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IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Case 12.645

TYRONE DA COSTA CADOGAN

Alleged Victim

AND

BARBADOS

State Party

WRITTEN SUBMISSIONS OF THE ALLEGED VICTIM

CONTENTS

<u>SECTION</u>	<u>PAGE</u>
I. THE MANDATORY DEATH PENALTY	4
(i) Introduction	4
(ii) The Order of the Court in <i>Boyce et al v Barbados</i>	6
(iii) The State of Barbados' Report on Compliance	7
(iv) The Inter-American Commission's Observations	8
(v) The Alleged Victim's Observations	8
(vi) Reparations in this Case	9
(a) Commutation to Life Sentence and meaning of "Life Sentence"	10
(b) Re-sentencing Hearing	12
(c) The Role of the Mercy Committee	14
 II. PSYCHIATRIC EXAMINATION	 15
(i) The Right to be Examined by a Psychiatrist	15
(ii) The Violation of Convention Rights due to the failure to undertake a Psychiatric Examination	15
(iii) The Appropriate Remedy	19
(iv) The Failure of the Caribbean Court of Justice to Adjourn	26
 III. CONCLUSIONS ON REPARATIONS AND COSTS	 26
(i) Declarations of Violations	27
(ii) Quashing of Death Sentence and Sentencing Hearing	27
(iii) Adoption of Necessary Legislative Measures	27
(iv) Compensation	28

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(v) Costs

28

Honourable Court,

I. THE MANDATORY DEATH PENALTY

(i) Introduction

The State of Barbados has conceded that it has violated the alleged victim's rights under the Convention to the extent that the sentence of death was a mandatory sentence imposed upon him by a law which allowed for no judicial discretion or determination of the appropriate sentence, and which offered no opportunity for the alleged victim to make representations. In accordance with Article 52(2) of the Rules of Procedure, this Honourable Court must now seek to determine "whether such acquiescence and its juridical effects are acceptable" and what "appropriate reparation and indemnities" should be ordered.

However, the State of Barbados submits that "reparations are unnecessary and inappropriate in the present case" having regard to the fact that it has already committed itself to compliance with the orders of this Court in the case of *Boyce et al v Barbados* and that it intends to provide the Governor General of Barbados with all information relevant to the commutation of the death sentence of the alleged victim for his Excellency's consideration of mercy.¹ The State of Barbados appears to take the position that it has not yet taken steps to finalise the commutation of the alleged victim's sentence of death because it must first await the decision of this Court before so doing. In this regard, it cites the decision of the Caribbean Court of Justice in *Attorney General of Barbados v Joseph and Boyce* where the Court said: "We would recommend that the BPC should meet only once and that they should do so at the very end of all the domestic and international processes." In the circumstances, it appears appropriate to set out in some detail the order made by this Honourable Court in *Boyce et al v Barbados*, the promise which Barbados has made to comply therewith and the comments made by the Inter-American Commission and the alleged victim in that case so that the position taken by the State of Barbados in the present case can be appreciated. But first, the alleged victim will address the submission that the State of

¹ See paragraphs 4-14 and 114 of the Response of the State of Barbados.

Barbados is bound to await the decision of this Court before moving to commute the sentence of death.

It is the alleged victim's respectful submission that, in a case where the Governor General proposes to commute a sentence of death it is not necessary that he await the completion of international processes before doing so. The guidance given by the CCJ in the *Joseph and Boyce* case related to the ordinary case where the exercise of mercy in relation to a condemned prisoner was to be considered. As is clear from the passage quoted by the State of Barbados,² the CCJ was concerned that if the Barbados Privy Council (which advises the Governor General on the question of mercy) were to meet any earlier, it might unfairly pre-judge the issue and might not be in a position to deliberate on the prisoner's case in an even handed manner once the domestic and international processes had been completed. This is apparent from the CCJ's statement that, "there is always a risk that if members of the BPC form an initial view against commutation, it may be more difficult to persuade them subsequently to change that stance when ultimately an opportunity is provided to the condemned man to make written representations." Moreover, it is clear that the CCJ envisaged that if the Governor General proposed to commute the sentence of death he could summon a meeting of the BPC at an earlier date. This too is apparent from the CCJ's statement that:

"This does not of course preclude the Governor-General in his or her discretion from convening at any time a meeting of the BPC with a view to achieving a consensus on commutation if the Governor-General considers there is a strong case for a commutation. If there is no decision in favour of commutation, then further deliberation would have to be adjourned."

Accordingly, there was and is nothing preventing the State of Barbados from taking the necessary steps to have the alleged victim's sentence of death commuted before the delivery of the judgment of this Honourable Court in this case. The State of Barbados has not done so and therefore the question of reparations is still a live one.

² At paragraph 11 of its Response.

(ii) The Order of the Court in *Boyce et al v Barbados*

In *Boyce et al v Barbados* this Honourable Court held that the State of Barbados had violated the Convention on a number of grounds. One such ground concerned the mandatory death penalty and in this regard, this Honourable Court held that:

"62. In light of these facts, the Court concludes that because the *Offences Against the Person Act* submits all persons charged with murder to a judicial process in which the participation and degree of culpability of the accused and the individual circumstances of the crime are not considered, the aforementioned Act violates the prohibition against the arbitrary deprivation of life and fails to limit the application of the death penalty to the most serious crimes, in contravention of Article 4(1) and 4(2) of the Convention."

As a consequence, this Honourable Court therefore unanimously decided that:

"The State shall formally commute the death sentence of Michael Huggins within six months from the date of notification of the present Judgment, in the terms of paragraphs 127(a) and 128 of this Judgment"

And:

"The State shall adopt, within a reasonable time from the date of notification of the present Judgment, such legislative or other measures as may be necessary to ensure that the imposition of the death penalty does not contravene the rights and freedoms guaranteed under the Convention, and in particular, that it is not imposed through mandatory sentencing in the terms of paragraphs 127(b) and 128 hereof."³

In relation to the Savings Clause contained within Section 26 of the Constitution of Barbados, this Honourable Court held that:

"Section 26 of the Constitution of Barbados prevents judicial scrutiny over Section 2 of the *Offences Against the Person Act*, which in turn violates the right not to be arbitrarily deprived of life, [and] the Court finds that the State has failed to abide by its obligations under Article 2 of the Convention in relation to Articles 1(1), 4(1), 4(2) and 25(1) of such instrument."⁴

As a consequence this Honourable Court therefore unanimously decided that:

³ *Boyce et al v Barbados* at para. 138

⁴ *Boyce et al v Barbados* at para. 80

"The State shall adopt, within a reasonable time from the date of notification of the present Judgment, such legislative or other measures necessary to ensure that the Constitution and laws of Barbados are brought into compliance with the American Convention, and, specifically, remove the immunising effect of Section 26 of the Constitution of Barbados in respect of "existing laws", in the terms of paragraphs 127(c) and 128 hereof."⁵

This Honourable Court also found that the conditions of detention in which the victims in that case were held did not comply with the requirements of the American Convention, and also that the reading of death warrants to a number of the alleged victims whilst their domestic appeals and application before the Inter-American system were pending constituted cruel treatment in violation of Article 5 of the Convention.

(iii) The State of Barbados' Report on Compliance

On 30th January 2009, the State of Barbados presented its Report on actions taken to comply with the Judgment of this Honourable Court of 20th November 2007, in the case of *Boyce et al v Barbados*.

The State of Barbados informed this Honourable Court that, "the State intends to comply with the above Order of the Court in full" and has taken the following actions in compliance with the Judgment:

- (i) The death sentence of Mr Michael McDonald Huggins was commuted to life imprisonment on 17th June 2008.
- (ii) Arrangements are being made to make payment for reimbursement of costs and expenses to the representatives of the alleged victim.
- (iii) The State has decided that the mandatory aspect of the death penalty should be abolished
- (iv) The State has decided that Section 26 of the Constitution should be repealed.
- (v) The State upgraded the facilities of Her Majesty's Prisons significantly through the construction of a new purpose built prison at Dodds, St Phillip.

⁵ *Boyce et al v Barbados* at para. 138

(iv) The Inter-American Commission's Observations

On 24th March 2009, the Inter-American Commission on Human Rights filed their Observations on the State's Compliance Report. The Commission welcomed the decision of the State of Barbados to abolish the mandatory aspect of the death penalty and to repeal Section 26 of the Constitution. The Commission also made a number of observations regarding the adoption and implementation of measures to ensure that the conditions of detention meet with the requirements of the Convention.

Regarding the commutation of Mr Huggins' death sentence, the Commission submitted that:

"Barbados stated that on June 13, 2008, the Governor General of Barbados granted Mr McDonald Huggins "pardon" for his offence and, consequently, commuted his death sentence to life imprisonment. The Commission recognises and values this measure of compliance. However, the Commission would like to point out that, as stated in its application before the Court, "the mercy procedure is not an adequate substitute for a judicial process that determines the appropriate sentence after a conviction for murder." (para. 98) [emphasis added]

(v) The Alleged Victim's Observations

On 30th March 2009, the victim's representatives provided this Honourable Court with Observations on the Report of Barbados on measures adopted to comply with the Judgment in *Boyce et al v Barbados*.

Whilst commending the State for intending to comply with the Order of the Court in full, the victim's representatives made a number of observations on the actions taken by the State.

In relation to the commutation of Michael Huggins' death sentence it was noted that the warrant of commutation stated that: "Michael McDonald Huggins shall be imprisoned for the remainder of his natural life." The victim's representatives observed that imprisonment for the "remainder of his natural life" is an inhuman punishment because it precludes any account being taken of individual circumstances of progress in prison, such as might justify the victim's early release. In these circumstances, the victim's

representatives requested that the State confirm whether the condition attached to the pardon is to be read literally, or whether the warrant should be interpreted as intending to do no more than substitute a sentence of life imprisonment subject to a system of periodic review.

The victim's representatives welcomed the State of Barbados' decision to abolish the mandatory aspect of the death penalty and to repeal Section 26 of the Constitution. Finally, the victim's representatives made a number of further observations on the measures taken to improve the conditions of detention in Barbados.

(vi) Reparations in this Case

In this regard, the alleged victim agrees, as the Commission has submitted, that the State of Barbados must be ordered to amend its laws to make the imposition of the sentence of death a discretionary sentence to only be imposed following a fair hearing before a judicial body. It should also be ordered to amend its Constitution in order to delete the savings law clause. Despite its undertaking in the *Boyce* case, the State of Barbados has not yet complied fully with the Court's order.

It is submitted further that, at a minimum, it is also appropriate, as the Commission has suggested, that this Honourable Court should order that the alleged victim's sentence of death be commuted. This was the order made in the *Boyce and Joseph* case and there is no reason why a similar order should not be made in this case as well. The question is, what sentence should be imposed in substitution for the sentence of death and by what process should this be accomplished? From the above exchanges in relation to the *Boyce* case, it is clear that the question of the appropriate method and form of commutation is in dispute and accordingly needs to be resolved in this case.

For the reasons set out below, it is submitted that the more appropriate remedy would be for the alleged victim to be afforded a full sentencing hearing, at which a judge determines the just and appropriate sentence after hearing oral representations from the alleged victim.

(a) Commutation to Life Sentence and meaning of "Life Sentence"

In cases where it has been determined by the local courts that a condemned prisoner's constitutional rights have been infringed in relation to the imposition or application of the sentence of death, it is the usual practice to substitute a sentence of life imprisonment⁶. Under the laws of Barbados, a sentence of life imprisonment does not mean in practice that the prisoner will actually or even will invariably spend the rest of his life in prison. He is entitled under the Prison Rules to periodic reviews of his detention to determine whether he meets the test for release and in practically all such cases, release has in fact been ordered. The decision on release is, however, made by the Executive and not the Judiciary.

Section 42 (one of the remissions provisions) of the Prison Rules 1978 states:

"The case of every prisoner imprisoned for four years or more shall be reviewed by the Governor-General at four yearly intervals or shorter periods if deemed advisable."

As appears from the above, in the *Boyce* case, the State of Barbados, in purported compliance with this Court's order, granted a pardon under Section 76 of the Constitution to Michael Huggins on the condition that he shall be "imprisoned for the remainder of his natural life", implying that Huggins was never to be released from prison.

It is submitted that that any such sentence in this case would constitute a further violation of the Convention and the Constitution of the State of Barbados⁷. This is because if the alleged victim's sentence is commuted to a life imprisonment, meaning that he is to remain in prison for the rest of his life without the possibility of parole, such a sentence, mandatorily imposed, is subject to almost all the vices held to be inherent in

⁶ *Pratt & Morgan v Attorney General* [1994] 2 AC 1; *Neville Lewis v The Attorney General* [2001] 2 AC 50; *Thomas & Hilaire v The State* Privy Council Appeal No.60 of 1998, *Bradshaw & Roberts v The Queen* [1995] 1 WLR 936, *Dottin & Others v The State* (unreported) 19 August 2008, High Court of Trinidad & Tobago

⁷ See *State v Tcoeib* [1997] 1 LRC 90; *R v Lichniak* [2003] 1 AC 903; *R (Ralston Wellington) v Secretary of State for the Home Department* [2009] 2 WLR 48; *Bernard Coard & Others v Attorney General* [2007] UKPC 7; *Roger de Boucherville v Mauritius* [2008] UKPC 37; *Trimmingham v The Queen* [2009] UKPC 25

the mandatory death sentence itself. It permits no distinction to be drawn between one offence of murder and another, despite the great and well known disparity between the culpability of different murders, even where an intention to kill is a necessary ingredient of the offence. It allows no account to be taken of the youth, age, vulnerability or circumstances of the individual offender. It gives the individual no opportunity to plead for a lesser penalty before being deprived of everything worth living for, save for life itself. It permits no account to be taken of the defendant's remorse or the prospects of his rehabilitation.

In *R v Lichniak* [2003] 1 AC 903, Lord Bingham said:

"If the House had concluded that on imposition of the mandatory life sentence for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights... as being arbitrary and disproportionate."⁸

In *Coard and Others v The Attorney General* [2007] UKPC 7, it was submitted to the Court that the condition that the Appellants be in prison for the rest of their "natural lives" was unknown to the law and would be an inhuman punishment, because it would preclude any account being taken of individual circumstances or progress in prison. Lord Hoffman, delivering the unanimous judgment of their Lordships' Board, held that:

"Their Lordships consider that if the condition attached to the pardon is read literally, there is much in what Mr Fitzgerald says. But the document should be construed on the assumption that the Governor-General intended to do what he was constitutionally required to do, namely, to give effect to the advice of the Minister. The fact that he (or whoever drafted the instrument) may have had an imperfect understanding of what a sentence of life imprisonment would entail or did not realise that it took effect under section 72(1)(c) of the Constitution rather than section 72(1)(a) should not deflect the court from applying this principle of construction. Their Lordships therefore interpret the warrants as having been intended to do no more than substitute a sentence of life imprisonment."⁹

⁸ See Note 7 above

⁹ See Note 7 above

In these circumstances, it is respectfully submitted that this Honourable Court must bear this in mind when determining what the appropriate reparation in this case is. If this Court determines that the appropriate remedy is for this Court to commute the sentence, then the correct sentence should be to a life sentence, and not to "imprisonment for the remainder of his natural life."

(b) Re-sentencing Hearing

The alleged victim submits that the appropriate remedy in this case is for the matter to be remitted back for a fair sentencing hearing before a judicial body. The nature of the violation in this case requires an approach which is more finely tailored to remedy the violation which has occurred.

Article 63 (1) of the Convention provides:

"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."

This Honourable Court has held that reparation requires full restitution which, "consists in re-establishing the situation to the state it was in before the violation"¹⁰ and, "if possible attempt to restore the right violated"¹¹. The alleged victim has been denied the right to have the appropriate punishment for his crime determined by a judge following a fair hearing. It is the absence of the judicial determination of his sentence which is at the heart of the violation. He has also been deprived of the right to put before the tribunal determining his sentence such information personal to his case as might bear upon the appropriate sentence.

In those countries in the Eastern Caribbean where the mandatory death penalty is no longer on the statute books, prisoners convicted of murder have been sentenced to

¹⁰ Case of *Hilaire, Constantine and Benjamin v Trinidad and Tobago* June 21st 2002. Series C (No. 94), para. 203

¹¹ Case of *Velásquez-Rodríguez v. Honduras* Judgment of July 29, 1988 (Merits) para. 166

terms of imprisonment of varying lengths.¹² It is submitted, in short, that whilst at a minimum the sentence of death must be commuted, the punishment which should be imposed in its place is “at large”; it is not necessarily or inevitably life imprisonment, and must be determined by a judge. It is only the judicial determination of the alleged victim’s sentence following a fair hearing which will fully remedy the breach he has suffered.

Accordingly, in order to ensure appropriate reparation, it is submitted that this Honourable Court should order that:

- i) The sentence of death imposed on the alleged victim be quashed;
- ii) The case should be remitted to a judge of the High Court of Barbados to determine the sentence which should be imposed in substitution for the death penalty and that appropriate amendments to the laws of Barbados should be made to ensure that this is done.
- iii) That the alleged victim should be given the right to be heard by the tribunal determining his sentence, including the right to put before such a tribunal any information or arguments he might think fit.

It might assist this Court in considering the appropriate terms of the Order to consider the position in the State of Jamaica. It amended its laws to provide retrospectively for the quashing of mandatory sentences already imposed and for the judicial determination of the appropriate sentence in those cases. The Offences Against the Person (Amendment) Act, 2005 of Jamaica states as follows:

s.8(1) Subject to the provisions of the principal Act as amended by this Act shall have effect in relation to persons who were sentenced to death

¹² *R v Hughes* (unreported), 14 November 2002, High Court of Saint Lucia – Saunders J adopted the approach that the case was not of the grievous kind and also stressed the strong individual mitigation and for these reasons imposed a sentence to 20 years’ imprisonment; *R v Charles & Gilbert* (unreported), 28th April 2003, High Court of St Lucia – Hariprasahd – Charles J. accepted that the murder itself did not fall into the worst category and imposed a life sentence on the worst offender and sentences of 15 years on the other 3 offenders; *R v Bowen* (unreported), December 2005, High Court of Grenada – Benjamin J. imposed a sentence of 20 years imprisonment in view of the mitigating circumstances; *R v Ogilvie* (unreported), 14th July 2004, High Court of Grenada – having heard the plea of mitigation Benjamin J imposed a sentence of 12 years imprisonment.

on or after the 14 October, 1992, but before the date of commencement of the Offences Against the Person (Amendment) Act, 2005 (hereinafter referred to as the amending Act) as if the amending Act were in force at the time of the sentence, and the provisions of this section shall have effect without prejudice to any appeal which may, at the date of commencement of the amending Act, be pending in respect of those persons or any right of those persons to appeal.

S.8 (2) For the purposes of subsection (1), in relation to the case of every person referred to in that subsection, a Judge of the Supreme Court shall – (a) quash any sentence passed before the date of commencement of the amending Act; and (b) determine the appropriate sentence having regard to the date of conviction and the provisions of the principal Act as amended by the amending Act.

(3) Where pursuant to subsection (2), a Judge determines that a sentence of death is the appropriate sentence in relation to a murder, he shall by notice in writing to the person convicted of the murder, inform that person of the determination and of the rights conferred by subsection (4).

(4) A person who is notified pursuant to subsection (3) shall have the right to appeal to the Court of Appeal against the sentence imposed pursuant to subsection (2)(b).

(5) The provisions of section 3 (1C) of the Principal Act as amended by the amending Act shall not apply to any murder committed before the commencement of the amending Act.

(6) Notwithstanding the provisions of section 6 of the Parole Act, the Judge may, on sentencing a person who had been convicted of murder committed before the date of commencement of the amending Act, to imprisonment for life, specify a period, being longer than seven years, which that person should serve before becoming eligible for parole.

(c) The Role of the Mercy Committee

The State of Barbados has indicated that it intends to pursue the commutation of the alleged victim's sentence through the Mercy Committee. As argued above, as such a procedure would not afford the alleged victim a judicial determination of his sentence this would not be the appropriate remedy. However, in the alternative, if this Court does not accept those submissions then it is submitted that the alleged victim must at the very least be given the right to make representations to the Mercy Committee on the

appropriate sentence. The procedure should allow for such representations to be made orally, but at the very least they must be admissible in writing.¹³

II. PSYCHIATRIC EXAMINATION

(i) The Right to be Examined by a Psychiatrist

Turning to the issue of the psychiatric examination of the alleged victim, it is submitted that the failure to provide for mandatory psychiatric assessments where there is a mandatory penalty of death violates Article 8(2)(c) and 8(2)(f) of the Convention.

It is submitted that the failure to provide for mandatory psychiatric assessment in murder cases will lead to the possibility of more victims of violations of Convention rights. Those who suffer mental health problems which go undetected risk being convicted unjustly of murder due to a failure to consider defences available to them. This, therefore, enhances the risk of the death penalty being imposed on persons wrongly convicted and on those who are suffering from a mental abnormality.

(ii) The Violation of Convention Rights due to the Failure to Undertake a Psychiatric Examination.

There was evidence in the alleged victim's case of abuse of alcohol and marijuana. Despite this, there was no attempt made by his Counsel to raise any defence based upon mental infirmity either at trial or before the Court of Appeal of Barbados. Neither was any attempt made after conviction to pray in aid any mental infirmity in order to avoid the imposition of the sentence of death. As a consequence, no request was made by the defence to the state authorities to have a full psychiatric or psychological evaluation carried out on the alleged victim. It was only when the alleged victim

¹³ Article 4(6) American Convention on Human Rights provides that, "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." In *Baptiste v Grenada*, Report of Inter-American Commission on Human Rights No. 38/00, 13 April 2000, the Inter-American Commission on Human Rights held that procedural fairness was a necessary requirement under Article 4(6) in order to make the right to apply for amnesty, pardon or commutation "effective"; See also *Desmond McKenzie et al v Jamaica* IAC Report No. 41/00, 13th April 2000; and the approach of the domestic courts in *Neville Lewis and others –v- Attorney General of Jamaica* [2001] 2 AC 50.

petitioned the Caribbean Court of Justice for leave to appeal that he was examined by a psychiatrist in order that the state of his mental health be assessed.

While the alleged victim was examined prior to his trial by a state psychiatrist this was for the purpose only of determining whether he was fit to plead. The examination which took place was brief and it appears to be agreed by the State of Barbados that this was insufficient for the purpose of determining whether he was suffering from any mental illness which might have afforded him a defence to the charge of murder.

The only other examination prior to this application was carried out by Dr. George Mahy on June 13th 2006. Dr. Mahy confessed that because of the constraints of time, he was only able to see the alleged victim once and accordingly he was not in a position to give, "a definitive opinion at this time." Nevertheless, Dr. Mahy did venture to say that his "impression" was that the alleged victim "has a major Personality Disorder with a strong psychopathic element" and that he qualified for a, "Dual Diagnosis of Anti-Social personality disorder and substance abuse". Dr. Mahy concluded that, "Given my assessment of his Personality Disorder, impulsive, aggressive and irrational behaviour could easily be triggered by mind-altering drugs. If he cannot honestly recollect these multiple stab wounds that he inflicted on Poullette Braithwaite, it raises some doubt as to whether he intended to kill her."

Before the CCJ, the alleged victim's Counsel asked that Dr. Mahy's report be admitted into evidence in order to establish a defence of diminished responsibility. The CCJ was of the view that Dr. Mahy's preliminary opinion was, "very weak material upon which to hope to establish a basis for a diminished responsibility plea" and, "fell short of the standard required for presenting an arguable case of abnormality of mind." Recognising the flaws in Dr. Mahy's assessment, Counsel for the alleged victim suggested that the appeal be stayed "until a further, definitive, psychiatric report" could be obtained. This request was summarily denied.

The alleged victim has now been examined by Dr. Timothy Green, a Chartered Clinical Psychologist, albeit after the determination of the case by the Commission and their Article 50 Report. Dr Green's qualifications are not disputed. After a comprehensive examination, Dr. Green concluded as follows:

"It is my opinion that Mr. Cadogan suffers from a Personality Disorder as well as Alcohol Dependence. I believe that this would have a direct bearing on Mr. Cadogan's conviction and sentence as Personality Disorder and Alcohol Dependence could both lead to a disposal of diminished responsibility in a Murder trial in the UK as they are recognised as formal mental disorders....."

Dr Green also noted that there might be, "specific damage to the alleged victim's brain that might help to explain his behaviour during the index offence" and recommended that, "this should be investigated by both MRI scanning and neuropsychometric testing". He expressed the opinion, "based on (his) observation of the alleged victim and his description of his behaviour, that many of the acts that he has engaged in might have been beyond his control as he is suffering from brain damage that causes him to be more impulsive than the average person."

Professor Nigel Eastman is a highly qualified, internationally renowned Forensic Psychiatrist. He has examined Dr. Green's report and concluded that Dr. Green, "carried out an assessment with great care and to a standard adequate for the case at hand" and that, "his conclusions, based upon the data he presents, are entirely capable of belief and appear both internally consistent and consistent with the data upon which they are based." Professor Eastman concludes that, "as regards conviction the alleged victim's diagnosed personality disorder and substance misuse disorders are relevant to his commission of the offence" and that as regards sentence, "the alleged victim's mental disorder as diagnosed, and as it might additionally be diagnosed upon further neuropsychiatric and neuropsychological investigation, could, and should be seen as relevant to the proper imposition of sentence."

It is noted that the efficacy and soundness of these reports are questioned by witnesses for the State. However, it is submitted that in the absence of cross-examination, this Honourable Court is not in a position to determine whether Dr. Green's conclusions are reliable and whether they are sufficient to mount a defence to a charge of murder under Barbados law. Ultimately, this is a matter which ought properly to be resolved in the course of criminal proceedings before the domestic courts. What, however, is not in doubt and must be beyond dispute is that there is now available a potentially credible and reliable psychiatric assessment of the alleged victim's mental condition,

which, had it been available at trial, might have persuaded a jury not to convict on the charge of murder, or might have persuaded the Caribbean Court of Justice to remit the case to the Court of Appeal to determine whether a defence of diminished responsibility has been made out.

The failure to put such evidence before the Courts of Barbados resulted from a combination of the failure of defence counsel to request that a psychiatric evaluation be carried out, the failure of the State of Barbados to cause such an evaluation to be conducted even in the absence of such a request, and the failure of the CCJ to adjourn the application for leave to appeal in order to give the alleged victim the opportunity to be properly evaluated. Had any of those measures been taken, it now appears at least possible that the alleged victim would have been in a position to mount a credible defence of diminished responsibility, and so not be convicted of murder and so avoid the imposition of the mandatory sentence of death.

The question for this Honourable Court is whether any of the above gives rise to a violation of the alleged victim's rights under the Convention, and if so what is the appropriate remedy.

The Commission determined that there was no violation of the alleged victim's rights primarily, it appears, because the assessment carried out by Dr. Mahy was inadequate and fell far short of what was required in the circumstances and also because of the failure of defence counsel to request a more detailed report.

It is submitted that the alleged victim's right to a fair trial, including his right to equality of arms, was infringed by the failure of the State of Barbados, even in the absence of a request from defence counsel, to cause a psychiatric evaluation of the alleged victim to be carried out, and secondly by the failure of the CCJ to adjourn its hearing in order to permit the alleged victim an opportunity to be properly evaluated. In totality, this amounts to a violation of Articles 8(2)(c) and 8(2)(f) of the Convention.

Article 8(2) (c) and (f) state:

"2. 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:

a. ...

c. adequate time and means for the preparation of his defense;

d. ...

e. ...

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

It is submitted that in order to protect the right of a person accused of murder (where murder carries a mandatory sentence of death), to have adequate time and means to prepare their defence and to be able to call expert evidence to support any defence related to mental impairment or disorder, it is necessary that there is appropriate provision for access to psychiatric assessment. In such cases the right to a fair trial requires a mandatory duty on the part of the prosecuting state to provide time and facilities for every person accused of murder to have access to psychiatric assessment.

(iii) The Appropriate remedy

It is not being suggested that the State of Barbados is obliged to force persons accused of murder to submit themselves to a psychiatric examination. Quite apart from the futility of carrying out an examination on someone who is not cooperative, the spectre of strapping a person in place and coercing answers to intrusive, personal questions is reminiscent of Star Chamber proceedings and would be nothing short of a horrific violation of the accused's rights to dignity and liberty, as the State of Barbados has pointed out. But this is not what is being contended for.

What is being submitted is that it is the State's duty to take such steps as to initiate and proactively facilitate the psychiatric evaluation of the accused, even if the accused or his counsel fails to initiate the process by requesting an assessment. What is envisaged here is no different in nature, albeit different in comprehensiveness, from the evaluation that is now carried out by the State of Barbados as a matter of course in order to determine fitness to plead. It is also no different in any respect to the approach taken by

the courts of the Eastern Caribbean, where death is now a discretionary penalty, of requiring that a psychiatric evaluation be carried as a necessary prerequisite to a proper sentencing hearing. The State of Barbados has not suggested that the evaluation that is carried out to determine fitness to plead is in any way a violation of the rights of the accused and the procedure adopted by the Eastern Caribbean courts has been sanctioned by the highest court in the Caribbean. As a matter of practical reality, what is being proposed is the establishment of a protocol whereby: i) the State of Barbados would inform the accused and his Counsel of the availability of psychiatric assessments, either by a state employed psychiatrist, or, in appropriate circumstances, by a psychiatrist in private practice funded by the State and of his right to be so examined if he chose to do so; ii) efforts are made by the State to fix appointments for such assessments to take place; and iii) in planning for the trial of a murder case the trial judge make enquiries as to whether a psychiatric assessment has been carried out. In all of this, it should be made clear that the consent of the accused is required.

In this regard, what is being contended for is similar to the ruling of the Privy Council in *Attorney General of Trinidad and Tobago v Whiteman* [1991] 2 AC 240. In that case, the Board held that since the right of a person arrested or detained to communicate with counsel of his choice would be ineffective in certain circumstances unless there was provision for a procedure whereby he was informed of his right, a person arrested or detained had a constitutional right to be informed of his right to communicate with a legal adviser as soon as possible and before interrogation; and that, further, it was the duty of police officers to ensure his understanding of his right, and the mere display of notices in the police station was insufficient.

As the expert testimony of Edward Fitzgerald QC demonstrates, in a trial on a charge of murder, the mental state of an accused is relevant at a number of crucial junctures: in order to determine fitness to plead, to determine whether the defences of insanity or diminished responsibility are available, to determine whether it is appropriate to impose the sentence of death at all and to determine whether mercy should be granted in the event the sentence is imposed. The accused's mental state is also relevant in determining whether a confession was voluntarily given and in determining whether the accused gave his or her consent to a joint enterprise. It is fairly obvious that a defendant on a charge of murder will only be in a position to pursue such defences and arguments

if he or she has access to the expert evidence of a psychiatrist to establish whether he or she is suffering from some disease of the mind. The availability of such evidence could literally make the difference between life and death. While there is no prohibition in Barbadian law which hinders a person accused of murder of tendering evidence of his mental condition, such persons usually find themselves in the unique position of indigence and, except in the most obvious cases, the fact that he may be suffering from a relevant mental condition may not be apparent to him or his legal adviser such as to prompt the taking of steps to have a psychiatric assessment done.

The history of death penalty litigation in the Caribbean is replete with examples of cases where it was not until on final appeal before the Privy Council that the accused was examined and found to be suffering from a mental condition¹⁴ which on further investigation by the courts below were found to support a defence of diminished responsibility. For example, Professor Eastman has referred in his expert testimony to the case of Adolphus Campbell and concluded, based on his experiences that, "an obvious general result of the lack of assessments, or the lack of adequate assessments is that important matters of high relevance to the trial of the defendant may not be addressed, or not adequately addressed, at the original trial and may come only to be so addressed at the stage when the defendant reached the Privy Council as an appellant. Thus, proper assessment, where it ever occurs, occurs at the final appeal stage rather than where it should occur, which is at the original trial." What is not known is the number of cases where persons who have had undetected mental conditions which would have avoided the death penalty, have either already been executed or are still languishing in jail without having had their mental conditions taken into consideration.

¹⁴ *Solomon v The State* [1998] 2 LRC 50 The Privy Council remitted the matter back to the Court of Appeal of Trinidad & Tobago who decided, in *Solomon v The State* (unreported), 11th June 1999, that the appellant's conviction and sentence should be quashed and a re-trial ordered on the grounds that the jury had not been given the opportunity to consider the issue of diminished responsibility in light of the Appellant's mental history and condition; *Williams v The Queen* (1998) 53 WIR 162, the Privy Council remitted the case back to the Court of Appeal of St Vincent who decided, in; *Williams v The Queen* (unreported), 2nd April 2001, that for reasons of diminished responsibility the conviction should be quashed and a verdict of manslaughter should be substituted and a sentence of ten years imprisonment imposed; *Phillip and John v The Queen* [2007] UKPC 31 The Privy Council remitted the matter back to the Court of Appeal of St Lucia who decided, in *Phillip and John v The Queen* (unreported), 7 July 2009, that the convictions and sentences should be quashed and re-trial ordered; *Pitman v The State* [2008] UKPC 16 Due to fresh psychiatric and psychological evidence the Privy Council remitted the matter back to the Court of Appeal of Trinidad and Tobago; *Pipersburgh v The Queen* [2008] UKPC 11 The Privy Council emphasised the need to obtain social enquiry and psychiatric reports for every prisoner being considered for a death sentence.

All persons are entitled under the Convention to the right not to be deprived of life arbitrarily and the right to a fair trial which includes the right, with full equality, to the minimum guarantees of, "adequate means for the preparation of his defence" and "the right to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts." By Article 2 of the Convention, State Parties undertake to "adopt such legislative or other measures as may be necessary to give effect" to the rights and freedoms recognized in the Convention. In the *Case of Ximenes-Lopes v. Brazil*, this Honourable Court said (at para 103) that

"..... any person who is in a vulnerable condition is entitled to special protection, which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights. The Court reaffirms that not only should the States refrain from violating such rights, but also adopt positive measures, to be determined according to the specific needs of protection of the legal person, either because of his personal condition or the specific situation he is in,¹⁵ such as his disabilities." ¹⁶

Further in *Case of Velásquez-Rodríguez v. Honduras* Judgment of July 29, 1988 (Merits) this Honourable Court said:

"166. The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention"

Given the significant impact the mental state of an accused may have on the course of his trial for murder, and given further the risk that mental conditions will go undetected at trial as criminal litigation in the Caribbean has repeatedly illustrated¹⁷, it is clear that the State of Barbados must adopt positive measures to guarantee that appropriate

¹⁵ Cf. *Case of Baldeón-García*, Judgment of April 06, 2006. Series C (No.147), para.81; *Case of the Sawhoyamaya Indigenous Community*, Judgment of March 29, 2006. Series C (No. 146), para. 154; and *Case of Pueblo Bello Massacre*, Judgment of 31 January, 2006. Series C (No. 159), para. 111.

¹⁶ *Case of Ximenes-Lopes v. Brazil*, Judgment of July 4, 2006. Series C (No.149), para.103

¹⁷ See footnote 7 supra.

psychiatric evidence will be available at trial. The State of Barbados contends that it has complied with its obligations under the Convention in this regard by making itself ready to provide the necessary psychiatric evaluation of a murder accused, but only upon request. It is not required, the State argues, to take the further step of proactively offering the services of its psychiatric experts in every case.

The question for this Honourable Court is whether the State's obligation, to ensure that a person accused of murder is accorded a fair trial and that his life is not taken arbitrarily, is satisfied simply by making the services of a psychiatrist available upon request or whether the State must go further and ensure that such a psychiatric evaluation will be carried out, provided of course that the accused consents to such an evaluation. It is submitted that the latter position ought to be adopted for the following reasons.

Firstly, it is unconstitutional and contrary to the Convention to impose the sentence of death on a person who is mentally disordered or mentally impaired. The law in this area has been dealt with in the Affidavit of Edward Fitzgerald QC, on which the alleged victim relies without repeating¹⁸. A court, before which a person is convicted of murder, is accordingly duty bound to ensure that a sentence of death is not imposed on someone in that condition. In order to avoid that eventuality, it follows that it is imperative that the court be provided with a psychiatric evaluation of the accused's mental state. It would violate the right of a person convicted not to be deprived of his life arbitrarily if he is sentenced to death despite the fact that he is mentally impaired to the required extent. Accordingly, it is the duty of the State to take measures to ensure that does not happen. Merely making facilities available on request is clearly not enough in this scenario. The State must proactively ensure that an assessment is made in order to rule out the possibility of an unconstitutional sentence. As noted above, in countries in the Eastern Caribbean where the death sentence is discretionary it is now compulsory that an assessment of an accused's mental state be undertaken for the purposes of determining the appropriate sentence. It should likewise be compulsory that an accused's mental state be ascertained in a country such as Barbados, especially where as currently the death penalty is mandatory. If an assessment is compulsory for the purpose of sentencing, it is a short step to requiring that it be carried out before trial and made

¹⁸ See Affidavit of Edward Fitzgerald QC para.7.1 – 7.8

available so that Counsel may decide whether a defence to the charge of murder should be pursued.

Secondly, making the State's obligation to carry out a psychiatric assessment of those accused of murder dependent upon a request being made by Counsel for the accused shifts the burden of ensuring a fair trial and the protection of life in a murder case to the judgment of Counsel for the defence, who in all likelihood will have no expertise, and is not required to have any expertise, in determining whether his or her client is suffering from a mental ailment, or was so suffering at the time the offence was committed, except in the most obvious cases. In fact, in the system under operation in Barbados, Counsel may incorrectly rely upon a determination that his client is fit to plead in reaching a conclusion that there is no possibility that his client is suffering from a mental condition which would provide a defence to a charge of murder, and will accordingly not request that further examinations be carried out. This would appear to be what happened in this case. The experience in many other cases in the Caribbean has shown that defence counsel, for one reason or another, have come to the decision not to require an assessment be carried out at trial only to discover on appeal that his or her client is suffering from a mental condition which supports a defence of diminished responsibility.

Unlike trial counsel, however, counsel who appeared for the alleged victim on appeal before the CCJ took a different view of the matter with the result that credible and reliable evidence, which *prima facie* raises a defence of diminished responsibility, is now available. Had the decision been taken earlier to have an assessment done, the course of the criminal trial may have been entirely different.

The experience in the Caribbean is that different counsel will be more or less sensitive to the need to have their clients undergo psychiatric examination at an early stage. Ultimately, to make the fairness of a trial and the protection of the life of a person accused of murder dependent arbitrarily upon the exercise of judgment on the part of the accused's representative, who is not qualified to determine whether the indicia of mental illness are present, is a dangerous course and invites unjust, unequal and arbitrary results.

Thirdly, the duty of the State must be assessed in light of the fact that the consequence of an error of judgement on the part of experienced counsel, made in good faith and without negligence, is that an accused may unnecessarily be exposed to the sentence of death. It is because of the finality of the death penalty that measures must be taken to ensure that all available defences are deployed. There is no room for human error. It is because death is currently the mandatory sentence on a conviction of murder in Barbados that this Court must adopt an approach of heightened scrutiny of the trial process. It is submitted that where death is the only penalty, this Honourable Court should impose all reasonable safeguards to ensure that the trial process is fair and that all steps have been taken to avoid the imposition of the death penalty. Requiring that the State of Barbados ensure psychiatric assessments are carried out is but a small measure toward this end. The recognition of such a duty ensures that the defendant can invoke the relevant protections from the capital sentence. The acceptance and enforcement of this duty is an essential procedural safeguard. Without it the rights to life and to due process cannot be made to be effective.

Fourthly, requiring the State to undertake psychiatric assessments might intrude unnecessarily in the conduct of the defence. It is submitted that there is no proper cause to think that this might happen. Any psychiatric examination carried out on the accused will be confidential and accordingly not available to the prosecution and once provided to the defence, it would be a matter for counsel to decide, after consultation with his client, whether and to what extent the assessment will be deployed.

Finally, there is no credible evidence that the State of Barbados lacks the resources needed to carry out psychiatric assessments of all persons charged with murder. In fact, the State of Barbados boasts that under Barbadian law, psychiatric assessments, including in the appropriate case, assessments by private practitioners, are available on request. Indeed, it is currently the practice to carry out limited assessments in all cases to determine fitness to plead. In these circumstances, the State of Barbados must already have the resources to respond positively to all requests for assessments. Given that what is argued for on behalf of the alleged victim is a system whereby the State would be relieved of its obligation to carry out an evaluation where a prisoner declines the State's offer to do so, the system proposed is unlikely to result in the imposition of a burden that the State is not already prepared to meet. Therefore, there ought not to be

any difficulty in carrying out more comprehensive assessments in every case at the earliest opportunity.

(iv) The Failure of the Caribbean Court of Justice to Adjourn

Further, it is submitted that the State of Barbados violated the alleged victim's rights to a fair trial by failing to adjourn the proceedings before the CCJ in order to permit him to have an assessment carried out. While it is conceded that Dr. Mahy's report was insufficient by itself to mount a successful defence of diminished responsibility, he did express the view that the alleged victim was suffering from a personality disorder and noted that he did not have sufficient time to carry out a more comprehensive examination which would have led to a more conclusive opinion. Employing a heightened degree of scrutiny, it is submitted that it is incredible that the CCJ would confirm the death penalty in the face of the opinion of an expert that the alleged victim was suffering from a mental ailment and accordingly in the face of the chance, however remote it may then have appeared, that a more comprehensive report might have revealed a defence based on diminished responsibility. It is submitted that due process required that the alleged victim be given the opportunity, "to exercise his rights and defend his interests effectively and in full procedural equity." No reason has been proffered as to why it was inappropriate to permit the alleged victim this opportunity to prepare and present his best case. Dr. Mahy's initial views would either have been confirmed or contradicted by a more comprehensive examination. If the former, the ends of justice would clearly have been served by ensuring that he was convicted of the appropriate offence and sentenced accordingly.

III. CONCLUSIONS ON REPARATIONS AND COSTS

In the alleged victim's case it is submitted that the violations of his right led to the imposition of the death penalty in circumstances where, not only was there no sentencing hearing but additionally where there must be a real doubt as to whether he should have been convicted of murder at all. Had he received proper and adequate access to a psychiatric assessment it may have been the case that he would have been convicted not of murder but of manslaughter. Therefore, the remedies required go beyond mere commutation of sentence but require that his case be referred to a judicial

body that can determine the appropriate sentence after a full and fair hearing, at which the alleged victim can make representations on, amongst other things, his mental state at the time of the offence. Only in this way will his Convention rights be fully restored.

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

(i) Declaration of Violations

A Declaration that the State of Barbados is responsible for violations of the rights of the victim in the present case under Articles 1, 2, 4, 5 and 8 of the American Convention.

(ii) Quashing of Death Sentence and Sentencing Hearing

A direction that the State of Barbados quash the alleged victim's death sentence and that this case be remitted to the High Court of Barbados for a judicial determination of the appropriate sentence. Alternatively, a direction that the State of Barbados quash the death sentence imposed on the alleged victim but that he should be entitled to make oral representations to the Mercy Committee on the appropriate sentence that should be imposed in substitution thereof.

(iii) Adoption of Necessary Legislative Measures

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.

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".

A direction that the State of Barbados adopt such legislative or other measures as may be necessary to ensure:

a) that persons charged with murder are:

- i) provided with adequate facilities for the conduct of psychiatric/psychological examinations;
- ii) informed of the availability of psychiatric/psychological assessments, either by a state employed psychiatrist, or, in appropriate circumstances, by a psychiatrist in private practice funded by the State;
- iii) informed of his right to be so examined if he chose to do so;

b) that efforts are made to fix appointments for such assessments to take place; and

c) that in planning for the trial of a murder case the trial judge make enquiries as to whether a psychiatric assessment has been carried out.

(iv) Compensation

In relation to compensation, the alleged victim is 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 victim, but rather to preserve his life and to secure his humane treatment, he does not seek financial compensation in respect of any violations.

(v) Costs

In relation to costs, the alleged victim wishes to emphasise that the lawyers involved in the submission of his case to the Inter-American Court do not seek any legal fees in relation to this application. The alleged victim's legal advisors have conducted the case on a *pro bono* basis. In relation to expenses, the alleged victim would submit that the expenses incurred in respect of the hearing before the Inter-American Court should be recovered from the State. These should include travel and per diem allowance, accommodation for the legal representatives attending the hearing and an additional

amount representing the costs of preparation of the case to cover courier, photocopying and travel expenses as well as affidavit fees.

Alair Shepherd QC
Douglas L Mendes SC
Saul Lehrfreund MBE
Parvais Jabbar
Tariq Khan
Alison Gerry
Ruth Brander

3rd August 2009
Representatives of the Alleged Victim