados.

³⁸ See Appendix A.1, Constitution of Barbados, s. 88.

³⁹ See Appendix A.11, Agreement Establishing the Caribbean Court of Justice [also available at http://www.caribbeancourtjustice.org/courtadministration/ccj_agreement.pdf].

⁴⁰ See Appendix A.3, Constitution (Amendment) Act 2003-10. See also Appendix A.9 – Caribbean Court of Justice Act, 2003-9; Appendix A.10 – 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.

⁴¹ See Appendix A.11, Agreement Establishing the Caribbean Court of Justice.

⁴² See Appendix A.12, 2001 Revised Treaty of Chaguaramas [also available at http://www.caricom.org/jsp/community/revised_treaty-text.pdf].

⁴³ See Appendix A.11, Agreement Establishing the Caribbean Court of Justice. Art. XXVI. See also Appendix A.3 – Constitution (Amendment) Act 2003-9, s. 9; Appendix A.9, Caribbean Court of Justice Act, ss. 6-8.

46. Messrs Lennox Boyce and Jeffrey Joseph were arraigned with Messrs Rodney Murrey and Ramaine Ben, for the murder of Marquelle Hippolyte on 10 April, 1999⁴⁴. At the beginning of their trial on 24 January, 2001, Messrs Murrey and Ben pleaded guilty to the lesser offence of manslaughter which was accepted by the Crown. Messrs Boyce and Joseph, however, pleaded not guilty to the charge of murder and thereafter a jury was selected⁴⁵. They were tried in the Supreme Court of Barbados before a judge and a jury and were convicted of murder and were sentenced to suffer death by hanging on February 2, 2001 pursuant to the Offences Against the Person Act⁴⁶.

47. Messrs Boyce and Joseph appealed against their convictions and sentences to the Court of Appeal of Barbados, which dismissed their appeal on March 27, 2002. They applied for special leave to appeal as poor persons to the Judicial Committee of the Privy Council (also "JCPC") on sentence.

48. Death warrants were read to Messrs Boyce and Joseph on June 27, 2002 for their execution on July 2, 2002⁴⁷. The day after the warrants were read, a Constitutional Motion was filed in the Supreme Court of Barbados pending their appeals to the Judicial Committee of the Privy Council and stays of execution were granted⁴⁸.

49. On November 20, 2002, the Judicial Committee of the Privy Council granted Messrs Boyce and Joseph special leave to appeal as poor persons against the judgment of the Court of Appeals of Barbados in relation to the mandatory death penalty imposed⁴⁹.

50. On July 7, 2004, the JCPC dismissed this appeal challenging the constitutionality of the mandatory death penalty. Their Lordships' held by a majority of five to four, that the mandatory death penalty in Barbados, although contrary to fundamental human rights, is immunized from challenge by operation of section 26 of the Constitution (the "Savings Clause"). Since the statutory provision for the mandatory death penalty contained in section 2 of the Offences Against the Person Act 1994 is an "existing law" for the purposes of Section 26 of the Constitution, the effect of the majority's decision is to maintain in force the mandatory death penalty notwithstanding

⁴⁴ The Commission notes that some of these facts took place before June 4, 2000, when the State accepted the Court's *rationae temporis* jurisdiction, thus it refers to them only as context of the facts that are under the jurisdiction of the Court.

⁴⁵ See Appendix B.1, Lennox Boyce & Jeffrey Joseph – Record of the proceedings, at 325-326.

⁴⁶ See Appendix B.1, Lennox Boyce & Jeffrey Joseph – Record of the proceedings, at 319-320.

⁴⁷ See Appendix C.1, General Media re: Warrants. But see Appendix B.5, Court of Appeal of Barbados, Civil Appeal No. 29 of 2004 para. 2 (stating that the warrants were read on 26 June 2002).

⁴⁸ See Appendix B.5, Court of Appeal of Barbados, Civil Appeal No. 29 of 2004 para. 2.

⁴⁹ See Appendix B.1, Lennox Boyce & Jeffrey Joseph – Record of the proceedings, at 377-378.

their Lordships' unanimous acknowledgement that such a penalty was inhuman and degrading⁵⁰.

51. On September 15, 2004, death warrants were read to Messrs Boyce and Joseph a second time for their execution on September 21, 2004⁵¹. On September 17, 2004, the High Court of Barbados granted orders staying the executions of Messrs Boyce and Joseph pending the determination of a Constitutional Motion filed on September 16, 2004⁵². On December 22, 2004, Greenidge J dismissed the constitutional motion, but granted further stays of execution for a period of six weeks to allow Messrs Boyce and Joseph to appeal to the Barbados Court of Appeal⁵³.

52. On December 29, 2004, Messrs Joseph and Boyce appealed the decision dismissing the Notice of Motion for Constitutional Redress. On May 31, 2005, the Court of Appeal allowed the appeal of Messrs Boyce and Joseph and commuted their death sentences to life imprisonment⁵⁴. The State of Barbados applied for leave to appeal to the Caribbean Court of Justice to challenge the decision of the Court of Appeal of Barbados to commute the death sentences of Messrs. Boyce and Joseph⁵⁵.

53. The appeal was argued on June 21, 2006 and up to the date of this application, the appeal had not been decided.

C. Facts regarding Frederick Atkins

54. Mr. Frederick Benjamin Atkins (who is now deceased) was born on 18 July, 1970. He was a Barbadian national. His occupation, prior to conviction, was a taxi driver. He was detained at Her Majesty's Prison, Glendairy, Barbados, West Indies on or about October 16, 1998 until it was destroyed in a fire in 2005. On October 30, 2005, Mr. Atkins died from as yet unknown causes.

55. Mr. Atkins was charged on an indictment alleging that, between October 10 and 13, 1998, in the Parish of Christchurch, he murdered Sharmaine Hurley. He pleaded not guilty to the charge. The trial took place from July 17 to July 21, 2000, before a judge and a jury⁵⁶. On July 21, 2000, Mr. Atkins was convicted of murder and sentenced

⁵⁰ See Appendix B.2, *Lennox Boyce & Jeffrey Joseph v. The Queen (Barbados)* [2004] UKPC 32, Privy Council Appeal No. 99 of 2002, Judgment of July 7, 2004 (JCPC).

⁵¹ See Appendix B.3, Warrants.

⁵² See Appendix B.4, Orders, September 17, 2004.

⁵³ See Appendix B.5, Court of Appeal of Barbados, Civil Appeal No. 29 of 2004 para. 2.

⁵⁴ See Appendix B.5, Court of Appeal of Barbados, Civil Appeal No. 29 of 2004.

⁵⁵ See Appendix E.2, Petitioners, Letter of July 28, 2005.

⁵⁶ See Appendix B.6, *Frederick Atkins - Trial Transcript*. The Commission notes that some of these facts took place before June 4, 2000, when the State accepted the Court's *rationae temporis* jurisdiction, thus it refers to them only as context of the facts that are under the jurisdiction of the Court.

to the mandatory death penalty by hanging pursuant to Barbados' Offences Against the Person Act⁵⁷.

56. Mr. Atkins appealed against his conviction to the Court of Appeal of Barbados. On March 27, 2002 the Court of Appeal of Barbados dismissed his appeal against conviction and sentence⁵⁸.

57. Death warrants were read to Mr. Atkins on June 27, 2002 for his execution on July 2, 2002⁵⁹. The day after the warrants were read a Constitutional Motion was filed in the Supreme Court of Barbados and stays of execution were granted.

58. Mr. Atkins applied to the Judicial Committee of the Privy Council for special leave to appeal as a poor person against his conviction and sentence for murder⁶⁰. On November 20, 2002, the JCPC dismissed Mr. Atkins' petition on conviction. Their Lordships adjourned their consideration of the constitutionality of death sentence imposed, pending the determination of the appeal brought by Messrs. Boyce and Joseph with respect to the constitutionality of a mandatory death penalty. As a result of the decision in Boyce and Joseph⁶¹, the appeal on sentence was withdrawn.

59. On February 9, 2005, Mr. Frederick Atkins was read a warrant of execution for his execution on Monday February 14, 2005⁶². The warrant of execution for Mr. Atkins was temporarily stayed in the High Court of Barbados on February 11, 2005, pending final determination of the Constitutional Motion for Boyce and Joseph.

60. No further information was received by the Commission regarding the effect of the May 31, 2005⁶³ decision on the temporary stay on Mr. Atkins' warrant of execution, or if the State appealed the said decision to the Caribbean Court of Appeal.

61. On October 30, 2005, Mr. Atkins passed away in custody⁶⁴. So far, the cause of Mr. Atkins' death is unknown.

⁵⁷ See Appendix B 6, Frederick Atkins – Trial Transcript, at 315.

⁵⁸ See Appendix B.7, Frederick Atkins – Court of Appeal Judgment.

⁵⁹ See Appendix C.1, General Media re: Warrants.

⁶⁰ See Appendix B.8, Frederick Atkins – Petition to the Judicial Committee of the Privy Council, 23 July, 2002.

⁶¹ See Appendix B.2, Lennox Boyce & Jeffrey Joseph v. The Queen (Barbados) [2004] UKPC 32, Privy Council Appeal No. 99 of 2002, Judgment of July 7, 2004 (JCPC).

⁶² See Appendix E.2, Letter by Mr. Alair Sheperd to Mr. Saul Lehfreund dated February 10, 2005, attached to Letter by petitioners of February 10, 2005.

⁶³ On May 31, 2005, the Court of Appeal allowed the appeal of Messrs Boyce and Joseph and commuted their death sentences to life imprisonment. See Appendix B.5, Court of Appeal of Barbados, Civil Appeal No. 29 of 2004.

⁶⁴ Caribbean Broadcasting Corporation, *Murderer dies at QEH*, October 31, 2005, www.cbc.bb [last visited February 7, 2006].

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D. Facts regarding Michael Huggins

62. Mr. Michael Huggins was born on 28 June, 1974. He is a Barbadian national. His occupation, prior to conviction, was a hairdresser. He was detained at Her Majesty's Prison, Glendairy, Barbados, West Indies on or about December 6, 1999 until it was destroyed in a fire in 2005. He is currently detained at Harrison Point Prison, St Lucy, Barbados.

63. Mr. Huggins was accused of having shot and murdered Mr. Stephen Wharton on November 30, 1999⁶⁵. The trial took place between 17 and 19 July, 2001, before Carlisle Payne J. in the Supreme Court of Barbados (Criminal Division). On July 19, 2001, Michael Huggins was convicted of the murder of Stephen Wharton and sentenced to death, pursuant to the Offences Against the Person Act of Barbados⁶⁶. Mr. Huggins' subsequent appeal to the Court of Appeal of Barbados against his conviction was dismissed on March 27, 2002⁶⁷.

64. Mr. Huggins applied to the Judicial Committee of the Privy Council for special leave to appeal as a poor person against his conviction for murder and his sentence of death.

65. A death warrant was read to Mr. Huggins on June 27, 2002 for his execution on July 2, 2002⁶⁸. The day after the warrant was read, that is June 28, 2002, a Constitutional Motion was filed in the Supreme Court of Barbados and a stay of execution was granted.

66. On November 29, 2002, the JCPC granted Mr. Huggins special leave to appeal the conviction. On January 29, 2004, the Judicial Committee of the Privy Council dismissed Mr. Huggins' appeal on conviction⁶⁹.

67. In relation to his appeal on sentence, which challenged the imposition of the mandatory death penalty, their Lordships decided that this should be adjourned pending the determination of the appeal of Boyce and Joseph on the constitutionality of the mandatory death penalty⁷⁰. As set above, the JCPC dismissed the appeal of Boyce and

⁶⁵ The Commission notes that these facts took place before June 4, 2000, when the State accepted the Court's *rationae temporis* jurisdiction, thus it refers to them only as context of the facts that are under the jurisdiction of the Court.

⁶⁶ See Appendix B.9, Michael Huggins – Record of Proceedings.

⁶⁷ See Appendix B.10, Court of Appeals Judgment, March 27, 2002, 96-118.

⁶⁸ See Appendix C.1, General Media re: Warrants.

⁶⁹ See Appendix B.7, Michael Huggins – Judgment of the Judicial Committee of the Privy Council dated 29 January, 2004.

⁷⁰ See Appendix B.7, Michael Huggins – Judgment of the Judicial Committee of the Privy Council dated 29 January, 2004, at 1.

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Joseph on July 7, 2004⁷¹, thus Mr. Higgins' appeal on sentence was withdrawn after that.

68. On May 18, 2005, a death warrant was read to Mr. Huggins for his execution on May 23, 2005⁷². On May 20, 2005, the High Court of Barbados ordered a stay of execution pending the Judgment of the Court of Appeal in Civil Appeal No. 29 of 2004⁷³. As mentioned above (*supra* para. 52), on May 31, 2005, the Court of Appeal allowed the appeal of Messrs Boyce and Joseph and commuted their death sentences to life imprisonment.

E. Treatment while in Prison and effects of reading warrants of execution

69. Messrs Boyce, Joseph, Atkins and Huggins were detained in Glendairy Prison, Bridgetown, Barbados, the nation's sole prison, since their arrest or detention on or about, respectively, April 11, 1999, October 16, 1998, and December 6, 1999, until March 2005. They are currently detained at a temporary prison constructed at Harrison Point.

70. Glendairy Prison was built in 1855 to hold 350 prisoners. A 1994 report by Baroness Vivien Stern found that there was serious understaffing and overcrowding (the Prison held more than double the amount of prisoners it was initially intended to hold), that there was no integral sanitation for all prisoners, that death row prisoners were held in single cells which offered no natural lighting and little if any ventilation, and that death row prisoners received a maximum of 30 minutes exercise per day⁷⁴. Reports of the year 2004, showed that the prison population had swelled even further to a figure of more than 900⁷⁵. Other national and international authorities have for several years made similar observations concerning inadequacies in the conditions of detention of prisoners and other detainees in Barbados⁷⁶.

⁷¹ See Appendix B.2, Lennox Boyce & Jeffrey Joseph [2004] UKPC 32.

⁷² See Appendix C.5, "Warrant read to killer", Media, May 19, 2005. See also File of Provisional Measures, Letter by Mr. Alair Sheperd to Mr. Saul Lehfrend dated May 18, 2005.

⁷³ See File of Provisional Measures, State of Barbados, Communication of May 24, 2005, Re: Provisional Measures Orders of the Inter-American Court of Human Rights of 17 September 2004 and November 2004 and Expansion of Orders of 11 February 2005 and 20 May 2005.

⁷⁴ See Appendix C.3, Report of Baroness Vivien Stern 1994 visit to Glendairy Prison.

⁷⁵ See Appendix C.2, Media. See also Appendix C.5, United States of America State Department Report on Barbados (2005).

⁷⁶ See Report of the National Commission on Law and Order (appointed by decision made by the Cabinet of Ministers of Barbados on September 19, 2002), June 2004, available at <http://www.publicworks.gov.bb/Docs/lawprint.pdf> (last visited: June 21, 2006), at 125-7, 144.

See United Nations Committee on the Rights of the Child (CRC), Concluding Observations of the Rights of the Child: Barbados. 24/08/99, CRC/C/Add.103 (Concluding Observations/Comments), 24 August 1999:

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71. Messrs Boyce, Joseph, Atkins and Huggins were detained in the maximum security section of the Prison, in the condemned cells. These were small cells with no windows, lit by a bare light bulb constantly. The only ventilation was through the door of the cells which opened onto a corridor. This inadequate ventilation made the cells extremely hot and uncomfortable. The cells were deprived of adequate sanitation and they had to use a "slop bucket" to urinate and defecate in. They were allowed to empty the slop pail twice per day, once in the morning and once in the evening. If the slop bucket was used during any other time of the day, it could not be emptied until the end of the day. The prisoners were locked in their cells at least 23 hours a day. They were allowed out of their cells for approximately one hour per day, when they were expected to bathe and exercise⁷⁷.

72. Glendairy Prison was destroyed in a fire in March of 2005. The damage necessitated the removal of nearly one thousand prisoners to several temporary holding facilities⁷⁸. On April 11, the government announced that all prisoners had been moved to a temporary prison constructed at Harrison Point until a permanent prison could be built. In May the press reported complaints by prisoners and their families about inadequate conditions at the temporary prison, including unsanitary cells, inedible food, and unclean drinking water. Family members complained that they were denied the opportunity to visit their relatives in prison and that prison authorities had failed to inform them in a timely manner when prisoners had serious health problems that resulted in their being taken to the hospital. Attorneys also complained that they were denied the ability to see their clients held at Harrison Point and other facilities. The superintendent of prisons responded that the emergency situation necessitated temporary restrictions on visits but that attorneys were allowed to visit prisoners. In September 2005 the government announced that construction had begun on a new permanent prison. The Harrison Point facility held approximately 900 prisoners; the new facility, which will have a capacity of 1,200 prisoners, is due to be completed by January 2007⁷⁹.

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19. The Committee is concerned about legislation and policies that allow the use of flogging of children as a disciplinary measure in prisons and its use as a judicial sentence. [...] The Committee encourages the State party to conduct a public awareness-raising campaign and to review its legislation and policies in order to eliminate flogging as a judicial sentence and as a disciplinary measure in the prison system.

See also International Center for Prison Studies, King's College London, Guidance Note 4, Dealing with prison overcrowding, signaling out Glendairy Prison in Barbados as one of the most overcrowded prisons in the world with 302 per cent occupancy level (where 100% is full occupancy), available at www.kcl.ac.uk/depsta/rel/icps/gn4-prison-overcrowding.pdf [last visit: June 21, 2006].

⁷⁷ See Appendix D.2, Affidavits of Messrs Boyce, Joseph, Atkins and Huggins, August 17, 2004.

⁷⁸ See Appendix C.5. United States of America State Department Report on Barbados (2005). See also press releases available at <http://www.guyanachronicle.com/ARCHIVES/archive%2001-04-05.html> [last visit: June 21, 2006]; and <http://www.guyanachronicle.com/ARCHIVES/archive%2012-04-05.html> [last visit: June 21, 2006].

⁷⁹ See Appendix C.5. United States of America State Department Report on Barbados (2005).

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73. The impact of the victims' conditions of detention was exacerbated by the reading of warrants of execution to each of the victims on two separate occasions. More particularly, the victims were subjected to intense mental anguish and prolonged psychological suffering. For example, Lennox Boyce has given the following description of his experience after the first warrant of execution was read to him:

When the Marshall appeared at the door of my cell and read the Death Warrant I went into shock and started to tremble. I was very very scared. I honestly believed that I was going to die and that there was nothing I could do to prevent the sentence of death being carried out at a time when I still had a right of appeal to the Judicial Committee of the Privy Council. This caused me to have nervous breakdown for which I had to take medication. This medication was in the form of injections in my foot which prevented me from speaking properly. My family was not informed until after the warrant was read to me and I was afraid that I would be executed without my family being informed.⁸⁰

VII. LEGAL ARGUMENTS

A. Violation of Articles 4 (1) and (2), 5 and 8 of the American Convention, in conjunction with Article 1 (1) of the Convention, due to the Mandatory Nature of the Death Penalty

74. The Commission respectfully submits that the State of Barbados is responsible for violating Articles 4 (1) and (2), 5 and 8 of the American Convention, in relation to Article 1 (1) of the Convention, by sentencing the victims in the present case to death pursuant to a law that renders capital punishment the mandatory sentence for the crime of murder.

⁸⁰ See Appendix D.1- Affidavit of Mr. Boyce, August 17, 2004, paras. 5-7. See also affidavit of Mr. Joseph, August 17, 2004, para. 5:

"When the Marshall appeared at the door of my cell and read the Death Warrant I had a very unreal feeling. I was terrified. I could not believe this was happening to me. The feeling was so intense that I would not wish it upon any enemy of mine. Since that time I have been suffering from insomnia and my dreams have been nightmarish".

See also affidavit of Mr. Atkins, August, 17, 2004, para. 5:

"When the Marshall appeared at the door of my cell and read the Death Warrant I was terrified. I felt as though I was going to die immediately and not be able to do anything about it. I was in shock as I knew I had another appeal and I simply did not know what to do. I did not know how to contact my lawyers or members of my family. I did not know whether my family was aware of what was going on".

See also affidavit of Mr. Huggins, August 17, 2004, para. 5:

"I cannot describe the feeling that I had when the Marshall appeared at the door of my cell and read the Death Warrant. I was terrified. My feelings of horror were intensified by the fact that I was not told if any members of my family or my lawyers knew that the Death Warrant was going to be read. I immediately thought that my attorneys would not know as they were busy preparing to file the Appeal to the Judicial Committee of the Privy Council and would have been proceeding on the basis that the warrant would not be read. I felt I was going to die immediately and not be able to do anything about it".

75. Each of the four victims in the present case was convicted of murder and sentenced to death. In each case, the sentence was imposed pursuant to legislation in Barbados that prescribes the death penalty as the only punishment available when a defendant is found guilty of murder.

76. More particularly, all of the victims have been convicted of murder under the Barbados' *Offences Against the Person Act 1994-18*, section 2 of which provides that "[a]ny person convicted of murder shall be sentenced to, and suffer, death." Accordingly, a trial court has no discretion to impose a punishment other than death once a defendant is found guilty of the crime of murder. In this sense, the crime of murder in Barbados can be regarded as subject to a "mandatory death penalty", namely a death sentence that the law compels a court to impose based solely upon the category of crime for which the defendant is found responsible. Under this legislative framework, mitigating circumstances cannot be taken into account by the trial court in sentencing an individual to death.

77. Therefore, once the juries found the victims in these cases guilty of murder, the trial judge was required to sentence them to death. For example, in the case of Lennox Boyce and Jeffrey Joseph, following the determination by the jury that both defendants were guilty of murder, the trial judge pronounced as follows following the victims' convictions for murder:

Lennox Ricardo Boyce, you have been convicted with the crime of murder. The sentence of the Court is that you be taken from this place to the place from whence you came, that you be there kept until the time of execution, that you there suffer death by hanging, and that your body be buried within the precincts of the gaol where you last been confined and may the Lord have mercy on your soul.

Jeffrey Joseph, you have been convicted of the crime of murder. The sentence of the Court is that you be taken from this place to the place whence you came, that you there be kept until the time of execution, that you there suffer death by hanging, and that your body be buried within the precincts of the gaol where you last have been confined and may the Lord have mercy on your soul⁸¹.

78. In this factual context, and based upon the following submissions, the Commission contends before this Court that the State is responsible for the promulgation of the Offences Against the Person Act and its application in the case of each of the 4 victims, and accordingly is responsible for the violations of Articles 4(1), 5(1), 5(2) and 8(1) of the Convention in respect of those victims.

B. The Death Penalty in the Inter-American Human Rights System

79. Article 4 of the American Convention on Human Rights, governing the right to life, addresses the use of the death penalty by states parties that have not abolished it as follows:

⁸¹ See Appendix B 1. Lennox Boyce & Jeffrey Joseph, Record of Proceedings, at 319-320.

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

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

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it apply to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by a competent authority.

80. The terms of Article 4 have, in turn, been interpreted by the supervisory bodies of the inter-American human rights system within their spheres of competence. According to this Court, Article 4 of the Convention does not expressly prohibit the death penalty in states that have not abolished it. At the same time, Article 4 requires that the conventional rules concerning the death penalty be interpreted as "imposing restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance."⁸²

81. This Court has also indicated that 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. 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.⁸³

⁸² I/A Court H.R., Advisory Opinion OC-3/83, Advisory Opinion OC-13/93 of September 8, 1983, (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Ser. A No. 3, para. 51

⁸³ Advisory Opinion OC-3/83, *supra*, para. 55.

82. On numerous occasions, the Court has emphasized that proceedings that may result in the imposition of the death penalty must be carried out in strict compliance with the due process guarantees prescribed under human rights treaties. According to the Court, "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."⁸⁴

83. Consequently, states parties to the American Convention that have not abolished the death penalty are not free to impose this punishment without restrictions. Rather, they must comply with the limitations prescribed by Article 4 and other pertinent provisions of the Convention, in particular those concerning judicial protection and guarantees. Further, one of the restrictions applicable to capital punishment in the inter-American and other human rights system is the requirement that the death penalty not be imposed as the mandatory punishment for a crime, as argued below.

C. The Mandatory Death Penalty under Inter-American Jurisprudence

84. This Court as well as the Inter-American Commission has specifically determined 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 right not to be arbitrarily deprived of life protected under Article 4 of the American Convention.⁸⁵ The Inter-American Commission has also found death penalty laws of this nature to be inconsistent with the right to humane treatment under Article 5 of the Convention and the right to a fair trial under Article 8 of the Convention.⁸⁶

85. More particularly, in its judgment on the merits and reparations in the *Hilaire, Constantine and Benjamin et al.* Case, this Court considered the permissibility of the death penalty in the context of provisions of the Trinidad and Tobago's Offences Against the Person Act⁸⁷ which had two elements:

⁸⁴ 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, Ser. A No. 16 (1999), para. 136. See also I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, Ser. C No. 94, para. 101.

⁸⁵ See I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, Ser. C No. 94, para. 101; I/A Court H.R., *Raxcacó Reyes v. Guatemala*, Judgment of September 15, 2005, Ser. C No. 133, paras. 54-90. See also Case No. 12.023, Report 41/00, Desmond McKenzie *et al.* (Jamaica), Annual Report of the IACHR 1999.

⁸⁶ See, e.g., Case No. 12.023, Report 41/00, Desmond McKenzie *et al.* (Jamaica), Annual Report of the IACHR 1999; Case 11.743, Report 38/00, Rudolph Baptiste *v. Grenada*, Annual Report of the IACHR 1999.

⁸⁷ See Appendix A.6, Trinidad and Tobago Offences Against the Person Act, (3 April 1925), Laws of Trinidad and Tobago, Ch. 11:08.

a) in the determination of criminal responsibility, the law only authorized the competent judicial authority to find a person guilty of murder solely based on the categorization of the crime, without taking into account the personal conditions of the defendant or the individual circumstances of the crime; and

b) in the determination of punishment, it mechanically and generically imposed the death penalty for all persons found guilty of murder and prevented the modification of the punishment through a process of judicial review.⁸⁸

86. In finding that this legislation contravened Article 4(1) and 4(2) of the American Convention, the Court noted that the law disregarded the fact that murder may have varying degrees of seriousness, and compelled the indiscriminate imposition of the same punishment for conduct that can be vastly different. The Court also noted that the law prevented the judge from considering the basic circumstances in establishing the degree of culpability and individualizing the sentence.⁸⁹

87. In this respect, the Court shared the view of the United States Supreme Court, that to consider all persons responsible for murder as deserving of the death penalty "treats all persons convicted of a designated offense not as uniquely individual beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty."⁹⁰

88. According to the Inter-American Court, this approach failed to ensure that the death penalty was imposed for crimes of utmost seriousness as required under Article 4(2) of the Convention and therefore resulted in the arbitrary deprivation of life contrary to Article 4(1) of the Convention.⁹¹ The Court therefore held that the mandatory death penalty law was in and of itself a violation of the American Convention and that the legislation had to be amended to be brought into compliance with the Convention and international human rights norms.⁹²

89. This Court reached the same conclusion in the case of *Raxcacó Reyes v. Guatemala*, in which it held, *inter alia*, that the mandatory imposition of the death penalty for the crime of kidnapping in the Republic of Guatemala violated the prohibition against the arbitrary deprivation of life established under Article 4(1) and (2) of the Convention.⁹³

⁸⁸ *Hilaire, Constantine and Benjamin et al.*, *supra*, para. 104.

⁸⁹ *Hilaire, Constantine and Benjamin et al.*, *supra*, para. 103.

⁹⁰ *Hilaire, Constantine and Benjamin et al.*, *supra*, para. 105, *citing* *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

⁹¹ *Hilaire, Constantine and Benjamin et al.*, *supra*, paras. 106-108.

⁹² *Hilaire, Constantine and Benjamin et al.*, *supra*, paras. 211, 212.

⁹³ I/A Court H.R., *Raxcacó Reyes v. Guatemala*, *supra*, paras. 54-90. See also I/A Court H.R., Request for Advisory Opinion Presented by the Inter-American Commission on Human Rights, Resolution of June 24, 2005, "Considering", para. 9.

90. As the Court has previously noted, the United Nations Human Rights Committee has likewise found the mandatory death penalty to be incompatible with the right to life under Article 6(1) of the International Covenant on Civil and Political Rights.⁹⁴

91. The Inter-American Commission also submits that legislation that renders the death penalty mandatory for certain crimes is inconsistent with the right to humane treatment prescribed under Article 5(1) and 5(2) of the American Convention.⁹⁵ In particular, these provisions of the Convention require persons to be treated as individual human beings and afforded the dignity and respect inherent in that status, particularly where a state is determining whether a person should be deprived of his or her life pursuant to death penalty legislation. As the evidence before the Court indicates, however, the mandatory imposition of the death penalty has both the intent and the effect of denying a person his or her right to life based solely upon the category of crime for which the offender is convicted, without regard to the offender's person circumstances or the circumstances of the particular offense. The Commission contends that as a result, under mandatory death penalty laws, all persons convicted of a designated offense are not treated as uniquely individual beings, contrary to the terms and spirit of Article 5 of the Convention.⁹⁶

92. Further, the Commission submits to the Court that mandatory death sentences cannot be reconciled with an offender's right to due process as provided for under Article 8 of the Convention, in conjunction with the requirements of Article 4 of the Convention. In particular, the Commission contends that mandatory sentencing for the death penalty precludes any opportunity on the part of an offender to make representations to the court imposing sentence as to whether the death penalty is a permissible or appropriate form of punishment, based upon the criteria prescribed in Article 4 of the Convention or otherwise, and prevents any effective review by a higher court as to the propriety of a sentence of death in the circumstances of a particular case. As a consequence, individuals subjected to this law cannot effectively exercise their right of defense and their right of appeal guaranteed by Article 8 of the Convention, interpreted together with the requirements of Article 4 of the Convention.⁹⁷

⁹⁴ UNHRC, *Eversley Thompson (Saint Vincent and the Grenadines)*, Communication N° 806/1998 (October 18, 2000).

⁹⁵ See, e.g., *McKenzie Case*, supra, para. 203; Case No. 11.743, Report 38/00, *Rudolph Baptiste (Grenada)*, Annual Report of the IACHR 1999, para. 90; Case No. 11.826, Report 49/01, *Leroy Lamey et al. (Jamaica)*, Annual Report of the IACHR 2000, para. 135; Case No. 12.183, Report 127/01, *Joseph Thomas (Jamaica)*, Annual Report of the IACHR 2001, para. 110; Case No. 12.275, Report 58/02, *Denton Aitken (Jamaica)*, Annual Report of the IACHR 2000, para. 112; Case No. 12.347, Report 76/02, *Dave Sewell (Jamaica)*, Annual Report of the IACHR 2001, para. 99.

⁹⁶ *McKenzie Case*, supra, para. 203; *Baptiste Case*, supra, para. 90; *Lamey Case*, supra, para. 135; *Thomas Case*, supra, para. 110; *Aitkin Case*, supra, para. 111; *Sewell Case*, supra, para. 99; *Edwards Case*, supra, para. 147.

⁹⁷ *McKenzie Case*, supra, paras. 204-206; *Baptiste Case*, supra, paras. 91-93; *Lamey Case*, supra, paras. 136-138; *Thomas Case*, supra, para. 111; *Aitkin Case*, supra, para. 112; *Sewell Case*, supra, para. 100; *Edwards Case*, supra, paras. 148-150.

93. In summary, the Commission respectfully submits to the Court that, following from the established jurisprudence of the inter-American human rights system, a death penalty law which submits all persons convicted of a designated offense to a judicial process in which the individual circumstances of the accused and the crime are not considered, and where the death penalty is automatically and generically mandated as the applicable punishment for that offense, violates the prohibition against the arbitrary deprivation of life, the right to humane treatment, and the right to a fair trial guaranteed under Articles 4, 5, and 8 of the Convention.

94. In the case presently before the Court, the evidence indicates that Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins were each convicted of the offense of murder under the domestic law of Barbados. As noted above, section 2 of the Offences Against the Person Act of Barbados provides that once an offender is found guilty of the crime of murder, he or she must be sentenced to death. There is no provision in the *Act* that permits a judge or jury to consider the personal circumstances of an offender or his or her offense, such as the offender's record or character, the subjective factors that may have motivated his or her conduct, or the offender's likelihood of reform or social readaptation, in determining whether the death penalty is an appropriate penalty for a particular offender in the circumstances of the offender's case.

95. The Offences Against the Person Act does permit a jury to consider certain circumstances of a killing in determining whether an offender is guilty of the crime of murder. For example, section 4 of the *Act*, which refers to "diminished responsibility", provides that an individual shall not be convicted of murder "if he was suffering from such abnormality of mind, whether arising from a condition or arrested or retarded development of mind or any inherent causes or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."⁹⁸ The legislation also permits the jury to consider evidence of provocation,⁹⁹ and provides particular punishment other than death for such crimes as conspiracy to murder, aiding and abetting suicide, suicide pacts, and infanticide.¹⁰⁰ 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

⁹⁸ See Appendix A.4, Offences Against the Person Act of Barbados, s. 4(1).

⁹⁹ See Appendix A.4, Offences Against the Person Act of Barbados, s. 5 (providing that "[w]here on a charge of murder there is evidence on which the jury can find that the person charged was provoked, whether by things done or by things said or by both together, to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.").

¹⁰⁰ See Appendix A.4, Offences Against the Person Act of Barbados, ss. 11-14.

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determination as to whether the death sentence is a necessary and appropriate punishment in the circumstances of a particular crime.

96. Consequently, in the present cases, once the victims were found guilty of murder, the law in Barbados did not permit a hearing by the courts as to whether the death penalty was a permissible or appropriate penalty for those victims, in light of such factors as the victims' character or record, the nature or gravity of the offense, or the subjective factors that may have motivated the victims' conduct. The victims were likewise precluded from making representations on these matters to the courts that tried them, which sentenced the victims based solely upon the category of crime for which they had been found responsible.

97. Based upon the foregoing facts and the interpretive principles outlined above, the Commission submits that the mandatory death penalties imposed upon the four victims in the present case violate the right not to be arbitrarily deprived of life under Article 4(1) and (2) of the Convention as well as the right to humane treatment under Article 5(1) and (2) of the Convention and the right to a fair trial provided for in Article 8 of the Convention. The trial courts lacked any guided discretion to consider the victims' personal characteristics and the particular circumstances of their offenses in determining whether death was an appropriate punishment. No opportunity was provided to the courts to consider whether the death penalty was the most appropriate punishment in the circumstances of the victims' cases. Rather, the death penalty was imposed without principled distinction or rationalization in the circumstances of each victim's case. The appeal courts were similarly precluded from substituting different sentences to those passed by the trial courts based upon the victims' circumstances, and the sentences and their implementation were thereby immune from any proper form of judicial review.

98. As noted previously, under the law of Barbados, the Governor-General of Barbados has the authority to commute a death sentence pursuant to the executive discretion to exercise the prerogative of mercy. For the reasons outlined below, however, the Commission submits that the mercy procedure is not an adequate substitute for a judicial process that determines the appropriate sentence after a conviction for murder.

99. In this connection, individuals in the position of the victims who are sentenced to death are entitled to have their cases considered by the Barbados Privy Council and the Governor-General of Barbados in exercise of the prerogative of mercy under section 78 of the Constitution of Barbados.¹⁰¹ According to this provision of the Constitution, which is similar in substance to provisions contained in the Constitutions of other Commonwealth jurisdictions including Trinidad and Tobago,¹⁰² the Barbados Privy

¹⁰¹ See Appendix A.1, Constitution of Barbados, s. 78.

¹⁰² See Appendix A.5, Constitution of Trinidad and Tobago, ss. 87, 88 and 89, which read as follows:

87.(1) The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof.

Continued.

Council is responsible for considering and making recommendations to the Governor-General of Barbados as to whether an offender sentenced to death should benefit from the Governor-General's discretionary power to exercise the prerogative of mercy.¹⁰³ Neither the Constitution of Barbados nor any other legislation prescribes criteria that are to be applied in the exercise of the discretion of the Privy Council or the Governor-General, however, save for the requirement under section 78(3) in death penalty cases that the Governor-General cause a written report of the case from the trial judge together with any other information in the Minister's discretion, to be forwarded to the Privy Council so that it may advise him on the exercise of his prerogative, and the right of the condemned person under section 78(5), which was added to the Constitution effective September 5, 2002, to make written representations in relation to the exercise by the Governor-General or the Privy Council of its prerogative of mercy.¹⁰⁴

...continuation

(2)The President may-

(a)grant to any person convicted of any offence against the law of Trinidad and Tobago a pardon, either free or subject to lawful conditions;

(b)grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(c)substitute a less severe form of punishment for that imposed by any sentence for such an offence; or

(d)remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to the State on account of such an offence.

(3)The power of the President under subsection (2) may be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister.

88. There shall be an Advisory Committee on the Power of Pardon which shall consist of-

(a)the Minister referred to in section 87(3) who shall be Chairman;

(b)the Attorney General;

(c)the Director of Public Prosecutions;

(d)not more than four other members appointed by the President, after consultation with the Prime Minister and the Leader of the Opposition.

89.(1)Where an offender has been sentenced to death by any court of an offence against the law of Trinidad and Tobago, the Minister shall cause a written report of the case from the trial justice, together with such other information derived from the record of the case or elsewhere and the Minister may require, to be taken into consideration at a meeting of the Advisory Committee.

(2)The Minister may consult with the Advisory Committee before tendering any advice to the President under section 87(3) in any case not falling within subsection (1).

(3)The Minister shall not be obliged in any case to act in accordance with the advice of the Advisory Committee.

(4)The Advisory Committee may regulate its own procedure.

(5)In this Section "the Minister" means the Minister referred to in section 87(3).

¹⁰³ See Appendix A.1, Constitution of Barbados, s. 78.

¹⁰⁴ See Appendix A.2, Constitution (Amendment) Act, 2002, 2002-14 (29 August 2002), s. 4.

100. It is apparent, however, that the prerogative of mercy process is not equivalent to and cannot be a substitute for a determination by the court that tries and convicts a defendant of the appropriate sentence, a responsibility that 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 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. In finding the mandatory death penalty law under the Offences Against the Person Act in Trinidad and Tobago to violate Article 4(2) of the Convention, the Court observed that the Act "prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different."¹⁰⁵ The Judicial Committee of the Privy Council has similarly held 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.¹⁰⁶

101. Accordingly the Commission submits that the prerogative of mercy cannot be considered sufficient for providing a person convicted of murder with a judicial determination as to whether the death penalty is an appropriate punishment in the circumstances of his or her case in accordance with the standards prescribed under Articles 4, 5 and 8 of the American Convention.

102. Finally, the Commission contends that these submissions are not affected by the fact that two of the alleged victims (Boyce and Joseph) have had their death sentences commuted by the Court of Appeal of Barbados. The Commission notes that an appeal against this Court of Appeal decision by the State of Barbados is currently pending before the Caribbean Court of Justice. With respect to Frederick Huggins, he remains under sentence of death. It is therefore still possible that these three alleged victims may remain at risk of execution, partly subject to the outcome of the State's appeal before the Caribbean Court of Justice. The Commission's findings are similarly not altered by the death of Michael Atkins, given that up to time of his death, he remained liable to execution pursuant to a mandatory death sentence. The fact remains that a mandatory death sentence was imposed upon all four victims, in contravention of Articles 4, 5, and 8 of the Convention.

103. It follows from the Commission's findings that, should the State execute any of the alleged victims (with the exception of Fredrick Atkins) this would constitute

¹⁰⁵ I/A Court H.R., *Hilaire, Constantine and Benjamin et al.*, supra, para. 103.

¹⁰⁶ See Appendix A 10, *Patrick Reyes v. The Queen*, Privy Council Appeal No. 64 of 2001, Judgment of March 11, 2002 (JCPC), para. 44 (concluding that "the Advisory Council [on the Power of Pardon] is not an independent and impartial court within the meaning of section 6(2) of the Constitution [...] it has been repeatedly held that not only the determination of guilt but also the determination of the appropriate measure of punishment are judicial not executive functions").

further egregious and irreparable violations of their rights under Articles 4 of the Convention.

104. Therefore, the Commission requests the Court to declare that the State violated to the detriment of Messrs Boyce, Joseph, Atkins and Huggins, Articles 4, 5 and 8 of the American Convention on Human Rights in conjunction with Article 1(1) of the Convention.

B. Violation of Article 5 of the American Convention, in conjunction with Article 1 (1) of the Convention, due to conditions of detention and the reading of warrants of execution

105. The Commission respectfully submits that the conditions in which the victims in the present case have been detained by the State constitute a violation of their rights under Article 5(1) of the Convention to have their physical, mental and moral integrity respected, as well as their right under Article 5(2) of the Convention not to be subjected to cruel, unusual or degrading punishment or treatment. The Commission also submits that the State, by reading warrants of execution to the victims on two separate occasions, exacerbated these violations of the right to humane treatment.

106. Articles 5(1) and 5(2) of the American Convention guarantee the right to humane treatment in the following terms:

5.1 Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

107. According to the evidence before the Court, the four victims in the present case were held in similar conditions of detention from the outset of the criminal proceeding against them. In particular, Messrs Boyce, Joseph, Atkins and Huggins were detained in Glendairy Prison, Bridgetown, Barbados, the nation's sole prison, since their arrest or detention until March 2005. They are currently detained at a temporary prison constructed at Harrison Point. The Commission has provided evidence of the conditions of detention in such places (*supra* para. 69-73).

108. Also as described above (*supra* para. 73) the impact of the victims' conditions of detention was exacerbated by the reading of warrants of execution to each of the victims on two separate occasions. More particularly, the victims were subjected to intense mental anguish and prolonged psychological suffering¹⁰⁷.

¹⁰⁷ See Appendix D.1, affidavit of Mr. Joseph, August 17, 2004, para. 5; Affidavit of Mr. Boyce, August 17, 2004, para. 5-7; See also affidavit of Mr. Atkins, August, 17, 2004, para. 5; See affidavit of Mr. Huggins, August 17, 2004, para. 5.

109. It is the Commission's position that the conditions of detention in which the four victims have been held, when considered in light of the length of time for which they have been detained, the fact that their detention has included time in condemned cells on death row, and the reading of warrants to the victims on two occasions, constitute grave violations of the right to humane treatment prescribed under Article 5(1) and (2) of the Convention.

110. In considering the compatibility of conditions of detention with the standards under Article 5 of the Convention, this Court has held that any person deprived of his liberty has the right to be treated with dignity and the State has the responsibility and duty to guarantee his personal integrity while detained. As a result, the State, being responsible for detention facilities, is the guarantor of the rights of detainees.¹⁰⁸

111. This Court has also concluded in past cases before it that conditions of detention similar to those in the present matter contravened the right to humane treatment under Article 5 of the Convention. In the Suárez Rosero Case,¹⁰⁹ for example, the victim alleged, *inter alia*, that he was held incommunicado for over one month in a damp and poorly ventilated cell measuring five meters by three, together with sixteen other persons. In finding that the victim had been subjected to cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention, the Court stated as follows:

The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suárez-Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his *incomunicado* detention was arbitrary and carried out in violation of Ecuador's domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspapers; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suarez-Rosero was subjected may be described as cruel, inhuman and degrading.¹¹⁰

112. Similarly, in the case of Hilaire, Constantine and Benjamin *et al.*, this Court considered conditions of detention described by the Court as follows:

- m) All of the victims' pre and post trial detention took place in grossly overpopulated and unhygienic conditions. As to pre-trial detention conditions, their cells, referred to as "F2" cells, lack sufficient ventilation and natural light. Along with the showers

¹⁰⁸ See I/A Court H.R., *Neira Alegría et al. Case*. Judgment of January 19, 1995. Series C No. 20, para. 60; Hilaire, Constantine and Benjamin *et al.*, *supra*, para. 165.

¹⁰⁹ I/A Court H.R., *Suárez Rosero Case*, *supra*, at p. 283.

¹¹⁰ *Id.*, at pp. 302-3, para. 98.

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used by the victims, they are located in close proximity to the execution chamber (gallows). The prisoners do not have adequate nutrition, medical services or recreation, which only exacerbates the state of mental anguish in which they live (*supra* paras. 76(b) and 77(c)).

- n) Only twenty-one of the alleged victims in this case have maintained that they were imprisoned under conditions of overcrowding, inadequate hygiene and other deficient detention conditions since the time of their arrest. Nevertheless, on the basis of the evidence, this Court accepts as fact that these conditions are typical of Trinidad and Tobago's prison system and therefore concludes that all of the alleged victims in the present Case have been subjected to those same conditions indicated in the previous paragraph.
- o) The detention conditions described above only exacerbate the intrinsic suffering that the alleged victims already endure due to the impending imposition of their death penalty.¹¹¹

113. The Court found that the conditions experienced by the victims in that case, as described above, compelled them to live in circumstances that impinged on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment.¹¹²

114. Similar to the above cases, the victims in the matter presently before the Court have been held in solitary confinement and their contact with family and other visitors has been severely limited. Moreover, the prison conditions under which they have been detained, particularly prior to their trials, are strikingly similar to those to which the victims in the Suárez Rosero and Hilaire, Constantine and Benjamin et al. cases were subjected. The victims have been held in over-crowded conditions with inadequate hygiene, ventilation and natural light, and are provided with fresh air and exercise infrequently¹¹³.

115. Accordingly, the Commission submits that in the present case, the conditions of detention experienced by Messrs Boyce, Joseph, Atkins and Huggins, as depicted by the evidence before the Court, are very similar to those condemned by the Court in the past and should likewise be declared in contravention of Article 5 of the Convention.

116. In addition, the Commission submits that a comparison of the victims' prison conditions with international standards for the treatment of prisoners also suggests that their treatment has failed to respect minimum requirements of humane treatment. In

¹¹¹ I/A Court H.R., *Hilaire, Constantine and Benjamin et al.*, *supra*, para. 84(m)-(o).

¹¹² I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al.*, *supra*, para. 169.

¹¹³ See also I/A Court H.R., *Case of Lori Berenson-Mejía v. Perú*, Judgment of November 25, 2004, (in Spanish only), para. 104, 106; I/A Court H.R., *Case of García-Asto and Ramírez-Rojas v. Perú*, Judgment of November 25, 2005, Series C No.137, para. 220, 229, 231.

particular, Rules 10, 11, 12, 15, and 21 of the United Nations Standard Minimum Rules for the Treatment of Prisoners,¹¹⁴ which in the Commission's view provide reliable benchmarks as to minimal international standards for the humane treatment of prisoners, prescribe for the following basic standards in respect of accommodation, hygiene, medical treatment and exercise:

10. All accommodation provided for the use of prisoners and in particular all sleeping arrangements shall meet all requirements of health, due regard being paid to climactic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.
11. In all places where prisoners are required to live or work,
 - (a) the windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;
 - (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.
12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.
15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.
21. (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
- (2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.

117. In the Commission's submission, it is apparent based upon the evidence in the present case that the State has failed to satisfy these minimum standards of proper treatment of prisoners. The cumulative impact of such conditions cannot be considered consistent with the right to humane treatment under Article 5 of the Convention.¹¹⁵

¹¹⁴ 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).

¹¹⁵ See similarly European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Second General Report on the CPT's Activities Covering the Period 1 January to 31 December 1991, Ref. CPT/Inf. (92) 3 (13 April 1992), paras. 44-50 (criticizing prison conditions involving overcrowding, the absence of at least one hour of exercise in the open air every day for prisoners, and the practice of prisoners discharging human waste in buckets, and stating that the Committee is "particularly concerned when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment. The cumulative effect of such conditions can prove extremely detrimental to prisoners.").

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118. Further, the Commission contends that the physical and psychological impact of these conditions were exacerbated not only by the suffering caused by the impending imposition of their death penalty, but also by the deliberate acts of the State in reading warrants of execution to the alleged victims on two separate occasions and before their proceedings before the domestic courts or the inter-American system had been completed. According to the evidence before the Court, on September 15, 2004, Barbados read warrants of execution to Messrs. Boyce and Joseph on June 27, 2002 and September 15, 2004 for their executions on, respectively, July 2, 2002 and September 21, 2004. Similarly, Mr. Atkins was read warrants of execution on June 27, 2002 and February 9, 2005 for his execution on, respectively, July 2, 2002 and February 14, 2005, and Mr. Huggins was read warrants of execution on June 27, 2002 and May 18, 2005 for his execution on, respective, July 2, 2002 and May 23, 2005.

119. As the affidavits of the victims reveal, the reading of the warrants caused them amplified and intense fear and suffering at the knowledge that their executions had in fact been scheduled. In this respect, this Court has considered the anticipation of death as an aggravating factor in the treatment of prisons on death row. In its judgment in the *Hilaire, Constantine and Benjamin et al.* Case, the Court specifically observed that

in the *Soering v. United Kingdom*, the European Court found that the "death row phenomenon" is a cruel, inhuman, and degrading treatment, and is characterized by a prolonged period of detention while awaiting execution, during which prisoners sentenced to death suffer severe mental anxiety in addition to other circumstances, including, among others: the way in which the sentence was imposed; lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; the detention conditions while awaiting execution; delays in the appeal process or in reviewing the death sentence during which time the individual experiences extreme psychological tension and trauma; the fact that the judge does not take into consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail.¹¹⁶

120. The Commission respectfully submits that in the present case, the reading of warrants only amplified the extreme psychological tension and trauma described by the Court and suffered by the victims.

121. Therefore, the Commission requests the Court to declare that the State violated to the detriment of Messrs Boyce, Joseph, Atkins and Huggins, Article 5 (1) and (2) of the American Convention on Human Rights, in conjunction with Article 1(1) of the Convention.

¹¹⁶ I/A Court H.R., *Hilaire, Constantine and Benjamin et al.*, supra, para. 167, citing European Court of Human Rights, *Soering v. United Kingdom*, Judgment of July 7, 1989, Series A, Vol. 161.

C. Violation of Article 1(1) of the American Convention with respect to the reading of warrants of executions to the victims while their complaints were pending before the inter-American human rights system

122. Further, the Commission respectfully submits that the State is responsible for violations of its obligations under Article 1(1) of the Convention, in relation to the right to life protected under Article 4 of the Convention, by reading warrants of execution to the victims while their complaints were pending before the inter-American human rights system.

123. The facts in the present case indicate that the victims' petition was lodged with the Commission on September 3, 2004. Subsequently, on September 17, 2005 the Commission transmitted the pertinent parts of the petition to the State together with a request for precautionary measures in favor of Messrs. Atkins and Huggins asking the State to preserve their lives and physical integrity so as not to hinder the processing of their complaints before the inter-American system. With respect to Messrs. Boyce and Joseph, the Commission sought and, on September 17, 2004 this Court granted provisional measures in their favor requesting that their executions be stayed. Subsequently, on February 11, 2005 and May 20, 2005 the Court amplified the Boyce and Joseph provisional measures to include, respectively, Fredrick Atkins and Michael Huggins.

124. Notwithstanding these proceedings before the inter-American human rights system, on September 15, 2004, Barbados read warrants of execution to Messrs. Boyce and Joseph for their executions on September 21, 2004. Similarly, a warrant of execution was read to Mr. Atkins on February 9, 2005 for his execution on February 14, 2005 and on May 18, 2005 Barbados read a death warrant to Mr. Huggins for his execution on May 23, 2005. All of these executions were subsequently stayed by orders obtained from the domestic courts by the victims' legal representatives.

125. In this respect, both the Commission and the Inter-American Court have held that executing an individual while his or her complaint is pending before the inter-American system creates a situation of serious and irreparable harm and undermines the efficacy of the inter-American system and accordingly is inconsistent with a state's international human rights obligations.¹¹⁷ The Court has observed on numerous occasions that executing a condemned prisoner while his or her complaint is pending before the inter-American system "would lead to an irreparable situation, as well as constitute

¹¹⁷ See, e.g., Case 12.243, Report 52/01, *Juan Raul Garza v. United States*, Annual Report of the IACHR 2000, para. 117; I/A Court H.R., *Case of Boyce and Joseph v. Barbados*, Order for Provisional Measures dated November 25, 2004, "Considering", paras. 9, 10. See also I/A Court H.R., Request for Advisory Opinion Presented by the Inter-American Commission on Human Rights, Resolution of June 24, 2005, "Considering", para. 11.

conduct incompatible with the object and purpose of the Convention,"¹¹⁸ and, if carried out, constitutes an arbitrary deprivation of life contrary to Article 4(1) of the Convention.¹¹⁹

126. In the present case, the Commission respectfully submits that Barbados, by reading warrants to the alleged victims while their petitions were pending before the inter-American system and when the Commission had adopted precautionary measures in their favor, expressed its clear intention to disregard the victims' international proceedings and proceed with their executions. In these circumstances, the Commission respectfully submits that the State has failed to respect its obligations under Article 1(1) of the Convention to ensure respect for the right to life protected under Article 4 of the American Convention.

127. It is also notable in this respect that the Judicial Committee of the Privy Council in its judgment in the case of *Darrin Roger Thomas & Haniff Hilaire v. Cipriani Baptiste (Commissioner of Prisons) et al.*, concluded that condemned prisoners were entitled to have their executions stayed while their petitions were pending before this Court and the Commission. While this finding has once again been brought into question by Barbados in its appeal currently pending before the Caribbean Court of Justice, the Commission submits that the reasoning of the Judicial Committee of the Privy Council reinforces the basic requirement that a condemned prisoner cannot effectively exercise his or her prerogative to petition the inter-American system to protect his or her right to life and other fundamental rights absent a stay of execution pending the final determination of the petition by the Commission or the Court.

128. Therefore, the Commission requests the Court to declare that the State failed to fulfill its obligations under Article 1(1) of the American Convention, in relation to Article 4 of the Convention, by reading warrants of execution to Messrs Boyce, Joseph, Atkins and Huggins while their complaints were pending before the inter-American system.

¹¹⁸ I/A Court H.R., *Case of Boyce and Joseph v. Barbados*, Order for Provisional Measures dated November 25, 2004, "Considering", para. 9, citing *Cf. Case of Raxcacó et al.* Provisional Measures. Resolution of the Inter-American Court of Human Rights of August 30, 2004, ninth "Considering"; and *Case of James et al.* Provisional Measures. Resolution of the Inter-American Court of Human Rights of November 26, 2001, twelfth "Considering".

¹¹⁹ I/A Court H.R., *Hilaire, Constantine and Benjamin et al. Case*, supra, paras. 98-99 (finding that the execution of Joey Ramiah by Trinidad and Tobago constituted an arbitrary deprivation of the right to life and that the State had "caused irreparable harm to the detriment of Joey Ramiah, by reason of its disregard of a direct order of the Court and its deliberate decision to order the execution of this victim").

D. Incompatibility of Section 2 of the Offences Against the Person Act 1994 and Section 26 of the Constitution of Barbados with Article 2 of the American Convention

129. The Commission also submits before the Court that both section 2 of the Offences Against the Person Act 1994 of Barbados and section 26 of the Constitution of Barbados are incompatible with the State's obligations under Article 2 of the American Convention, insofar as these legislative provisions fail to comply with or give effect to the rights and freedoms protected under the Constitution of Barbados and the American Convention on Human Rights.

130. Article 2 of the American Convention provides as follows:

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

131. This Court has consistently held that Article 2 of the American Convention establishes the general obligation of States Parties to bring their domestic law into compliance with the norms of the Convention, in order to guarantee the rights set out therein. According to the Court, the provisions of domestic law that are adopted must be effective (principle of *effet utile*), in that the State has the obligation to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice.¹²⁰

132. The Court has also held that if the States, pursuant to Article 2 of the American Convention, have a positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognised in the Convention, it also follows that they must refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them, as such acts would likewise constitute a violation of Article 2 of the Convention.¹²¹

133. As indicated in Part VI.A.1 above, section 2 of the Offences Against the Person Act 1994¹²² prescribes the death penalty as the automatic and mandatory punishment for murder in the following terms: "Any person convicted of murder shall be

¹²⁰ See I/A Court H.R., *"The Last Temptation of Christ" Case (Olmedo Bustos et al.)*, Judgment of February 5, 2001. Series C No. 73, para. 87; Hilaire, Constantine and Benjamin et al, *supra*, paras. 112, 113.

¹²¹ See I/A Court H.R., *Suárez Rosero Case*, *supra* note 66, para. 98; I/A Court H.R., *Barrios Altos Case*, Judgment of March 14, 2001. Series C No. 75, para. 42; Hilaire, Constantine and Benjamin et al, *supra*, paras. 114, 115.

¹²² See Appendix A.4, Offences Against the Person Act 1994-18. Laws of Barbados.

sentenced to, and suffer death."¹²³ The Commission has contended before this Court that this legislative provision in Barbados is incompatible with Articles 4, 5 and 8 of the American Convention, in conjunction with Article 1(1) of the Convention, as elaborated upon in Part VII.A of this Application.

134. Should the Court accept the Commission's submissions in this respect, it is also contended that 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 in itself constitutes a *per se* violation of Article 2 of the Convention.

135. In this regard, the Court held in the context of the mandatory death penalty under the Offences Against the Person Act of Trinidad and Tobago that this legislation could be held to be inconsistent with Article 2 of the American Convention even though most of the victims in that case had not been executed pursuant to that law. According to the Court,

even though thirty-one of the alleged victims in this case have not yet been executed, it is appropriate to find that there has been a violation of Article 2 of the Convention, by virtue of the fact that the mere existence of the *Offences Against the Person Act* in itself constitutes a *per se* violation of that provision of the Convention. This assertion is consistent with Advisory Opinion OC-14/94, which states that, "[i]n the case of self-executing laws, [...] the violation of human rights, whether individual or collective, occurs upon their promulgation."¹²⁴

136. The Court reached a similar conclusion in respect of legislation in the Republic of Guatemala that imposed the mandatory death penalty for the crime of kidnapping.¹²⁵

137. The Commission therefore contends that, by virtue of the fact that Barbados has not brought section 2 of its Offences Against the Person Act 1994 into compliance with the Convention, it has not fulfilled the obligation imposed on States Parties by Article 2.

138. The Commission submits that similar arguments apply to section 26 of the Constitution of Barbados. As indicated in Part VI.A.2 above, Section 26 of the Constitution of Barbados prevents the courts in that country from declaring certain laws to be inconsistent with the fundamental rights prescribed under sections 12 to 23 of the Constitution, in the following terms:

¹²³ See Appendix A.4, Offenses Against the Person Act 1994-18, Laws of Barbados, s. 2.

¹²⁴ I/A Court H.R., *Hilaire, Constantine and Benjamin et al. Case*, supra, para. 116, citing I/A Court H.R., *Suárez Rosero Case*, supra note 66, para. 98; I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 43.

¹²⁵ I/A Court H.R., *Raxcacó Reyes Case*, supra, paras. 87-88.

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26. 1. Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question -

a. is a law (in this section referred to as "an existing law") that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;

b. repeals and re-enacts an existing law without alteration; or

c. alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent.

2. In subsection (1)(c) the reference to altering and existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in subsection (1) "written law" includes any instrument having the force of law and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.¹²⁶

139. Section 26 is referred to as a "Savings Clause", because it immunizes pre-constitution laws from constitutional challenge even if those laws are inconsistent with fundamental rights and freedoms enshrined in the constitution. Similar provisions are contained in the constitutions of other Commonwealth Caribbean countries, including the Constitution of the Republic of Trinidad and Tobago,¹²⁷ the terms of which this Court considered in the *Hilaire, Constantine and Benjamin et al.* Case, as discussed below.

¹²⁶ See Appendix A1, Constitution of Barbados, s. 26.

¹²⁷ See Appendix A5, Constitution of Trinidad and Tobago 1976, section 6 (providing as follows:

6.- 1. Nothing in sections 4 and 5 shall invalidate-

a. an existing law;

b. an enactment that repeals and re-enacts an existing law without alteration; or

c. an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

2. Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.

3. In this section-

"alters" in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;

"existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitutions, and includes any enactment referred to in subsection (1);

"right" includes freedom.

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140. Also as indicated previously, a majority of the Judicial Committee of the Privy Council has 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.¹²⁸ 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 not consistent with a current interpretation of 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.

141. In this context, the Commission respectfully submits that section 26 of the Constitution of Barbados is incompatible with the obligation of State Parties under Article 2 of the Convention to give domestic legal effect to the rights protected under the Convention. In particular, to the extent that the mandatory death penalty prescribed under section 2 of the Offences Against the Person Act of Barbados is found to violate the rights of the victims in the present case under Articles 4, 5 and 8 of the American Convention, Barbados, as a State party to the American Convention, is obliged under Article 2 of the Convention to adopt such legislative or other measures as may be necessary to amend or derogate that law so as to give effect to the fundamental rights under the Convention. Section 26 of the Constitution of Barbados, however, has the opposite effect, by specifically and expressly preventing "existing laws" including section 2 of the Offences against the Person Act from being declared incompatible with such rights.

142. In this regard, this Court has previously held in the case of *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*¹²⁹ that the Savings Clause in the 1976 Constitution of Trinidad and Tobago (together with Trinidad & Tobago's Offences Against the Person Act) violated Article 2 of the Convention. The Court found that:

[...] Section 6 of the Constitution of the Republic of Trinidad and Tobago of 1976 establishes that no law in effect prior to the date the Constitution entered into force may be the object of constitutional challenge under Sections 4 and 5 (*supra* para. 84(f)). The Offences Against the Person Act is incompatible with the American Convention and thus any provision that establishes that Act's immunity from challenge is likewise incompatible, by virtue of the fact that Trinidad and Tobago, as a party to the Convention at the time that the acts took place, cannot invoke provisions of its domestic law as justification for failure to comply with its international obligations.¹³⁰

¹²⁸ See Appendix B2, *Lennox Boyce & Jeffrey Joseph v. The Queen (Barbados)* [2004] UKPC 32, Privy Council Appeal No. 99 of 2002, Judgment of July 7, 2004 (JCPC), at paras. 1-6.

¹²⁹ I/A Court H.R. *Hilaire, Constantine and Benjamin et al Case*, *supra*.

¹³⁰ *Ibid.* para 152 (c).

143. Equally, in the present case, the Constitution of Barbados is drafted so as to immunize from challenge any law that is deemed to be "an existing law" by section 26 of the Constitution and, since the Offences Against the Persons Act 1994 is such a law, the mandatory death penalty cannot be challenged on grounds of incompatibility with fundamental human rights.

144. Based upon the above submissions, the Commission requests the Court to declare that the State has failed to fulfill its obligations under Article 2 of the Convention in relation to section 2 of the Offences Against the Person Act 1994 as well as section 26 of the Constitution of Barbados.

VIII. REPARATIONS AND COSTS

145. In this section of the application the Commission presents its arguments to the Court concerning the reparations and costs that the State of Barbados must grant as a consequence of its responsibility for the violations to human rights of Messrs Boyce, Joseph, Atkins and Huggins.

146. Bearing in mind that according to the international law of human rights, those individuals who have the right to reparations are the victims and their families, and in attention to the provisions of the Rules of the Court which grant autonomous representation to the individual, the Commission will only develop general criteria on the subject of reparations and costs that should be applied by the Court in this case. The Commission understands that the victims will elaborate upon their requests in conformity with Article 63 of the Convention and Articles 23 and related of Court Rules of Procedure.

A. Obligation to repair and measures of reparation

147. Article 63(1) of the American Convention establishes that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

148. As indicated by the Court in the jurisprudence offered constantly

Article 63(1) of the American Convention contains a consuetudinary rule that constitutes one of the fundamental principles of contemporary international law with respect to the responsibilities of different States. Thus, when an illicit action imputable to a State takes place, the international responsibility of said State arises immediately due to its violation of an international rule and the corresponding

consequences, requiring the reparation and interruption of the consequences of the violation.¹³¹

149. The Court also has indicated that the "reparation of damages due to the violation of an international obligation requires, when possible, the full restitution (*restitutio in integrum*), which consists in reestablishing the situation to the state it was in before the violation."¹³² If that is not possible, the Court must "order that a series of measures be adopted so that in addition to guaranteeing that the violated rights will be respected in the future, the consequences produced by the violations may be repaired and a restitution payment be effected to compensate damages corresponding to case in question."¹³³ In this respect, the Court has stated that reparation measures tend to make the effects of violations disappear.¹³⁴ Said measures include the different means by which a State can fulfill its international responsibilities, which consist of restitution, compensation, rehabilitation, satisfaction and measures for non-repetition¹³⁵.

150. In this respect, the Commission requests the Court to order the State of Barbados to immediately adopt all the measures required to end the violations of the human rights of Messrs Boyce, Joseph, Atkins and Huggins that are specified in the present application, maintaining the commutation of the death sentences of Messrs Boyce and Joseph, and granting Mr. Huggins an effective remedy which includes commutation of sentence in relation to the mandatory death sentence.

151. The Commission also request the Court to order the State of Barbados to adopt such legislative or other measures as may be necessary to ensure that the conditions of detention in which Messrs Boyce, Joseph and Huggins are held comply with the standards of humane treatment mandated by Article 5 of the Convention.

152. The Commission also requests the Court to award compensation to Messrs Boyce, Joseph and Huggins and to Cynthia Esther Atkins, the mother and next-of-kin of Mr. Atkins, in respect of the violations of their rights. Nonetheless, the Commission considers important to advise the Court that Messrs Boyce, Joseph and Huggins have expressed that they do not seek financial compensation in respect of any violations as a result of this application¹³⁶.

¹³¹ I/A Court H.R., *Mack Chang Case*, supra pp. 142; *Bulacio Case*, supra pp. 71; *Juan Humberto Sánchez Case*, supra pp. 148; *Five Pensioners Case*, supra pp. 174, and *Cantos Case*, supra pp. 67, among others.

¹³² I/A Court H.R., *Hilaire Case, Constantine and Benjamin and others vs. Trinidad and Tobago*, Judgment of June 21, 2002, pp. 203; see also *Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano vs. Perú)*, judgment of January 31, 2001, pp. 119.

¹³³ *Id.*

¹³⁴ See I/A Court H.R., *Street Children Case*, Judgment for Reparations of May 26, 2001, pp. 63.

¹³⁵ See report by Theo Van Boven, Special Spokesman of the United Nations for Restitution, Compensation and Rehabilitation of Victims of Grave Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/Sub2/1990/10 (July 25, 1990).

¹³⁶ See Annex E.2, Petitioners, Letter of April 21, 2006 at 14.

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153. Regarding those measures that must be taken to avoid and guarantee that a repetition of the damage caused will not take place, the Court has stated that "the monetary compensation must be complemented with positive measures that the State may adopt in order to insure that prejudicial acts such as the ones in question will not be repeated."¹³⁷

154. Jurisprudence of the Court in those cases in which the existence of a violation of Article 2 of the American Convention has been determined indicates that one of the measures of reparation relating to the guarantee of non-repetition is the modification or integral reform of the legislation in question.

155. Considering the above, the Commission requests the Court to order, as guarantees of non-repetition, 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 in Barbados, and to adopt such legislative or other measures as may be necessary to ensure that the Constitution of Barbados conforms with Article 2 of the American Convention, that is to say, to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice.

B. Beneficiaries

156. Article 63(1) of the American Convention demands the reparation of the consequences of a violation and that "fair compensation be paid to the injured party". Individuals having the right to said compensation are generally those who have been directly injured by the violation in question.

157. According to the nature of the present case, the beneficiaries of the reparations that the Court may order as a result of the violations to human rights perpetrated by the State of Barbados are the victims themselves, Messrs Boyce, Joseph and Huggins, and Cynthia Esther Atkins, the mother and next-of-kin of Mr. Atkins regarding compensation¹³⁸.

C. Costs and expenses

158. In conformity with the established jurisprudence of the Court, costs and expenses must be understood as included in the concept of reparations set out in Article

¹³⁷ In the *Castillo Petruzzi Case; Hilaire Case, Constantine and Benjamin and others vs. Trinidad and Tobago*, Judgment of June 21, 2002, pp. 204, quoting the *Panel Blanca Case (Paniagua Morales and others)* as an example. Reparations (art. 63.1 American Convention on Human Rights). Judgment of May 25, 2001. Series C No. 86, pp. 80.

¹³⁸ See European Court of Human Rights, *Colozza v. Italia*, 1958, pp. 38, on moral damage awarded to family of the victim of violation of due process.

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63 (1) of the American Convention, since the activities undertaken by the victim or victims, their representatives or beneficiaries in order to pursue international remedies imply expenses and monetary commitments that must be compensated¹³⁹. In addition, the Court has understood that the costs to which Article 56(1)(h) of the Rules of Procedure of the Court refer to necessary and reasonable expenses in which the victim or victims incur in order to accede to the organs of supervision of the American Convention, fees of individuals providing legal counsel included.

159. The Commission notes that the lawyers of the victims in the present case have emphasized that they do not seek any legal fees in relation to this application since they conduct the case on a pro bono basis. They do request expenses to be recovered from the State¹⁴⁰. Consequently, the Commission requests the Court to consider the submissions of the victims' representatives in determining what order for costs and expenses may be appropriate.

IX. CONCLUSIONS

160. Based on the previous analysis, the Inter-American Commission requests the Court to conclude and declare that the State of Barbados is responsible for violations of:

- a) Articles 4(1), 4(2), 5(1), 5(2) and 8(1) of the Convention, in conjunction with Article 1(1) of the Convention, relating to the mandatory nature of the death penalty imposed upon the victims;
- b) Articles 5(1) and 5(2) of the Convention, in conjunction with Article 1(1) of the Convention, relating to the victims' conditions of detention and the reading of warrants of execution to the victims;
- c) Article 1(1) of the Convention with respect to the reading of warrants of execution to the victims while their complaints were pending before the inter-American human rights system;
- d) Article 2 of the Convention in relation to section 2 of the Offences Against the Person Act 1994 of Barbados and section 26 of the Constitution of Barbados, for failing to bring their domestic legislation into compliance with the rights and freedoms protected under the American Convention.

¹³⁹ I/A Court H.R., *Mack Chang Case*. Judgment of November 25, 2003, pp. 290; *Maritza Urrutia Case*, Judgment of November 27, 2003, pp. 182 and *Bulacio Case*, Judgment of September 18, 2003, Series C No. 100, pp. 150.

¹⁴⁰ See Annex E.2, Petitioners, Letter of April 21, 2006 at 14.

X. DEMANDS

161. The Inter-American Commission requests that the Court order the State of Barbados to:

1. Maintain the commutation of the death sentences of Messrs Boyce and Joseph, and award compensation to them in respect of the remaining violations of their rights under the American Convention as concluded above;
2. Grant Mr. Huggins an effective remedy which includes commutation of sentence in relation to the mandatory death sentence, and compensation in respect of the remaining violations of his rights under the American Convention as concluded above;
3. Grant an effective remedy to the estate or next-of-kin of Mr. Atkins, which includes compensation in respect of the violations of his rights as concluded above;
4. 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 and 8;
5. Adopt such legislative or other measures as may be necessary to ensure that the Constitution of Barbados conforms with Article 2 of the American Convention, that is to say, to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice;
6. Adopt such legislative or other measures as may be necessary to ensure that the conditions of detention in which the alleged victims are held comply with the standards of humane treatment mandated by Article 5 of the Convention.

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XI. EVIDENCE

162. The Inter-American Commission offers the following supporting evidence:

A. Documentary Evidence (List of Appendices)

Appendix A	Legislation and Jurisprudence
A.1	Constitution of Barbados
A.2	Constitution (Amendment) Act 2002-14 of Barbados
A.3	Constitution (Amendment) Act 2003-10 of Barbados
A.4	Offences Against the Person Act 1994-18, Laws of Barbados
A.5	Constitution of Trinidad and Tobago, Enacted as the Schedule to the Constitution of the Republic of Trinidad and Tobago Act (Ch. 1:01).
A.6	Trinidad and Tobago Offences Against the Person Act, (3 April 1925), Laws of Trinidad and Tobago, Ch. 11:08.
A.7	[REDACTED]
A.8	Criminal Procedure Act of Barbados
A.9	Caribbean Court of Justice Act, 2003-9 of Barbados
A.10	[REDACTED]
A.11	Agreement Establishing the Caribbean Court of Justice
A.12	2001 Revised Treaty of Chaguaramas
A.13	[REDACTED]
Appendix B	Domestic proceedings regarding the victims
B.1	Lennox Boyce & Jeffrey Joseph - Record of the proceedings (1-378)
B.2	[REDACTED]
B.3	Lennox Boyce, Warrant of Execution, September 15, 2004.
B.4	Lennox Boyce & Jeffrey Joseph, Orders, September 17, 2004
B.5	[REDACTED]
	[REDACTED] - Trial Transcript (1-316)
B.7	Frederick Atkins - Court of Appeal Judgment
B.8	[REDACTED]

B.9	Michael Huggins – Record of Proceedings
B.10	Michael Huggins – Judgment of the Judicial Committee of the Privy Council dated 29 January, 2004.
C	Media and reports
C.1	General Media re: Warrants
C.2	Media
C.3	Report of Baroness Vivien Stern 1994 visit to Glendairy Prison
C.4	United States of America State Department Report on Barbados (2005)
C.5	Media, "Warrant read to killer", May 19, 2005.
D.	Affidavits and powers of attorney
D.1	Affidavits of the victims on the effects of the reading of death warrants
D.2	Affidavit of victims re: condition of confinement
D.3	Powers of Attorney by Lennox Boyce, Jeffrey Joseph and Michael Huggins
E.	Proceedings before the Commission
E.1	Report 03/06.
E.2	Copy of the file of the petition before the IACHR.

B. Testimonial and Expert witness Evidence

a. Expert witnesses

163. The Commission presents the following list of expert witnesses:

- Mr. Adrian King** – Mr. King is an attorney and expert on death penalty legislation and procedure in Barbados. He will give evidence on the nature of mandatory sentencing in Barbados and the exercise of the Prerogative of Mercy. Mr. King will also testify as to domestic criminal law in the jurisdiction more generally, including the procedures followed in prosecutions for the crime of murder.
- Baroness Vivien Stern** – Baroness Stern is Honorary Secretary General of Penal Reform International and Honorary Fellow of the London School of Economics. She will give evidence respecting prison conditions in Barbados, both at the pre-trial and post-conviction stages.
- Professor Andrew Coyle** – Professor Coyle is Director of the International Centre for Prison Studies at King's College, University of London and a criminologist with 25 years' experience at a senior level in the prison services of the United Kingdom. He will provide expert evidence respecting prison conditions in Barbados, both at the pre-trial and post-conviction stages.

XII. DATA ON THE ORIGINAL COMPLAINANTS, THE VICTIM AND THEIR FAMILY MEMBERS

164. Finally, according to the provision of Article 33 of the Rules of Procedure of the Court, the Inter-American Commission informs the Court that three of the four victims of this case, Messrs Lennox Boyce, Jeffrey Joseph and Michael Huggins have granted powers of attorney to Saul Lehrfreund and Parvais Jabbar of Simons Muirhead & Burton, 50 Broadwick Street, London, W1F 7AG, United Kingdom, to be their representatives in the proceeding in the Inter-American Court of Human Rights, and that Cynthiere Esther Atkins, the mother of Mr. Fredrick Benjamin Atkins (deceased), as been identified as Mr. Atkins' next-of-kin and has likewise granted power of attorney to Saul Lehrfreund and Parvais Jabbar of Simons Muirhead & Burton, 50 Broadwick Street, London, W1F 7AG, United Kingdom, as her representative in the proceeding in the Inter-American Court of Human Rights.¹⁴¹

Washington, D.C.
June 23, 2006

¹⁷⁹ See Appendix D.3, powers of attorney.