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To Pablo Saavedra Alessandri
At Registrar
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From Saul Lehrfreund

Date 18 October 2006
Number of pages
(including this one)

Subject Case No. 12.480 - Boyce et al -v- Barbados - Part 1

Please see attached.

solicitors

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Our Reference:

Pablo Saavedra Alessandri
Registrar
Inter-American Court on Human Rights
Costa Rica
CENTRAL AMERICA

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incorporating CCL

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Dear Registrar

RE: Case No. 12,480 - Boyce et al -v- Barbados

We write further to your letter of 18th August 2006, in regard to the above case. In accordance with Article 36 of the Court's Rules of Procedure we enclose herewith the written submissions of the alleged victims and supporting documentation.

In accordance with Article 26(2) of the Rules of the Court we have sent you via courier the original written brief, and three identical copies, together with appendices.

Should you have any comments or questions, please do not hesitate to contact me or my colleague Parvais Jabbar.

Yours sincerely

pp *STB*
Saul Lehrfreund
Simons Muirhead & Burton

Encs
Written submissions of alleged victims
Appendices

IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

RECIBIDO
Por: <u>Corte IACH</u>
Fecha: <u>20-10-06</u>

Case 12.480

LENNOX BOYCE

First alleged victim

JEFFREY JOSEPH

Second alleged victim

FREDERICK ATKINS
(Deceased)

Third alleged victim

MICHAEL HUGGINS

Fourth alleged victim

AND

BARBADOS

State Party

0000096

WRITTEN SUBMISSIONS OF THE ALLEGED VICTIMS

Case 12.480

LENNOX BOYCE

First alleged victim

JEFFREY JOSEPH

Second alleged victim

FREDERICK ATKINS
(Deceased)

Third alleged victim

MICHAEL HUGGINS

Fourth alleged victim

AND

BARBADOS

State Party

WRITTEN SUBMISSIONS OF THE ALLEGED VICTIMS

[References to "CB Appendices" refer to the Inter American Commission's bundles of appendices before the Court.

References to "AVB Appendices" refer to the Alleged Victims' bundle of appendices before the Court.]

[1] INTRODUCTION

1. The alleged victims claim that the respondent, the State of Barbados, has failed to respect their fundamental rights and freedoms protected under the American Convention on Human Rights 1969 ("ACHR"). Their claims can be summarised as follows:
 - (i) The mandatory death sentences imposed upon them breach their rights under Articles 4(1), 4(2), 5(1), 5(2) and 8(1), in conjunction with Article 1 of the Convention;
 - (ii) The "savings clause" contained in section 26 of the Constitution of Barbados is incompatible with the respondent's obligations under Article 2, read in conjunction with Article 1, of the Convention, because it immunizes laws which pre-date the Constitution, including the mandatory death penalty, from legal challenge, notwithstanding the incompatibility of such laws with fundamental rights;

- (iii) Attempts by the respondent to execute the alleged victims whilst lawful appeals, and then an application to the Inter-American system, were pending breached Articles 4(1), 4(2), 5(1), 5(2), 8(2), in conjunction with Article 1 of the Convention. Warrants of execution were read to the alleged victims and dates fixed for their execution following the victims' notification of their intention to appeal to the Privy Council, and then again following the victims' notification of application to the Inter-American Commission. In addition, the respondent has vigorously opposed the victims' legal proceedings seeking stays of execution whilst their application before the Commission and this Court is being considered;
- (iv) The appalling prison conditions in which the alleged victims have been, and continue to be, held breach their rights under Articles 5(1) and 5(2), in conjunction with Article 1;
- (v) The method of execution of death by hanging violates Articles 5(1) and 5(2), in conjunction with Article 1.

[2] THE SIGNIFICANCE OF THIS CASE

2. The alleged victims submit that it is of primary importance that this Court consider their case because:

(i) **The most fundamental rights are at stake:**

The right to life, to humane treatment and to due process of law have been and continue to be violated. The respondent continues to seek to execute the victims in pursuance of the mandatory death sentence and the alleged victims continue to be housed in temporary prison accommodation, which is overcrowded, unsanitary, dangerous and inhumane. The third alleged victim, Frederick Atkins, has died whilst incarcerated in such conditions. The respondent has given no account or explanation of his death;

(ii) **The respondent State has persistently sought to undermine its obligations under the Inter-American system throughout the course of the victims' application:**

The State party's response to receiving notification that the victims had applied to the Inter-American Commission was to issue death warrants and to fix a date for execution within seven days¹. It was only upon the victims' successful application to the domestic courts that the death warrants were not carried out. Even then, the respondent sought to appeal the decision of the Court of Appeal of Barbados to the Caribbean Court of Justice. The judgment remains pending;

During the currency of the victims' application, the respondent has repeatedly argued before the domestic courts that it is

¹ See respondent's letter of 15 September 2004 to the alleged victims' attorney, contained in CB Appendix E.2, but for ease of reference reproduced at AVB Appendix 1

entitled to execute the victims, notwithstanding their pending application before the Inter-American system and the provisional measures ordered by this Court, because: "any international human rights that the [victims] may have are subordinate to the state's domestic law and [...] there is no lawful impediment to the law taking its course."²

- (iii) **The state party has sought to argue that this Court and the Inter-American Commission have acted outside their competence and illegally:**

The respondent has sought to argue that this Court and the Inter-American Commission "have applied an illegal standard... acted outside of their competence (or ultra vires) [and]... contrary to the rule of law" in so far as the Court and the Commission have found the mandatory death penalty to contravene articles 4, 5 and 8 of the American Convention on Human Rights in previous cases³;

- (iv) **This Court is the only forum in which the victims' rights to life, humane treatment and due process of law can be upheld:**

As a result of section 26 of the Barbados Constitution, the domestic courts are prohibited from declaring the mandatory death penalty to be contrary to fundamental Constitutional rights and from providing any remedy.

[3] FACTS, JURISDICTION AND PROCEDURE

3. The facts in relation to the alleged victims, their offences and the history of their legal proceedings are summarised in paragraph 3 of the Commission's application to this Court⁴, and are fully set out in paragraphs 44-68. The alleged victims gratefully adopt, without repeating, this exposition of their case. Likewise, the victims gratefully adopt:

- (i) the Commission's statement of the provisions governing the jurisdiction of the Court [paragraphs 9 & 10 of the application];
- (ii) the history of the processing of the victim's communication by the Commission and the response thereto by the respondent [paragraphs 11-29];
- (iii) the statement of relevant domestic legislation and jurisprudence [paragraphs 30-39];

² Reference to the State's submissions in the judgment of the Court of Appeal of Barbados, civil appeal no 29 of 2004, at paragraph 88 contained in CB Appendix E 2, but for ease of reference reproduced at AVB Appendix 2.

³ Submissions of the State of Barbados In the Matter of the Death Penalty, 20 October 2003 at p 29 Contained in CB Appendix E 2, but for ease of reference reproduced at AVB Appendix 3

⁴ The victims believe the reference to "Atkins" in the first bracket in paragraph 3 of the Commission's application to be an error and should read "Joseph". In addition the date of the conviction of the third alleged victim should be July 21st 2000, not July 21 1999 (see para 3 of the Commission's application)

- (iv) the account of judicial proceedings in Barbados for the crime of murder [paragraphs 40-43]; and
 - (v) the account of the treatment of the victims while in prison and the effects of reading warrants of execution [paragraphs 69-73].
4. In respect of (iii) and (iv) above, the alleged victims will in addition rely on the evidence of Adrian King, Attorney-at-law in Barbados (see AVB Appendix 10). In respect of (v) above, the alleged victims will in addition rely on further affidavits in respect of their conditions of detention at the temporary prison at Harrison Point (see AVB Appendix 5) and on additional expert evidence to be contained in a report from Professor Andrew Coyle and Baroness Vivien Stern CBE (see AVB Appendix 6). These further affidavits and report are yet to be filed.

[4] LEGAL ARGUMENTS

5. The alleged victims adopt and endorse the arguments set out in the Commission's application to this Court in respect of their case. Additional specific legal arguments advanced by the alleged victims are set out below.

(I) MANDATORY NATURE OF THE DEATH PENALTY

6. The victims complain that they were sentenced to death exclusively on the basis of the category of their offence; there has been no judicial determination of the mitigating or aggravating circumstances of their particular offences, nor of their personal characteristics. They submit that the mandatory death sentence condemns them to death without consideration of their individual humanity. It subjects them to an arbitrary deprivation of life, contrary to Article 4(1) of the Convention. It fails to ensure that the penalty of death is imposed only for the most serious crimes, as required by Article 4(2) and it violates their right to have their sentence determined by a competent, independent and impartial tribunal in accordance with Article 8(1). Further, contrary to Article 5(1) and (2), it is cruel and inhuman and degrades their inherent dignity as human persons by treating them "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty"⁵.
7. The alleged victims rely on the decision of this Court in the case of *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (Judgment of June 21, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 94 (2002)). In *Hilaire*, this Court considered the provision for the mandatory death penalty contained in the *Offences Against the Person Act 1925* of Trinidad and Tobago. This provision reads:

"Every person convicted of murder shall suffer death as a felon."
[section 4, OAPA 1925]
(see CB Appendix A.6)

⁵ *Woodson v North Carolina* 428 US 280, 304 (1976), cited with approval by this court in *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (Judgment of June 21, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 94 (2002)) at para 105.

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The equivalent provision for Barbados reads:

"Any person who is convicted of murder shall be sentenced to, and suffer death." [section 2, OAPA 1994] (see CB Appendix A.4)

The alleged victims submit there is no material difference between these provisions.

8. In *Hilaire*, this Court found:

"that the *Offences Against the Person Act* [of Trinidad and Tobago] automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness. Consequently, this Act prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different. In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely human life, and is arbitrary according to the terms of Article 4(1) of the Convention." [para 103]

"The Court concurs with the view that to consider all persons responsible for murder as deserving of the death penalty, 'treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty'." [para 105]

"In countries where the death penalty still exists, one of the ways in which the deprivation of life can be arbitrary under Article 4(1) of the Convention is when it is used, as is the case in Trinidad and Tobago due to the *Offences Against the Person Act*, to punish crimes that do not exhibit characteristics of utmost seriousness, in other words, when the application of this punishment is contrary to the provisions of Article 4(2) of the American Convention." [para 107]

"the Court concludes that because the *Offences Against the Person Act* submits all persons charged with murder to a judicial process in which the individual circumstances of the accused and the crime are not considered, the aforementioned Act violates the prohibition against arbitrary deprivation of life, in contravention of Article 4(1) and 4(2) of the Convention." [para 108]

9. This analysis accords with the consistent jurisprudence of the Inter-American Commission, the United Nations Human Rights Committee⁶ ("HRC") and the decisions of domestic courts around the world⁷.

10. In April 2000, the Inter-American Commission found the death penalty regimes in Jamaica and Grenada to be in breach of the ACHR. In *Downer and Tracey v Jamaica* (Report No.41/00; 13th April 2000), the Commission stated:

"The experience of other international law rights authorities, as well as the high courts of various common law jurisdictions that have, at least until recently, retained the death penalty, substantiates and reinforces an interpretation of Article 4, 5 and 8 of the Convention that prohibits mandatory sentences. Based upon a study of these various international and domestic jurisdictions, it is the commission's view that a common precept has developed whereby the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offences is considered to be a condition *sine qua non* to the rationale, humane and fair imposition of capital punishment. Mitigating circumstances requiring consideration have been determined to include the character and the record of the offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offence, and the possibility of reform and social readaptation of the offender." (para.212)

11. The same reasoning has been applied in *Rudolph Baptiste v. Grenada* Report No. 38/00, 13th April 2000; *Donnason Knights v. Grenada* Report No. 47/01, 4th April 2001; *Leroy Lamey & Others v. Jamaica* Report No. 49/01, 4th April 2001; *Damion Thomas v. Jamaica* Report No. 50/01, 4th April 2001; *Joseph Thomas v. Jamaica* Report No. 127/01, 3rd December 2001; *Paul Lallion v Grenada* Report No. 55/02, 21st October 2002; *Benedict Jacob v Grenada* Report No. 56/02, 21st October 2002; *Denton Aitken v Jamaica* (Report No. 58/02, 21st October 2002); and *Dave Sewell v Jamaica* (Report No. 76/02, 27th December 2002).

12. The Commission has also found the death penalty regime in the Bahamas to be in breach of the *American Declaration of the Rights and Duties of Man*. In *Edwards v. The Bahamas* (Report No. 48/01, 4th April 2001) the Inter-American Commission observed that:

"147. The mandatory imposition of the death sentence, however, has both the intention and the effect of depriving a person of their right to

⁶ *Lubuto v Zambia* (Case No 390/1990; 17th November 1995); *Thompson v Saint Vincent and the Grenadines* (Case No. 806/1998, decision of 5 December 2000); *Kennedy v. Trinidad & Tobago* (Case No. 845/1998, 28 March 2002); *Carpo v. The Philippines* (Case No. 1077/2002; 15th May 2003); *Chan v. Guyana* (Case No. 913/2000; 23rd January 2006); *Hussain and Singh v. Guyana* (Case No. 862/1999; 14th December 2005); *Persaud and Rampersaud v. Guyana* (Case No. 812/1998; 16th May 2006); *Larrañaga v. The Philippines* (Case No. 1421/2005; 14th September 2006)

⁷ *Furman v Georgia* (1972) 408 US 238, *Woodson v North Carolina* (1976) 428 US 280 and *Roberts v Louisiana* (1977) 431 US 633; *Mithu v State of Punjab* [1983] 2 SCR 690; *Reyes v the Queen* [2002] 2 AC 235, *R v Hughes* [2002] 2 AC 259 and *Fox* [2002] 2 AC 284; *S v Makwanyane* (1995) (3) SA 391; Hungary (Constitutional Court decision No. 23/1990 (X.31)AB).

life based solely upon the category of crime for which an offender is found guilty, without regard for the offender's personal circumstances or the circumstances of the particular offence. The Commission cannot reconcile the essential respect for the dignity of the individual that underlies Article XXIV and XXVI of the Declaration, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual's case.

178 The Commission further concludes that the State, by sentencing the condemned men to mandatory death penalties absent consideration of their individual circumstances, has failed to respect their rights to humane treatment pursuant to Article XXIV and XXVI of the Declaration, and has subjected them to cruel, inhuman, or degrading punishment or treatment in violation of those Articles. The state sentenced the condemned men to death solely because they were convicted of a premeditated category of crime. Accordingly, the process to which they have been subjected, would deprive them of their most fundamental rights, their rights to life, without consideration of their personal circumstances and their offences. Treating [the petitioners] in this manner abrogates the fundamental respect for humanity that underlies the rights protected under the Declaration, and Articles XXV and XXVI in particular."

13. This reasoning affects all members of the OAS whether they have ratified the ACHR or not.

14. Further, although this is the first case to be considered by the Commission and the Court in respect of the mandatory death penalty in Barbados, the Commission, in a letter to the respondent State dated 21 January 2003, referred to the above line of authority, and described the issue of the incompatibility of the mandatory sentence of death with the fundamental rights obligations under the Inter-American system as having "already been the subject of clear determination". The Commission observed:

"In a series of cases arising out of the Caribbean region over the past several years, the Commission has found the mandatory imposition of the death penalty to contravene certain protections under both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. These rights include the right not to be arbitrarily deprived of life under Article 4(1) of the Convention and Article I of the Declaration, the right to humane treatment under Article 5(1) and (2) of the Convention and Article XXVI of the Declaration, and the right to a fair trial under Article 8 of the Convention and Articles XVIII and XXVI of the Declaration. The Commission has proclaimed in particular that a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through

"individualised" sentencing. Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offence, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment.

Evaluating the mandatory death penalty in light of these requirements, the Commission has specifically concluded that the imposition of the death penalty through mandatory sentencing is inconsistent with the terms of Articles 4, 5 and 8 of the American Convention. Other international and domestic adjudicative bodies have since endorsed or echoed the views of the Commission, including the Inter American Court of Human Rights, the UN Human Rights Committee, the Eastern Caribbean Court of Appeal, and the Judicial Committee of the Privy Council." [the Commission's letter of 21 January 2003 is at AVB Appendix 4]

15. The alleged victims note that the respondent State has previously sought to distinguish its mandatory death penalty from all others as being uniquely compatible with fundamental rights on the following grounds:

- (i) "under the laws of Barbados it is extremely difficult to obtain a death penalty conviction... Only a person committing an offence of the utmost seriousness will be subject to capital punishment"⁸; and
- (ii) "the Barbadian legal system is different from that of other legal systems, where separation of proof of the elements of a crime from aggravating and mitigating factors is done during the sentencing phase... [in Barbados they are] assessed at a later point, namely, before the [Barbadian] Privy Council when it is exercising the prerogative of mercy."⁹

16. The alleged victims submit that neither of these contentions is sustainable either in fact or in law.

(i) Only offences of the utmost seriousness will be subject to the death penalty

17. There is no evidence that in Barbados it is extremely difficult to obtain a death penalty conviction nor is it the case that persons committing an offence of the utmost seriousness will be subject to capital punishment under the laws of Barbados. The death penalty is mandatory for everyone convicted of murder that is without regard to individual circumstances of the case or the particular culpability of the offender. It was recognised by the Judicial Committee of the

⁸ Submissions of the State of Barbados to the Inter-American Commission "In the Matter of the Death Penalty", 20 October 2003 at p 52. Contained in CB Appendix E 2, but for ease of reference reproduced at AVB Appendix 3

⁹ Ibid at p 64.

Privy Council ("JCPC") in *Reyes v. The Queen* [2002] 2 AC 235 that the offence of murder is one that covers a wide range of culpability, Lord Bingham said:

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"11. It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous"

18. Furthermore, the fact that, prior to trial in this case, the State was prepared to accept pleas to manslaughter as an adequate reflection of the circumstances of the case concerning the first and second alleged victims militates strongly against the contention that only those convicted of offences of the utmost seriousness will be subject to the automatic death penalty. Prior to the first and second victims' trial, the State had indicated that it would accept pleas to manslaughter. This offer was accepted by the alleged victims' co-defendants, but Lennox Boyce and Jeffrey Joseph chose to contest their trial. They were subsequently convicted of murder and thus automatically sentenced to death. The circumstances of the trial of the first and second alleged victims provide powerful evidence for the fact that defendants may be subjected to the automatic death penalty even where the State itself has previously indicated that the offences in question are consistent with a lesser degree of culpability.

19. Further, even where states have sought to restrict the imposition of the mandatory death penalty to a sub-category of particularly serious classes of murder, this has been found to violate the requirement "of basic humanity... that the [convicted person] should be given the opportunity to show why the sentence of death should not be passed on him... it must be open to the judge to take into account the facts of the case and the [convicted person's] background and personal circumstances."¹⁰

20. In *Mithu v State of Punjab*¹¹, the Supreme Court of India struck down a provision of the penal code which sought to impose a mandatory death sentence in cases limited to the commission of murder by those who were already subject to a life sentence. Even in these restricted circumstances, the Supreme Court held:

"So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive."¹²

¹⁰ Judgment of Lord Bingham in *Lambert Watson v The Queen* [2004] UKPC 34, Judicial Committee of the Privy Council, judgment of 7 July 2004.

¹¹ [1983] 2 SCR 690

¹² *Ibid* Chinnappa Reddy J at p 713F

21. Nor is the condemnation of mandatory sentences of death a recent phenomenon. In *Woodson v North Carolina*¹³, the United States Supreme Court traced the history of the mandatory death penalty in the US. The Court cited a previous decision dating back to 1949¹⁴:

"The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has travelled far from the period in which the death sentence was an automatic and commonplace result of convictions..."

22. In Barbados no attempt has even been made to restrict the imposition of the mandatory death penalty to a sub-category of particularly serious cases of murder. In light of the case law cited above the proposition advanced by the respondent State that only a person committing an offence of the utmost seriousness will be subject to capital punishment cannot be sustained.

(ii) The Barbadian legal system is different because of the prerogative of mercy.

23. The respondent State is clearly wrong in its contention that the Constitutional provision for the prerogative of mercy sets Barbados apart from the mandatory death penalty regimes of the other countries considered by this Court and the Commission and thereby saves its mandatory penalty from being arbitrary and inhuman. First because the legal system does not differ in any material way from other Caribbean and Commonwealth constitutions and second because the prerogative of mercy is not a judicial determination.

24. As the Commission observes in its application in this case, the mercy provisions in the Constitution of the Republic of Trinidad and Tobago, considered by this Court in *Hilaire*, are similar in substance to those contained in the Constitution of Barbados, and indeed in other Commonwealth constitutions¹⁵. The JCPC held in *Reyes v The Queen*¹⁶ in respect of similar provisions in the Constitution of Belize:

"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."

25. Further, as the Commission sets out in its application at paragraph 92, the denial of any opportunity on the part of an offender to make representations to the sentencing court and thereafter the failure to afford him a judicial determination of the just and appropriate sentence cannot be reconciled with the offender's right to due process under Article 8 of the ACHR.

¹³ (1976) 428 US 280

¹⁴ *Williams v New York*, cited in *Woodson* ibid p 956

¹⁵ See para 99 of the Commission's application.

¹⁶ Privy Council Appeal No 64 of 2001, Judgment of 11 March 2002, para.44

Conclusion

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26. In all the circumstances, the Court is requested to declare that the State has violated the alleged victims' rights under Articles 4, 5 and 8 of the American Convention on Human Rights, in conjunction with Article 1, by imposing upon them a mandatory death sentence.

(II) ARTICLE 2: SAVINGS CLAUSE AND IMMUNIZATION OF EXISTING LAW

27. The Constitution of Barbados is drafted so as to immunize from challenge on grounds of incompatibility with fundamental rights any law which is deemed to be 'an existing law' by section 26 of the Constitution. Since the *Offences Against the Person Act 1994* is such a law, the mandatory death penalty cannot be challenged domestically on grounds of incompatibility with fundamental human rights¹⁷. Therefore, this Court is the only forum in which the alleged victims can raise the complaints set out in these submissions.

28. The Court is invited to follow its decision in *Hilaire*. In that case, the savings clause in the 1976 Constitution of Trinidad and Tobago was found to violate Article 2 of the ACHR:

"111. Article 2 of the American Convention provides that:

[w]here 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.

112. Based on the above provision, the Court has consistently held that 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. The provisions of domestic law that are adopted must be effective (principle of *effet utile*). That is to say 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.

113. 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 follows, then, that they also must refrain both from promulgating laws that disregard or impede the free exercise of

¹⁷ See majority judgment in *Boyce and Joseph v The Queen* [2004] UKPC 32, Privy Council Appeal No 99 of 2002, Judgment of 7 July 2004. See CB Appendix B 2

these rights, and from suppressing or modifying the existing laws protecting them. These acts would likewise constitute a violation of Article 2 of the Convention."

Conclusion

29. It is submitted that there are three ways in which Barbados has breached its obligations under Article 2 of the ACHR:

- (i) it has failed to take any steps to bring section 2 of the *Offences Against the Person Act 1994* into conformity with its international obligations under the Convention and the American Declaration, notwithstanding the consistent jurisprudence of this Court and the Commission, as specifically drawn to its attention in the Commission's letter of 21st January 2003¹⁸;
- (ii) it has failed to take any step to repeal section 26 of the Constitution, despite the fact that the conflict between that section and the State's international obligations was made explicit in the decision of the majority of the JCPC in *Boyce and Joseph*¹⁹;
- (iii) even where the State has enjoyed a measure of discretion which would have enabled it to take steps to mitigate the violations of its international obligations, e.g. by refraining from reading death warrants and fixing dates for execution in respect of those subject to the mandatory death sentence, it has instead vigorously sought to carry out such sentences by appealing stays and commutations of sentence imposed by the domestic courts and arguing that its international obligations are of no effect in the face of domestic law²⁰.

(III) THE READING OF WARRANTS OF EXECUTION WHILST (i) DOMESTIC APPEALS WERE BEING PURSUED; (ii) AN APPLICATION WAS PENDING BEFORE THE INTER-AMERICAN COMMISSION

30. Warrants of death were read to all four of the alleged victims on 27 June 2002, for their execution on 2 July 2002. Two months previously, on 2 May 2002, the respondent's London Solicitors, Messrs Charles Russell had written to the alleged victims' legal representatives informing them that any petition of appeal to the Privy Council should be filed with the Registrar no later than Friday 26 July 2002. On 23 May 2002, the alleged victims' solicitors had replied to Messrs Charles

¹⁸ See para. 14 above.

¹⁹ See Lord Hoffmann at paras 25, 27 & 31: "... their Lordships feel bound to approach this appeal in the footing that the mandatory death penalty is inconsistent with the international obligations of Barbados. If their Lordships were called upon to construe section 15(1) of the Constitution [the prohibition on inhuman and degrading treatment], they would be of opinion that it was inconsistent with a mandatory death penalty for murder. The reasoning of the Board in *Reyes v The Queen* [2002] 2 AC 235, which was in turn heavily influenced by developments in international human rights law and the jurisprudence of a number of other countries, including states in the Caribbean, is applicable and compelling. ... [However] if one reads section 26 [of the Constitution] together with section 1 [of the Constitution], it discloses a clear constitutional policy. No existing written law is to be held to be inconsistent with sections 12 to 23 [the fundamental rights provisions]. Existing laws are to be immunised from constitutional challenge on that ground." See CB Appendix B 2

²⁰ See the respondent State's submissions referred to at para 2(ii) above.

Russell confirming that they were instructed to petition the JCPC and that petitions would be filed within the specified time frame.

31. In view of this clear and unambiguous notification that appeals were being pursued within the very timetable set-out by the respondent States' solicitors, Charles Russell (see above), it is submitted that the reading of warrants of execution prior to the determination of those appeals was in blatant contravention of the right to an appeal contained in Article 8(2)(h) of the ACHR.

32. Article 8(2)(h) of the ACHR provides:

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(h) the right to appeal the judgment to a higher court.

33. Further, it is submitted that seeking to execute the alleged victims prior to the determination of their appeals constituted an attempt arbitrarily to deprive them of their lives contrary to Articles 4(1) and (2) of the Convention. The alleged victims note that this Court has previously held that the sentence of death does not actually have to have been carried out before a violation of Article 4 can be found²¹.

34. The reading of the warrants of execution in the circumstances described above was cruel, inhuman and degrading, contrary to Article 5(1) and (2) of the ACHR.

35. The alleged victims will rely on the evidence contained in their sworn affidavits. An indication of the effect of this experience on the alleged victims is given by the following excerpt from the affidavit of Lennox Boyce:

"When the Marshal 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 a 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."
[See CB Appendix D.1]

²¹ *Hilaire* para 116.

36. Although stays of execution were granted by the acting Chief Justice of Barbados on 28 June 2002, further warrants of execution were read to the first and second alleged victims on 15 September 2004, after the conclusion of their appeals to the JCPC, but this time whilst their applications to the Inter-American Commission were pending. Indeed, the respondent informed the alleged victims' legal representative of the warrants, and the date of execution, fixed for 21 September 2004, in the same letter that acknowledged notification of the application to the Inter-American Commission.
37. In an affidavit that the second alleged victim will rely upon (see AVB Appendix 5), Mr Jeffrey Joseph will set out how on the 24th September 2004, under the pretext of being allowed out of his cell to exercise, he was taken to a cage which was fifteen to seventeen feet away from the grave that had been dug for his burial. The second alleged victim's intended grave was in his full view. In addition, from the 16th September 2004, the gallows were tested and the second alleged victim was positioned so that he would hear every sound involved with the testing. It is submitted that this amounted to cruel and inhuman treatment and is further clear evidence of the respondent State's intention to carry out the execution of the alleged victim in manifest disregard of the pending application before the Commission.
38. Further, warrants were read to the third alleged victim on 9 February 2005 for execution on 14 February 2005, and to the fourth alleged victim on 18 May 2005 for execution on 23 May 2005.
39. Although each of these warrants was subsequently stayed by the Barbados High Court, pending Constitutional motions lodged by the first and second alleged victims, it is submitted that the actions of the respondent in reading the warrants, undertaking preparation for the executions, and subsequently seeking to have the stays of execution overturned, notwithstanding the Conservatory Orders issued by this Court, amount to further violations of Articles 4(1), 4(2), 5(1), 5(2) and 8, in conjunction with Article 1 of the Convention.
40. The reading of execution warrants and the taking of steps in preparation for execution whilst appeals and/or applications are pending were clearly contrary to both international and domestic law. In *Neville Lewis v Attorney-General of Jamaica*²², Lord Slynn, delivering the judgment of the JCPC held:

"It is of course well established that a ratified but unincorporated treaty, though it creates obligations for the state under international law, does not in the ordinary way create rights for individuals enforceable in domestic courts... But even assuming that that applies to international treaties dealing with human rights, that is not the end of the matter. Their Lordships agree with the Court of Appeal in *Lewis* that "the protection of the law" covers the same ground as an entitlement to "due process"... Execution consequent upon the Jamaican Privy Council

²² Privy Council [2001] 2 AC 50

decision without consideration of the Inter-American Commission report would be unlawful."²³

0000111

41. The Barbados Court of Appeal in considering the Constitutional motion of the first and second alleged victims held:

"It is the executive that is the treaty-making organ of government; the BPC as part of the executive cannot therefore ignore treaties which give rights to citizens and to which the executive has bound the state." [para. 33]

"In the light of *Bradshaw and Roberts*²⁴, it may not be possible to contend that the BPC can lawfully advise that execution be carried out without regard to a pending petition before an international human rights organisation." [para. 36]

"To hold that international treaties to which Barbados is a party, but which are not incorporated into domestic law, do not afford the appellants any procedural rights to fundamental justice is to imply that the work and meetings undertaken by the executive in and about the ratification of those treaties are futile, expensive and time-wasting exercises." [para. 38]

42. It is recognised that the above decision of the Barbados Court of Appeal is being appealed by the respondent to the Caribbean Court of Justice; as yet no judgment has been delivered by that court. However, the alleged victims respectfully submit that the decision of the Barbados Court of Appeal was correct. In any event, the respondent's argument that its international obligations are of no effect in domestic law is irrelevant before this tribunal, where the State's international obligations are clearly applicable. It is fully within the jurisdiction of this Court to find that the respondent, in seeking to execute the alleged victims whilst their application to the Commission was pending, amounted to a violation of the victims' rights to due process and non-arbitrary deprivation of life under the Convention.

43. In support of their complaint of cruel, inhuman and degrading treatment as a result of the reading of the fresh warrants while their Inter-American applications were pending, the alleged victims will provide further sworn affidavits detailing the effects of this treatment (see AVB Appendix 5).

[IV] CONDITIONS OF DETENTION

44. From the date of their convictions until March 2005, the alleged victims were imprisoned in Glendairy Prison, the State's sole prison. In March 2005, Glendairy Prison was destroyed by fire and since that date the alleged victims have been held in a temporary prison at Harrison Point. Complaints about their conditions of detention therefore fall into two parts.

²³ Ibid p 84H and 85A-E

²⁴ [1995] 1 WLR 936

(1) Conditions at Glendairy Prison

45. It is submitted that the conditions at Glendairy Prison, prior to its destruction by fire, were widely condemned by national and international bodies, and were the subject of a detailed and critical report by leading expert, Baroness Vivien Stern²⁵, as being in violation of internationally recognised standards. The inadequate accommodation afforded to prisoners, their inadequate sanitation and health care, and their poor diet have led to the inevitable conclusion that Barbados is in breach of a number of international instruments that are intended to give those detained a minimum level of protection. It is submitted that this treatment violated the alleged victims' rights under Article 5 of the Convention not be subjected to inhuman or degrading treatment or punishment. The alleged victims rely on the Commission's findings of fact in relation to conditions of detention at Glendairy Prison, set out in paragraphs 70-72 of the Commission's application to this Court.

46. Glendairy Prison was situated in a suburb of Bridgetown. The prison was built in 1855, and had strong colonial influences in its design. The alleged victims refer to the following reports and media sources on the conditions of confinement at Glendairy Prison:-

- (i) Baroness Vivien Stern - Report of Glendairy Prison (1994) (See CB Appendix C.3).
- (ii) Local Media Sources (See CB Appendix C.1 and C.2)
- (iii) U.S. State Department Country Reports on Human Rights Practices: Barbados 2001 (see CB Appendix C.4), and 2005 (see CB Appendix E.2)
- (iv) United Nations Committee on the Rights of the child, concluding observations of the Rights of the Child: Barbados. 24/08/99, CRC/C/Add.103(concluding observations and comments) 24 August 1999
- (v) Report of the National Commission on Law and Order (appointed by decision made by the Cabinet of Ministers of Barbados on September 19, 2002).
- (vi) International Centre for Prison Studies, King's College London, Guidance Note 4, Dealing with prison overcrowding, singling out Glendairy Prison in Barbados as on of the most overcrowded prisons in the world with 302% occupancy level²⁶.

47. The following represents a selection of the findings of these sources:

- (i) Baroness Stern's report found that the prison was seriously understaffed. Staffing levels were reduced further by sickness and leave. The cells originally designed for one prisoner were alarmingly overcrowded as they held three prisoners, instead of one. Baroness Stern also reported that there was no integral sanitation for all prisoners. Death row prisoners were held in single cells which offer no natural lighting and little if any ventilation. Death row prisoners received a maximum of 30 minutes exercise per day.
- (ii) It is submitted that since Baroness Stern's report in 1994, prison conditions continued to fall below recognised international standards. This is verified by the victims' description of their conditions of confinement on death row at

²⁵ See CB Appendix C 3, Report of Baroness Vivien Stern 1994 visit to Glendairy Prison.

²⁶ For (iv) (v) and (vi) see Commission Application to this Court p 18 and p.19, note 76

Glendairy. In summary, the alleged victims were detained in cells which were approximately 2 meters by 3 metres. None of the cells had integral sanitation and they were provided with a slop bucket in which to urinate and defecate. [See the affidavits of the alleged victims at CB Appendix D.2]

- (iii) Glendairy Prison was originally built to hold 350 prisoners. However, at the time of Baroness Stern's report in 1994, the prison was desperately overcrowded, as it held more than double the amount of prisoners it was initially intended to hold. Since Baroness Stern's report in 1994, the prison population swelled even further to a figure of approximately 1000. [See Report by Lieutenant Colonel John Nurse in the Daily Nation, 2004, CB Appendix E.2]
- (iv) Baroness Stern concluded in 1994 that the conditions and facilities in the prison were in breach of all relevant human rights standards.

48. The alleged victims submit that the following conditions of detention to which they were all subjected at Glendairy Prison constitute violations of their rights under Articles 5(1) and 5(2) of the Convention:

- (i) They were detained in the maximum security section of the prison (the condemned cells). This was a section which was at the end of a corridor of other cells. The cells which were not part of the maximum security section were separated from the cells in maximum security by an iron gate. They were confined in small cells with no windows. They were constantly lit by a bare light bulb. Their only ventilation was through the door of the cell which opened onto a corridor. They were locked in their cells for at least 23 hours a day;
- (ii) They were allowed out of their cells for approximately one hour per day. During this time, the alleged victims were expected to bathe and take exercise. On occasions, the alleged victims received less than one hour to exercise;
- (iii) The alleged victim, Jeffrey Joseph, on some occasions received only 15 minutes per day of exercise. The alleged victim, Michael Huggins, experienced occasions when he received no exercise time at all;
- (iv) The alleged victims were deprived of adequate sanitation and had to use a slop bucket as a toilet. 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;
- (v) The alleged victims' cells had inadequate ventilation and were therefore extremely hot and uncomfortable;
- (vi) After the reading of the warrants of execution, the alleged victims received less water than previously and in particular, the alleged victims, Jeffrey Joseph and Frederick Atkins, had their personal belongings removed.

[See Affidavits of the alleged victims on their conditions of confinement at CB Appendix D.2]

Conditions at Harrison Point

49. Since March 2005, the alleged victims, together with approximately 900 other inmates, have been held in temporary accommodation at Harrison Point.
50. In May 2005, 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 of inmates 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.
51. A report by the US State Department on 8 March 2006²⁷, recounted the following complaints by inmates held at Harrison Point:

"Keith Fields, held at the temporary prison while awaiting trial, told a judge that conditions at the prison were dangerous. Fields said he had to be hospitalized after being beaten and stabbed by other prisoners. On April 30, Deryck Smith, a prisoner held at the temporary prison, died after reportedly suffering an asthmatic attack. On May 24, prisoner Darcy Bradshaw fell into a coma and died in the hospital after having become ill at Harrison Point."

[See CB Appendix E 2]

Further Evidence

52. It is the intention of the alleged victims to serve further sworn affidavits in respect of the conditions in which they are currently held at Harrison Point. However, to date, the alleged victims' legal representatives have not been granted access to the prison to take such statements from them.
53. It is also the intention of the alleged victims to serve further expert evidence from Professor Andrew Coyle and Baroness Vivien Stern CBE with regard to prison conditions at both Glendairy and Harrison Point prisons. A request for access to the prison at Harrison Point in order for them to complete their report was made on 9th October 2006 (see AVB Appendix 9), a response to the request is currently awaited.

Death of third alleged victim in custody

54. The Court is respectfully reminded that the third alleged victim, Frederick Atkins, died whilst detained at Harrison Point. Despite requests from his next-of-kin and legal representatives, the respondent has to date provided no account of how this

²⁷ Report available at <http://www.state.gov/q/drl/ris/hrrpt/2005/61715.htm> (see CB E 2)

death occurred²⁸. It is submitted that in the absence of an explanation, Mr Atkins' death must be taken as further evidence of the dangerous and inhumane conditions in which the alleged victims are detained. It is further submitted that the respondent's failure to provide an account of how Mr Atkins' came by his death in itself constitutes a violation of Article 4 of the Convention. The family of the third alleged victim will provide affidavit evidence setting out the failure of the respondent to provide information regarding the cause and circumstances of his death (see AVB Appendix 7).

Applicable Jurisprudence

55. The alleged victims submit that the conditions of detention to which they have been subjected fail to respect their physical, mental and moral integrity as required under Article 5(1) of the Convention and, in all the circumstances, constitute cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention.
56. The alleged victims rely on the decision of this Court in the *Suarez-Rosero Case*²⁹. Apart from the fact that the victim in that case was held incommunicado, of which the present alleged victims do not complain (although at various times and to varying degrees the alleged victims have been prevented from communicating with family members and with their lawyers), similar conditions of detention to those in which the alleged victims have been and continue to be held were considered by the Court.
57. In finding that the victim in the *Suarez-Rosero* case had been subjected to cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention, the Court stated as follows: -

"Mr Suarez-Rosero ... testified that during his isolation he was held in a damp underground cell measuring approximately 15 square metres with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspapers; he also described the beating and threats he received during his detention. For all these reasons, the treatment to which Mr Suarez-Rosero was subjected may be described as cruel, inhuman and degrading". [Paragraph 98].
58. It is submitted that the present alleged victims have likewise been held in confined conditions with inadequate hygiene, ventilation and natural light, and have been allowed out of their cells infrequently and then only for short periods.
59. Further, the alleged victims submit that they are being detained in conditions of confinement which would also constitute a violation of their rights under Article 7 and Article 10(1) of the International Covenant on Civil and Political Rights and invite this Court to adopt a similar approach to that of the HCR.

²⁸ A letter was sent on 30th May 2006 to Messrs Charles Russell requesting information on the cause and circumstances of death, see AVB Appendix 8

²⁹ Judgment, 12th November 1997, Annual Report 1997

60. In its General Comment 7(16) on Article 7 the HRC said that:

"For all persons deprived of their liberty, the prohibition of treatment contrary to Article 7 is supplemented by the positive requirement of Article 10(1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person."

61. It added in its General Comment on Article 10(1):

"The humane treatment and respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources. While the Committee is aware in other respects the modalities and conditions of detention may vary with the available resources, they must always be applied without discrimination, as required by Article 2(1)."

Ultimate responsibility for the observance of this principle rests with the State as regards all institutions where persons are lawfully held against their will ... (see also *Mukong v Cameroon*³⁰)

62. In a line of cases the HRC has expressed the view that conditions of detention can violate Articles 7 and 10(1): see e.g. *Ambrosini v. Uruguay* Doc. A/37/40; *Carballal v. Uruguay* Doc. A/36/40.

63. In *Estrella v. Uruguay* the HRC found that the systematic way in which detainees had been treated constituted a practice of inhuman treatment. The applicant had been detained in Libertad prison and been subject to conditions of detention which had been the subject of a number of complaints by other Applicants. The HRC stated:

"On the basis of the detailed information submitted by the author ... the Committee is in a position to conclude that the conditions of imprisonment to which Miguel Estrella was subjected at Libertad were inhuman. In this connection the Committee recalls its consideration of other communications ... which confirm the existence of a practice of inhuman treatment at Libertad."

64. A comparison of the prison conditions of the alleged victims with international standards for the treatment of prisoners also suggests that their treatment has failed to respect the minimum requirements of humane treatment. The alleged victims rely on the basic standards provided in respect of accommodation, hygiene, exercise, and medical treatment for prisoners set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners³¹. It is submitted that based upon the alleged victims' allegations, the State has failed to meet the minimum standards of proper treatment of prisoners. It can be no answer that Barbados is a less

³⁰ Communication No. 458/1991

³¹ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the United Nations Economic and Social Council resolution 663 c (XXIV) of 31 July 1957; and amended by Economic Social Council Resolution 2076 (LXII) of 13 May 1977)

affluent country than some in the region. It is submitted that the guarantees in the Convention are expressed in absolute and unqualified terms and apply equally and with the same force to all those countries which became signatories to the Convention.

65. In *Mukong -v- Cameroon*³², the HCR observed that the minimum standards governing the conditions of detention for prisoners reflected in the United Nations Standard Minimum Rules for the Treatment of Prisoners must be observed regardless of a state party's level of development.
66. The alleged victims also invite this Court to adopt the approach taken on Article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950 ("ECHR") which provides that: -

"No one shall be subject to torture or to inhuman and degrading treatment or punishment".

67. This Article is clearly designed to protect the same rights as Article 5 of the Inter American Convention on Human Rights. The European Commission of Human Rights and the European Court of Human Rights have found that prison conditions may amount to inhuman treatment. In the *Greek Case* 12 YB 1 (1969) the conditions in which many detainees were being kept were held to be inhuman treatment by reference to overcrowding and to inadequate toilets, sleeping arrangements, food, recreation and provision for contact with the outside world. These deficiencies were found in different combinations and were not all present in each of the several places of detention where breaches of Article 3 were found. In *Cyprus v. Turkey*³³, the withholding of food and water and medical treatment from detainees was found to constitute inhuman treatment. These cases also established that a failure to provide adequate medical care, even in the absence of any other ill treatment may constitute inhuman treatment.

Conclusion

68. In all the circumstances, it is submitted that the conditions in which the alleged victims have been and continue to be detained violate international minimum standards for the treatment of prisoners and constitute inhuman and degrading treatment contrary to Article 5 of the ACHR.

[v] EXECUTION OF THE DEATH SENTENCE BY HANGING

69. The alleged victims submit that the execution of the death sentence by hanging, as provided for by Barbados law, constitutes, cruel and inhuman treatment or punishment in violation of Articles 5(1) and 5(2) of the ACHR.
70. It is contended that this method of execution is contrary to internationally accepted standards of humane treatment. The alleged victims note that whereas

³² Ibid. n 30

³³ Appln Nos. 6780/74 and 6950/75

Article 4(2) of the Convention allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with Article 5.

71. The alleged victims rely on the jurisprudence of the HRC, acting under the Optional Protocol to the International Covenant on Civil and Political Rights 1966. In the case of *Ng v Canada*³⁴ the Committee stated at paragraph 16.2 that:

"... by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant; on the other hand, Article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. Nonetheless, the Committee reaffirms, as it did in its General Comment 20 on Article 7 of the Covenant (CCPR/C/21/Add.3 para 6) that, when imposing capital punishment, the execution of the sentence "... must be carried out in such a way as to cause the least possible physical and mental suffering".

72. The alleged victims will rely on the expert evidence of Dr Harold Hillman contained in his affidavit dated 5th April 2004, filed in support of a Constitutional Motion before the Constitutional Court of Uganda³⁵. Dr Hillman's evidence can be summarised as follows:

"The practice of hanging requires the prisoner to be blindfolded and pinioned. A noose is placed between the chin and the larynx and the trap door, upon which the person is standing, is released suddenly so that the weight of the falling body dislocates the neck, causing death. The pain causes the prisoners face to become engorged. The tongue protrudes, and there are usually violently twitching movements. The obstruction of the windpipe makes the person want to inspire but he cannot do so due to the obstruction of the windpipe itself. This causes great distress, however, the person cannot cry out, because his vocal cords are obstructed and compressed. Nor can he react normally to distress and pain by moving his limbs violently, as they are tied, hence, the violent twitching movements. The skin beneath the rope in the neck is stretched by the fall which will be painful and the fall of oxygen in the blood stimulates the automatic nervous system which often makes the prisoner involuntarily sweat, drool, micturate or defecate."

73. Research carried out by two forensic pathologists confirm the conclusions of Dr Hillman that in a significant number of cases death will result from strangulation and slow asphyxiation and that hanging does not cause instant death. Research carried out by Dr Hillman also confirms that the belief that fracture/dislocation of the neck causes instant death is not true. He concludes that the belief that death is instantaneous probably arises from the fact that the person neither cries out, nor moves violently because they cannot, but there is no physiological evidence that they lose sensation immediately.

³⁴ Communication No. 469/1991

³⁵ See CB Appendix E 2

74. Dr Hillman confirms that hanging is humiliating because the person is masked; the persons wrists and ankles are bound to restrain him; the person cannot react to pain, distress and feeling of asphyxia, by the usual physiological responses of crying out or moving violently. The person hanged often sweats, drools, the eyes bulge and he micturates and defecates.

75. The Court is respectfully invited to find, on the evidence of Dr Harold Hillman, that execution of the alleged victims' death sentences by hanging violates Article 5(2) of the Convention because:

- (i) Death by hanging constitutes inhuman and degrading treatment because it does not result in instantaneous death, and there is an impermissibly high risk that the victim will suffer an unnecessarily painful and torturous death by strangulation;
- (ii) the pressure in the brain will increase and this is normally accompanied by severe headaches. The increased pressure can be seen as engorgement of the face, eyes and tongue;
- (iii) the obstruction of the windpipe raises the carbon dioxide concentration in the blood which makes the person want to inspire, but he cannot do so, due to the obstruction of the windpipe itself. This causes great distress, as occurs during strangulation. However, the person cannot cry out nor can he react normally to distress and pain by moving his limbs violently as they are tied;
- (iv) the skin beneath the rope in the neck is stretched by the fall and this will be painful; and
- (v) the humiliating effects of hanging on the body clearly amount to degrading treatment and punishment.

76. The alleged victims will also rely on the expert evidence of Dr Albert Hunt contained in his affidavit dated 23rd March 2004, filed in support of a Constitutional Motion pending before the Constitutional Court of Uganda³⁶. This was filed in support of the contention that execution by hanging is inhuman and degrading and violates the Constitution of Uganda.

77. Dr Hunt's evidence can be summarised as follows:

Judicial hanging by use of a long drop causes damage to the vertebrae, spinal tissue and muscles in the neck. This damage usually includes dislocation and/or fractures of the cervical vertebrae. However, in a significant number of cases, these injuries will not be sufficient to cause death, and death will result from slow strangulation and asphyxiation. Research carried out by two forensic pathologists confirms these conclusions (see exhibit AH1 to Dr Hunt's Affidavit). The doctors examined and exhumed bodies of 34 prisoners hanged between 1882 and 1945 in the United Kingdom. They found that in 9 cases strangulation was the sole or contributory cause of death. These findings are corroborated by Dr Hunt's own experience, namely that at least one prisoner with whom he was involved was still alive one hour

³⁶ See CB Appendix E 2

after being hanged and had to be "finished off" by the pathologist prior to post-mortem.

78. The doctors' empirical findings are supported by contemporary accounts of executions by those who witnessed them, on whose evidence the alleged victims will rely. These accounts reveal a consistent pattern of failure to produce instantaneous death or unconsciousness with the result that the prisoner suffered extreme pain prior to death. Significantly, these accounts all post date the introduction of the so-called "humane" long drop, which it had been thought would produce instantaneous death. The authors of the report documenting such empirical findings conclude:

"It is therefore clear that there is considerable evidence that in judicial hanging between these dates (and there is no reason to suppose any improvement took place latterly) was not always instantaneous and if contemporary witnesses are to be believed was sometimes drawn out and gruesome". [page 89 of report of James and Nasmyth Jones, [Department of Forensic Pathology, Sheffield) (1992) exhibited to the Affidavit of Dr Albert Hunt, see CB Appendix E.2].

79. Further, there is no evidence that those who would carry out execution in Barbados have any training or experience. In the light of the evidence of the doctors, it is likely that the alleged victims would be made to suffer significant pain prior to death. The alleged victims intend also to rely on further expert evidence from Dr Hillman and Dr Hunt contained in affidavits to be filed (see AVB Appendix 11).

Conclusion

80. In the alleged victims' submission, the process of being blindfolded and pinioned, hanged by the neck, made to defecate and urinate, and being subjected to a long drawn out extremely painful and sometimes gruesome death amounts to cruel and inhuman degrading treatment contrary to Article 5. In the circumstances, the execution of the alleged victims by hanging would not meet the test of "least possible physical and mental suffering".

[5] REPARATIONS AND COSTS

81. In the event of this Court finding the alleged victims' allegations of violations to have been substantiated, the alleged victims would respectfully submit that the following reparations are appropriate:

(i) Declaration of violations

82. A declaration that the State of Barbados is responsible for violations of the rights of the victims in the present cases under Articles 1, 2, 4, 5 and 8 of the American Convention, as summarised in paragraph 1 above.

(ii) Commutation of sentence

83. A direction that the State of Barbados commute the death sentences of the victims and substitute therefore sentences of life imprisonment with appropriate opportunity to apply for parole.
84. Alternatively, a direction that the State of Barbados verify that it will abide by the ruling of the Court of Appeal of Barbados commuting the victims' death sentences and substituting therefore sentences of life imprisonment. Such direction to include reference to the need for the sentence to allow the victims appropriate opportunity to apply for parole.

(iii) Adoption of necessary legislative measures

85. A direction that the State of Barbados adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed in a manner inconsistent with the rights and freedoms guaranteed under the Convention, and in particular, that it is not imposed through mandatory sentencing and that it is not given effect by hanging.
86. A direction that the State of Barbados adopt such legislative or other measures as may be necessary to ensure that the conditions of detention in which the victims are held comply with the requirements of the American Convention, including the right to humane treatment under Article 5 of the Convention.
87. A direction that the State of Barbados adopt such legislative or other measures as may be necessary to ensure that the domestic courts have full jurisdiction to uphold fundamental Constitutional rights. In particular, that such steps are taken as are necessary to remove the immunizing effect of section 26 of the Constitution of Barbados in respect of "existing laws".

(iv) Compensation

88. In relation to compensation, the alleged victims are aware that the Court has within its discretion the power to order financial compensation in respect of violations. However, in order to emphasise that this action is brought not to enrich the alleged victims, but rather to preserve their life and to secure their humane treatment, they do not seek financial compensation in respect of any violations.

(v) Costs

89. In relation to costs, the alleged victims wish to emphasise that the lawyers involved in the submission of their case to the Inter-American Court do not seek any legal fees in relation to this application. The alleged victims' legal advisors conduct the case on a pro bono basis. In relation to expenses, the alleged victims would submit that the expenses incurred in respect of the hearing before the Inter-American Court should be recovered from the State insofar as these are not covered by the Inter-American Commission. These should include travel and per diem allowance,

0000122

accommodation for the legal representatives and the expert witnesses attending the hearing and an additional amount representing the costs of preparation of the appeal to cover courier, photocopying and travel expenses incurred in visiting prisons as well as affidavit fees.

Saul Lehrfreund MBE


Parvias Jabber

Keir Starmer QC

Alair Shepherd QC

Douglas Mendes SC

Ruth Brander

 Alison Gerry

17th October 2006

Legal Representatives of alleged victims