In the DaCosta Cadogan case,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Tribunal"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 30, 32, 38(6), 59, and 61 of the Court's Rules of Procedure [FN1] (hereinafter "the Rules of Procedure"), delivers the present Judgment.

[FN1] According to the provision of Article 72(2) of the Rules of the Procedure of the Inter-American Court of Human Rights, whose latest reforms entered into forced on March 24, 2009, "[c]ases pending resolution shall be processed according to the provisions of these Rules of Procedure, except for those cases in which a hearing has already been convened upon the entry into force of these Rules of Procedure; such cases shall be governed by the provisions of the previous Rules of Procedure." Thus, the Rules of Procedure mentioned in this Judgment correspond to the instrument approved by the Tribunal in its XLIX Ordinary Period of Sessions held from November 16 to 25, 2000, partially amended by the Court in its LXI Ordinary Period of Sessions held from November 20 to December 4, 2003, and partially amended in its LXXXII Ordinary Period of Sessions held from January 19 to January 31, 2009.

I. INTRODUCTION OF THE CASE AND SUBJECT OF THE DISPUTE

1. On October 31, 2008, in accordance with the provisions of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted an application to the Court against the State of Barbados (hereinafter "the State" or "Barbados"). The application originated

from petition No. 12.645, presented by Messrs. Alair P. Shepherd Q.C. and M. Tariq Khan to the Secretariat of the Commission on December 29, 2006. On March 4, 2008, the Commission adopted Admissibility Report No. 7/08 and on July 25, 2008, it adopted Merits Report No. 60/08, pursuant to Article 50 of the Convention, in which it made certain recommendations to the State. [FN2] Considering that the State had not adopted its recommendations, the Commission decided to submit this case to the jurisdiction of the Court on October 29, 2008, pursuant to Articles 51(1) of the Convention and 44 of the Commission's Rules of Procedure. The Commission designated Commissioner Paolo Sergio Pinheiro and Mr. Santiago A. Canton, Executive Secretary of the Commission, as its Delegates in this case. Elizabeth Abi-Mershed, Deputy Executive Secretary of the Commission, and Mario López-Garelli, Ismene Zarifis, and Manuela Cuvi Rodríguez were appointed to serve as legal advisors.

[FN2] In the report, the Commission concluded that the State, "by imposing the mandatory death penalty on the [alleged] victim in this case, violated [his] rights under Articles 4(1), 4(2), 5(1) and 5(2), and 8 of the Convention[,] in connection with Articles 1(1) and 2 [thereof]."

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2. In its application, the Commission requested that the Court declare Barbados responsible for imposing the mandatory death penalty on Mr. Tyrone DaCosta Cadogan "absent any consideration of the specific circumstances of the crime, and without any consideration for mitigating factors." The Commission alleged that "[o]n May 18, 2005[,] the Supreme Court of Barbados found Mr. Tyrone DaCosta Cadogan guilty of murder and sentenced him to death by hanging, pursuant to Barbados's Offences Against the Persons Act 1994, which prescribed capital punishment as the mandatory punishment for the crime of murder. As a consequence of a 'savings' clause in the Constitution of Barbados, the domestic courts cannot declare the mandatory death sentence to be invalid even though it violates fundamental rights protected under Barbados's Constitution and the American Convention." Consequently, the Commission requested that the Court declare the State responsible for the violations of Articles 4(1) and 4(2) (Right to Life), 5(1) and 5(2) (Right to Humane Treatment), and 8 (Right to a Fair Trial) of the American Convention on Human Rights, in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of Mr. Cadogan. Likewise, the Commission requested that the Court order corresponding reparations.

3. On January 16, 2009, the representatives of the alleged victim, Saul Lehrfreund M.B.E., Parvais Jabbar, Alair Shepherd Q.C., Douglas Mendes S.C., Tariq Khan, Ruth Brander, and Alison Gerry (hereinafter "the representatives"), submitted their written brief containing pleadings, motions, and evidence (hereinafter "the representatives' brief"), in accordance with Article 24 of the Rules of Procedure. The representatives asked the Court to declare the violation of the same rights alleged by the Commission; they also claimed that the failure of the State to cause a comprehensive psychiatric examination of the alleged victim to be undertaken and made available for the purposes of the trial breached his right to a fair trial protected under Article 8 of the Convention and is cruel and inhuman, contrary to Article 5(1) and 5(2) thereof. Furthermore, the representatives requested the adoption of additional measures of reparation and the reimbursement of the expenses incurred in the processing of the case before the Court.

4. On March 17, 2009, the State, represented by Hon. Freundel J. Stuart, Q.C., M.P., and Dr. David S. Berry as Agent and Deputy Agent, respectively, submitted its brief containing the answer to the application and observations to the representatives' brief (hereinafter "answer to the application"), in which it submitted the following three preliminary objections to the Court's jurisdiction: i) lack of exhaustion of domestic remedies, ii) breach of the fourth instance rule, and iii) that the complaint no longer involved the Commission as a party. The State alleged that some of the legal issues raised in this case are identical to those analyzed by this Court in the Boyce et al. case, and requested that the Court note that the State had already carried out certain measures to comply with the Court's Judgment in that case. At the same time, the State requested that the Court deny all the claims and requests submitted by the representatives and the Commission and affirm that the laws of Barbados comply with the American Convention.

5. Pursuant to Article 38(4) of the Rules of Procedure, on April 29, 2009, the representatives and the Commission submitted their respective written briefs on the preliminary objections presented by the State, requesting that they be dismissed.

II. PROCEEDINGS BEFORE THE COURT

6. On November 18, 2008, the Secretariat of the Court (hereinafter "the Secretariat"), following the President of the Court's preliminary examination, and pursuant to Articles 35 and 36(1) of the Rules of Procedure, served notice of the application to the State [FN3] and the representatives.

[FN3] When notified of the application, the State was also informed that it could appoint an ad hoc Judge to participate in the present case.

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7. On December 17, 2008, the State requested an extension of time for the appointment of an ad hoc Judge in the case. Accordingly, pursuant to instructions of the Court's President, the State was granted an extension until January 30, 2009. On that date, the State appointed the Hon. Justice John Connell as ad hoc Judge.

8. On May 18, 2009, the President of the Court ordered the submission of the sworn declarations (affidavits) of the alleged victim and six expert witnesses proposed by the Commission, the representatives, and the State, to which the parties were given the opportunity to submit their respective observations. Furthermore, due to the particular circumstances of the case, the President convened the Inter-American Commission, the representatives, and the State to a public hearing in order to hear the final arguments of the parties regarding the preliminary objections and possible merits, reparations, and costs. [FN4]

[FN4] Order of the President of the Inter-American Court of May 18, 2009.

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9. On June 10, 2009, the Inter-American Commission and the representatives submitted the sworn declaration (affidavit) of Mr. DaCosta Cadogan, and the representatives submitted the sworn statements (affidavits) of Prof. Nigel Eastman, Mr. Edward Fitzgerald Q.C., and Dr. Timothy Green. On June 11, 2009, the State submitted the sworn declarations (affidavits) of Dr. Brian MacLachlan, Mr. Anthony V. Grant, and Mr. Anthony Blackman. On June 22, 2009, the State submitted its observations to the affidavit of Mr. DaCosta Cadogan, and on June 23, 2009, the Inter-American Commission and the representatives indicated they had no observations to the affidavits submitted by the other parties. On June 24, 2009, the State submitted its observations on to the affidavits of Prof. Nigel Eastman, Mr. Edward Fitzgerald Q.C., and Dr. Timothy Green.

10. The public hearing in this case was held on July 1, 2009, during the Court's LXXXIII Ordinary Period of Sessions. [FN5]

[FN5] The following were present at this hearing: (a) for the Inter-American Commission: Commissioner Paulo Sérgio Pinheiro, as Delegate, and Lily Ching Soto and Juan Pablo Albán, as advisers; (b) for the representatives: Saul Lehrfreund, Parvais Jabbar, and Douglas Mendes, and (c) for the State: Charles Leacock, as Agent; David S. Berry, as Deputy Agent, and Jennifer Edwards, Solicitor General of Barbados.

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11. On July 31, 2009, the State submitted its final written arguments, and on August 3, 2009, the Commission and the representatives did the same.

12. On August 19, 2009, the President of the Court requested that the representatives submit verifying receipts and evidence regarding the expenses they incurred in the present case. On September 1, 2009, the representatives submitted the evidence requested by the President. On September 9 and 11, 2009, the Commission and the State indicated, respectively, that they had no observations regarding the alleged expenses incurred by the representatives.

III. PRELIMINARY OBJECTIONS

13. In its answer to the application, the State submitted the following three preliminary objections to the Court's jurisdiction: i) lack of exhaustion of domestic remedies, ii) breach of the fourth instance rule, and iii) that the complaint no longer involved the Commission as a party. The Tribunal will proceed to analyze them in the order presented by the State.

A) Lack of Exhaustion of Domestic Remedies

14. In its answer to the application, the State objected to the admissibility of the case because domestic remedies have allegedly not been exhausted. In particular, the State argued that "although the [p]etitioner pursued substantially the same claims in Barbados domestic courts, his appeals were against conviction alone [and] he did not raise the potential violation of his right to a fair trial, as protected by Section 18 of the Constitution, which is the central claim in the current [p]etition." Further, the State alleged that "the [p]etitioner therefore had, and has, available to him the right to pursue a constitutional motion to challenge all of the alleged

violations of his human rights, including his rights to a fair trial or due process of law, particularly in relation to [access to adequate psychiatric expertise] and [the adequacy of legal aid]." Likewise, the State submitted that "because legal aid is in fact available in Barbados for constitutional challenges, this domestic remedy requiring exhaustion is effective, not unduly burdensome[,] and is not exceptional." Consequently, the State alleged that "[c]onstitutional motions […] must be exhausted under the terms of Articles 46(1)(a) and 47(a) of the American Convention." Finally, the State indicated that "[b]oth of Barbados's notifications to the Commission regarding domestic remedies were filed subsequent to the initial report on admissibility of March 24, 2008, but before the final report, dated July 25, 2008. As such, they were transmitted in a timely manner, while the matter was still before the Inter-American Commission […], and Barbados had not waived its right to object, nor has it acquiesced in any manner."

15. The Commission "consider[ed] that this objection to the admissibility of the case should be deemed inadmissible because it [had] already decided in [Admissibility] Report No. 7/08 of March 4th, 2008, that Barbados had 'not provided observations regarding the admissibility of Mr. Cadogan's claims [during the procedural opportunity provided for that purpose], and [had] thereby tacitly waived its right to object to the admissibility of claims in the petition based on the exhaustion of domestic remedies requirement. The information before the Commission indicates that [Mr. Cadogan] in fact exhausted the ordinary remedies applicable in this case.'" Further, the Commission observed that the letters referred to by the State in its response (supra para. 14) are dated July 4 and July 9, 2008, whereas the Admissibility Report was issued on March 4, 2008, and "[t]he State was given ample opportunity by the Commission to contest the admissibility of the petition, from its transmission to the State [on] January 23, 2007." "Accordingly, the State waived its right to object to the admissibility of this case at the permissible stage, and it should be barred by the well established doctrine of estoppel from availing itself of this defense at a later stage in the proceedings."

16. The representatives argued that in accordance with the doctrine of estoppel and Articles 37 and 46 of the American Convention, "th[e] Court has consistently held that a State may not seek to challenge the admissibility of an application on grounds of non-exhaustion of domestic remedies in circumstances where it had every opportunity to raise such objection before the Commission, but failed to do so in a timely fashion; [o]r alternatively[, that t]here are no effective domestic remedies which remain to be exhausted." The representatives added that "[i]n the present case, the State of Barbados first raised the issue of exhaustion of domestic remedies in its [r]esponse dated 9th July 2008. This was not done in the time allotted by the Commission, [which was] two months from […] 23 January 2007, the date the request was transmitted. Thus, the Commission concluded in [its Merits Report No. 60/08 that]: '[t]he State did not provide observations regarding admissibility of Mr[.] Cadogan's claims in the time allotted. […] Given that the State did not respond within this timeframe, the State thereby tacitly waived its right to object to the admissibility of claims in the petition based on the exhaustion of domestic remedies requirement.'"

17. On the other hand, the representatives submitted that "[i]n his petition before the Caribbean Court of Justice for leave to appeal, the alleged victim argued[,] inter alia, that his constitutional right to a fair hearing was infringed because i) he was not given and/or was

deprived of the assistance [of a] psychiatric expert; ii) he did not have and/or was deprived of the effective assistance of an [a]ttorney[…], and iii) his [a]ttorney[…] was incompetent. [P]articularly, he submitted that 'because of a lack of legal aid he was deprived of the opportunity to present evidence as to whether he was suffering from mental illness.' Moreover, the alleged victim applied to the CCJ to adduce further evidence from a psychiatrist concerning the alleged victim's mental health to supplement what was admitted to be the unsatisfactory Report of Dr[.] Mahy or at least that the appeal be stayed so as to permit the alleged victim the opportunity to be further examined by a psychiatric expert." "The [Caribbean Court of Justice] denied the alleged victim leave to appeal against conviction and therefore rejected his constitutional complaints." In any case, the representatives further submitted "that legal aid for a constitutional challenge is only available for applications to the High Court and appeals to the Court of Appeal." Thus, "[l]egal [a]id [was] not available for any appeal from the Court of Appeal to the Caribbean Court of Justice when the alleged victim's appeals were extant."

18. This Tribunal, [FN6] as well as the European Court of Human Rights, [FN7] has consistently held that an objection to the Court's exercise of jurisdiction that is based on the alleged failure of exhaustion of domestic remedies must be raised at the appropriate procedural juncture; otherwise, the State will have lost the possibility of raising that defense before this Tribunal.

[FN6] Cf. Case of Velásquez-Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 88; Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 199, paras. 28 and 53, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2009. Series C No. 198, para. 20.

[FN7] Cf. ECHR Cases of De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium, Judgment of 18 June 1971, Series A no. 12, para. 55; ECHR Case of Foti and others v. Italy, Judgment of 10 December 1982, Series A, no. 56, para. 46, and ECHR Case of Bitiyeva and X v. Russia, Judgment of 21 June 2007, paras. 90-91.

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19. In the instant case, as is evident from the file of the proceedings before the Commission, on January 23, 2007, the Commission forwarded the petition to the State for it to submit its response within a period of two months, in accordance with Article 30(3) of the Rules of Procedure of the Commission. On January 14, 2008, the Commission reiterated a request for information to the State, asking that it respond and submit its observations to the petition within one month. On January 18, 2008, the Commission requested additional information from the petitioner, which was received on February 22, 2008, and transmitted to the State so that it could submit its observations thereto. On March 4, 2008, the Commission adopted the Report on Admissibility Nº 7/08, which was notified to the State on March 24, 2008. The State submitted its first communication to the Commission on July 4, 2008, after the adoption of the Report on Admissibility.

20. Thus, the Court verifies that although the State had numerous procedural opportunities to raise this preliminary objection, it failed to do so until after the adoption of the Commission's Report on Admissibility. Consequently, in light of the Tribunal's jurisprudence on this issue, [FN8] the Court concludes that the State failed to raise this objection at the appropriate procedural moment, and it is therefore dismissed.

[FN8] Cf. Case of Velásquez-Rodríguez, supra note 6, para. 88; Case of Escher et al., supra note 6, paras. 28, 53, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 20.

B) Breach of Fourth Instance Rule

21. The State also objected to the admissibility of all claims relating to the alleged victim's diminished responsibility for the crime of murder and the effectiveness of his legal representation. According to the State, these claims "amount to a thinly disguised attempt to use the Inter-American processes as a fourth instance of appeal and are therefore inadmissible." The State argued that "[i]nternational human rights jurisprudence is clear and consistent in prohibiting the use of international bodies as a fourth instance of domestic appeal." Further, "[i]t is well established that bodies such as the Inter-American Commission o[n] Human Rights and this […] Court cannot 'act as appellate bodies with the authority to examine alleged errors of domestic law or fact that national courts may have committed while acting within their jurisdiction.'" Therefore, "if a petition 'contains nothing more than the allegation that the domestic court's decision was wrong or unjust, [the Commission] must apply the fourth instance formula and declare the petition inadmissible ratione materiae.'" In the present case, "the [p]etition is almost identical […] to the Amended Notice of Application, which was submitted by the [p]etitioner's counsel to the Caribbean Court of Justice. All of the grounds of appeal of the Amended Notice of Application, […] - including arguments on diminished responsibility and the effectiveness of legal representation – were definitively dismissed by the Caribbean Court of Justice in the [p]etitioner's appeal." Thus, "the State […] submit[ted] that […] the [p]etition [i]s inadmissible."

22. In this regard, "the Commission consider[ed] that the arguments submitted by the State do not give rise to the need for observations from it on this matter."

23. The representatives contended that "[Mr. Cadogan's] complaints go far beyond the simple allegation that the CCJ's decision was wrong or unjust." The alleged victim "contended that [his] treatment during the course of [the] trial in relation to the defense of diminished responsibility and the inadequacy of his legal representation constitute violations of his Convention rights." Thus, the alleged victim "ask[ed] the Court to determine whether the State of Barbados is responsible for the violation of the American Convention, a matter which clearly falls within the jurisdiction ratione materiae of the Court."

24. This Court considers that the application submitted by the Inter-American Commission does not seek to review the judgments of domestic courts or of the Caribbean Court of Justice,

but rather seeks a pronouncement that the State violated several precepts of the American Convention to the detriment of Mr. Cadogan, including the right to a fair trial and the right to life. On numerous occasions, this Tribunal has held that clarification of whether the State has violated its international obligations owing to the actions of its judicial bodies may lead to a situation in which the Court must examine the respective domestic proceedings in order to establish their compatibility with the American Convention. In light of this, the consideration of domestic proceedings must take into account all decisions, including those of the courts of appeal, and in this case the Caribbean Court of Justice. [FN9]

[FN9] Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 222; Case of Escher et al., supra note 6, para. 44, and Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paras. 22-23.

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25. Consequently, the Court considers that the claims relating to the alleged victim's diminished responsibility for the crime of murder and the effectiveness of his legal representation are questions directly linked to the merits of the controversy that may be examined by this Tribunal in light of the American Convention without contravening the "fourth instance" rule. The preliminary objection is therefore dismissed.

C) The Commission as a Party in this Process

26. The State emphasized "that all of the complaints in the present case [that] are identified by the Commission in its [a]pplication, except one aspect of the relief requested, have been resolved by the State." "[T]he State submit[ed] that [the] only […] outstanding issue [is] that of commutation[, and argued that the] process for such relief may at any time be initiated [domestically] by the [p]etitioner himself." Thus, "the only complainant with juridical personality to appear before the Court no longer has any substantive basis of complaint under Inter-American human rights norms." Therefore, the State submitted "that the case should be withdrawn by the Commission, or struck out on the Court's own initiative."

27. "[T]he Commission considere[d] that the willingness expressed by the State to abolish mandatory [death] sentencing and to repeal the 'savings clause' represents an important step forward in the process of bringing domestic law and practice into compliance with the standards of the American Convention." However, "while recognizing the importance of the decisions reported by the State, the Commission observe[d] that they must be codified in law and implemented in practice before they can be considered to have an effect on the resolution of the instant case. The willingness to address these matters, although important, is not sufficient to resolve the central claims raised." In addition, "[a]s in the Boyce case, Mr. Cadogan still has no legal certainty that he will not face execution unless and until his sentence is formally commuted. In conclusion, this aspect of relief has not been resolved by Barbados."

28. The representatives requested that the Court dismiss this preliminary objection, arguing that "while the State […] has undertaken to take steps to comply with the order of the Court in the Boyce et al. v. Barbados case [to abolish the mandatory aspect of the death penalty,] the fact is that it has not yet done so." The representatives observed that "while the State […] is bound by the Court's decision in Boyce et al. v. Barbados to concede that the alleged victim's rights under the Convention have been violated by the failure to accord him the right to an individuali[z]ed sentencing hearing, [the alleged victim] is now entitled to reparation of his own for the violation of his rights." Additionally, the representatives alleged that "in any event, the Commission is not empowered by […] the American Convention or […] the Rules of Procedure […] to withdraw the case from the Court. […] Further, the Court's power to strike out a case under Article [56](1) of the Rules of Procedure of the Court applies only where the parties to a case inform the Court of the existence of a friendly settlement, compromise, or any other occurrence likely to lead to a settlement of the dispute. Neither the alleged victim nor the Commission, as far as the alleged victim is aware, has informed the Court of any such matters." In conclusion, the representatives submitted that the claims presented in this case are not moot, as "there is as yet no order from this Court in relation to the alleged victim with which the State of Barbados can comply."

29. The Court observes that the Commission and the representatives alleged that the State is responsible for certain violations of the American Convention to the detriment of Mr. Cadogan that have not yet been redressed by the State, and that the State has expressed a willingness to redress them in light of the Boyce et al. case, in which this Tribunal ordered some of the reparations sought in the present case. In this regard, the Court recognizes the State's expressed willingness to fully comply with what was ordered in the Boyce et al. Judgment and that the State is adopting measures intended to reform its laws and Constitution so that they conform to the American Convention and this Court's jurisprudence. Accordingly, the Tribunal positively values the State's disposition, which constitutes a significant contribution towards the reparation of the violations declared in the Boyce et al. case, which also relate to the present case.

30. Nonetheless, the Tribunal hereby reiterates that a State's international responsibility arises immediately when it commits an act that is unlawful under international law, [FN10] and that a willingness to domestically redress that unlawful act does not prevent either the Commission or the Court from hearing the case. [FN11] That is, pursuant to the Preamble to the American Convention, the international protection afforded by that instrument "reinforc[es] or complement[s] the protection provided by the domestic law of the American states." Consequently, where the State fails to fully comply with its obligation to remedy a violation of rights recognized under the American Convention, this Tribunal may exercise its jurisdiction over the alleged unlawful act (provided that the procedural requirements of the Convention are met), declare the existence of the corresponding violations, if applicable, and order the appropriate reparations pursuant to Article 63(1) of the Convention. Therefore, the Court considers that the actions that the State said it would adopt to eventually redress the alleged violations committed against Mr. Cadogan may be relevant to the Court's analysis of the merits of the case and to the eventual reparations it may order, but they have no effect over the Court's exercise of jurisdiction over the case. Consequently, the Tribunal dismisses the State's preliminary objection.

[FN10] Cf. Case of the Gómez-Paquiyauri Brothers v. Peru. Merits, Reparations, and Costs. Judgment of July 8, 2004. Series C No. 110, para. 75.
[FN11] Cf. Case of the Gómez-Paquiyauri Brothers, supra note 10, para. 75; Ricardo Canese v. Paraguay. Merits, Reparations, and Costs. Judgment of August 31, 2004. Series C No 111, para. 71, and Case of Heliodoro Portugal v. Panamá. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, para. 58.

IV. COMPETENCE

31. The Inter-American Court has jurisdiction over this case in accordance with Article 62(3) of the Convention. The State of Barbados ratified the American Convention on Human Rights on November 27, 1982, and recognized the Court's contentious jurisdiction on June 4, 2000.

V. EVIDENCE

32. Based on the provisions of Articles 46 and 47 of the Rules of Procedure, as well as the constant jurisprudence of the Court regarding evidence and the assessment thereof, [FN12] the Court shall examine and assess the evidence contained in the case file.

[FN12] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 76; Case of Escher et al., supra note 6, para. 55, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 22.

A) Documentary, Testimonial, and Expert Evidence

33. At the request of the President, [FN13] the Court received the declarations by affidavit provided by the alleged victim and six expert witnesses:

a) Tyrone DaCosta Cadogan, alleged victim whose declaration was proposed by the Commission and the representatives, testified on the process that led to the imposition of the mandatory death penalty in his case, and the consequences thereof;
b) Prof. Nigel Eastman, expert witness proposed by the representatives, is a professor of law and ethics in psychiatry and Head of Forensic Psychiatry of St. George's University of London. He testified on the relevance of the alleged victim's mental state to his conviction and sentence, and on the relevance of mental health in death penalty cases from a medical perspective;
c) Edward Fitzgerald Q.C., expert witness proposed by the representatives, is a specialist in criminal law, public law, and international human rights law, with significant experience in death penalty appeals. He testified on the relevance, from a legal perspective, of mental state to both conviction and sentencing in death penalty cases;
d) Dr. Timothy Green, expert witness proposed by the representatives, is a clinical psychologist. He testified on his psychological examination of the alleged victim and his

subsequent psychological report concerning the alleged victim's mental state in relation to defenses at trial and the imposition of the death penalty;
e) Anthony V. Grant, expert witness proposed by the State, is Director of Community Legal Services and an expert on the Barbadian community legal services system. He testified on the requirements for legal aid in death penalty cases;
f) Anthony Blackman, expert witness proposed by the State, is the Principal Crown Counsel of the Department of Public Prosecution. He testified on the law and procedure related to the defense of diminished responsibility in death penalty cases, and
g) Dr. Brian MacLachlan, expert witness proposed by the State, is a consultant psychiatrist at the Barbados Psychiatric Hospital and has provided expert psychiatric evidence in the law courts of Barbados. He testified as to psychiatric assessments in death penalty cases in Barbados.

[FN13] Order of the President, supra note 4.

B) Evidence Assessment

34. In the case at hand, as in many others, [FN14] the Court, in accordance with Article 46 of the Rules of Procedure, admits and recognizes the evidentiary value of the documents submitted by the parties at the appropriate procedural stage which have neither been disputed nor challenged, and the authenticity of which has not been questioned (supra paras. 9 and 12).

[FN14] Cf. Case of Velásquez-Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; Case of Escher et al., supra note 6, para. 67, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 26.
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35. With respect to the expert opinions rendered by the expert witnesses that were not objected to by the parties, the Court deems them pertinent insofar as they comport with the scope defined by the Order of the President (supra para. 8), and admits them to be weighed within the context of the body of evidence in this case and in accordance with the rules of sound judgment.

36. With respect to the expert testimony of Anthony Blackman, which the State offered extemporaneously, the Court notes that its admissibility has not been challenged by the parties, and finds it useful and relevant to the resolution of the issues in the present case regarding the defense of diminished responsibility in death penalty cases. Therefore, the Court incorporates it into the body of evidence, pursuant to Article 47(1) of the Rules of Procedure, and will weigh it along with other evidence in this case and in accordance with the rules of sound judgment.

37. With respect to the declaration of the alleged victim, the State challenged "the accuracy of Mr. [DaCosta] Cadogan's recollection of the events surrounding his detention, discussions with his lawyer, his trial, sentence[,] and appeal." Additionally, the State noted that there has never been a prison named "Glendairy Point," which was referred to in paragraph 4 of Mr.

Cadogan's affidavit. Nevertheless, the State did not challenge the admissibility of this declaration, but rather the weight the Court should give it with regard to certain facts alleged. The Court therefore admits this evidence to the extent that it relates to the object and purpose established in the Order of the President (supra para. 8), taking into account the observations of the State. Furthermore, the Court considers that due to the alleged victim's direct interest in this case, his declaration cannot be assessed separately, but rather must be weighed within the context of the body of evidence in this case and in accordance with the rules of sound judgment. [FN15]

[FN15] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 70; Case of Escher et al., supra note 6, para. 74, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 30.

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38. Additionally, the State challenged the affidavits submitted by Edward Fitzgerald C.B.E., Q.C., Dr. Timothy Green, and Professor Nigel Eastman. Regarding Mr. Fitzgerald's affidavit, the State questioned certain aspects of his expert opinion regarding the relevance of mental state to both conviction and sentencing in death penalty cases. Furthermore, the State affirmed that the affidavit offers "no evidence […] to prove that there is a 'norm of international law prohibiting both the judicial imposition of the death penalty, and the actual execution of a person suffering from significant mental disorder,' or that such a norm has achieved jus cogens status". Regarding Dr. Timothy Green's affidavit, the State indicated that it "add[ed] nothing to [the alleged victim's] case[, as it merely] describes, in the words of the Caribbean Court of Justice, an 'adolescent and adult life style [which] is very like the usual aberrant behavior of thousands of under-privileged young men indulging in some marijuana while over-indulging in alcohol.'" Finally, regarding Professor Nigel Eastman's affidavit, the State indicated that he had not examined Mr. Cadogan and his affidavit "entirely relies upon the affidavits and reports previously submitted to the Court." Nevertheless, the State did not challenge the admissibility of these declarations, but rather the weight the Court should give them with regard to certain alleged facts or opinions the State contests. The Court therefore admits this documentary evidence to the extent that it relates to the object and purpose established in the President's Order (supra para. 8), taking into account the observations of the State, and will weigh them in accordance with the rules of sound judgment and in conjunction with the body of evidence in the proceedings.

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39. Having examined the evidence in the case file, the Court will proceed with its analysis of the alleged violations of the American Convention in light of the facts that it deems proven, as well as the parties' legal arguments. [FN16]

[FN16] Cf. Case of the "White Van" (Paniagua-Morales et al.), supra note 12, para. 76; Case of Escher et al., supra note 6, para. 77, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 40.

VI. VIOLATION OF ARTICLE 4(1) [FN17] AND 4(2) [FN18] OF THE CONVENTION IN RELATION TO ARTICLE 1(1) [FN19] THEREOF

[FN17] Article 4.1 establishes that: "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of life."

[FN18] Article 4.2 establishes that: "[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply."

[FN19] Article 1.1 stipulates that: "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

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40. In this chapter, the Court will address the parties' arguments on whether the imposition of a mandatory death sentence on the alleged victim violated his right to life.

41. The Commission alleged that "sentencing individuals to the death penalty through mandatory sentencing and absent consideration of the individual circumstances of each offender and offense leads to the arbitrary deprivation of life within the meaning of Article 4(1) of the Convention," 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 that instrument. According to the Commission, "Section 2 of the Offences Against the Person Act[, hereinafter "OAPA", which] simply states that where a person is found guilty of murder, that person shall be sentenced to death[,] fails to differentiate between intentional killings punishable by death, and intentional killings (not merely manslaughter or other lesser form of homicide) that would not be punishable by death." Additionally, mandatory death sentencing fails to provide a defendant with the opportunity "to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person[, such as his or her] degree of culpability[, as well as] the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender." Thus, the Commission alleged that the State is responsible for the violation of Article 4(1) and 4(2) of the Convention because Mr. Cadogan "was not given an opportunity to present evidence of mitigating factors, nor did the courts have discretion to consider evidence of this nature in determining whether the death penalty was an appropriate punishment in the circumstances of [his] case."

42. On the other hand, the Commission alleged that "the essential respect for the dignity of the individual that underlies Article 5(1) and 5(2) of the Convention [cannot be reconciled] 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. In sum, the Commission f[ound] that the treatment of Mr. Cadogan in this manner abrogates the fundamental respect for humanity that underlies his right to be protected under Article 5(1) and (2) of the Convention."

43. Finally, the Commission indicated that "Article 4(6) of the American Convention, when read together with Articles 8 and 1(1), places the State under the obligation to […] implement a fair and transparent procedure by which an offender sentenced to death may make use of all favorable evidence deemed relevant to the granting of mercy." Additionally, the Commission alleged that "due process guarantees should […] be interpreted to include a right of effective review or appeal" as to the appropriate punishment in the circumstances of each case.

44. The representatives alleged the same violations of the American Convention as the Commission, and argued that "the mandatory death sentence condemn[ed the alleged victim] to death without consideration of his individual humanity. It subject[ed] him to an arbitrary deprivation of life, contrary to Article 4(1) of the Convention[, and i]t fail[ed] to ensure that the penalty of death [will be] imposed only for the most serious crimes, as required by Article 4(2) [of the Convention]. […] Further, contrary to Article 5(1) and (2) [of the Convention], it is cruel and inhuman and degrades his inherent dignity as a human person by not treating him as a uniquely individual being." The representatives further submitted that "[t]he imposition of the death sentence on someone suffering from a mental illness is […] inhuman and degrading" and a violation of the right to personal integrity recognized in Article 5(1) and 5(2) of the Convention. Finally, the representatives alleged that a mandatory death sentence "precludes any opportunity on the part of an offender to make representations to the court as to whether the death penalty is a permissible or appropriate form of punishment. It also prevents any effective review by a higher court as to the propriety of a sentence of death in the circumstances of any particular case. […] As a consequence, individuals subjected to this law cannot effectively exercise their right to a hearing, with due guarantees, by an independent tribunal (Article 8(1)) and their right to appeal the judgment to a higher court (Article 8(2)(h)). [The representatives therefore] submitted that the mandatory death penalty is also in violation of Article 8 of the Convention."

45. The State did not dispute the Commission and the representatives' arguments on the issue of whether a mandatory death sentence imposed in light of Section 2 of OAPA violates the American Convention. Rather, the State mentioned that "all of the grounds of complaint advanced in the [a]pplication of the Commission, except for one aspect of the relief requested in that [a]pplication, [namely, the issue of the commutation of the alleged victim's death sentence,] will be satisfied upon completion of the necessary legislative changes" ordered by this Tribunal in the Boyce et al. case, which the State intends to comply with fully (supra para. 26).

46. This Tribunal has already analyzed the issue of mandatory death sentencing in Barbados in the Boyce et al. Judgment. [FN20] The Court observes that the present case does not submit before this Tribunal new issues regarding the imposition of mandatory death sentencing in Barbados, except for the allegations concerning Articles 5 and 8 of the Convention (infra paras. 60 to 62). The Court considers that its position on this issue has been clearly established in previous cases, particularly in the Boyce et al. case, and, therefore, it would appear unnecessary

to request additional findings from the Court in that regard. Nonetheless, because the Commission decided to submit the present case to this Court's contentious jurisdiction, the Tribunal deems it pertinent to reiterate the criteria established in previous occasions on the issue of mandatory death sentencing.

[FN20] Cf. Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 20, 2007. Series C No. 169, paras. 46-63.

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47. In interpreting the issue of death penalty in general, the Court has observed that Article 4(2) of the Convention allows for the deprivation of the right to life by the imposition of the death penalty in those countries that have not abolished it. That is, capital punishment is not per se incompatible with or prohibited by the American Convention. However, the Convention has set a number of strict limitations to the imposition of capital punishment. [FN21] First, the imposition of the death penalty must be limited to the most serious common crimes not related to political offenses. [FN22] Second, the sentence must be individualized in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused. [FN23] Finally, the imposition of this sanction is subject to certain procedural guarantees, and compliance therewith must be strictly observed and reviewed. [FN24]

[FN21] Cf. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 55.

[FN22] Cf. Case of Hilaire, Constantine, and Benjamin et al. v. Trinidad and Tobago. Merits, Reparations, and Costs. Judgment of June 21, 2002. Series C No. 94, para. 106; Case of Boyce et al., supra note 20, para. 50, and Case of Raxcacó-Reyes v. Guatemala. Merits, Reparations, and Costs. Judgment of September 15, 2005. Series C No. 133, para. 68. See also Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 21, para. 55.

[FN23] Cf. Case of Hilaire, Constantine, and Benjamin et al., supra note 22, paras. 103, 106, and 108; Case of Boyce et al., supra note 20, para. 50, and Case of Raxcacó-Reyes, supra note 22, para. 81. See also Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 21, para. 55.

[FN24] Cf. Case of Fermín-Ramírez v. Guatemala. Merits, Reparations, and Costs. Judgment of June 20, 2005. Series C No. 126, para. 79, and Case of Boyce et al., supra note 20, para. 50. See also Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 21, para. 55, and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 135.

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48. Specifically, in addressing the issue of mandatory death sentencing in other cases, the Court has held that the reference to "arbitrary" in Article 4(1) of the Convention and the reference to "the most serious crimes" in Article 4(2) render the imposition of mandatory death

sentences incompatible with those provisions where the same penalty is imposed for conduct that can be vastly different, and where it is not restricted to the most serious crimes. [FN25]

[FN25] Cf. Case of Hilaire, Constantine, and Benjamin et al., supra note 22, paras. 103, 106, and 108; Case of Boyce et al., supra note 20, para. 51, and Case of Raxcacó-Reyes, supra note 22, paras. 81-82.

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49. The provisions of the Convention regarding the imposition of the death penalty must be interpreted in view of the pro persona principle, that is to say, they should be interpreted in favor of the individual [FN26] as "impos[ing] restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance." [FN27]

[FN26] Cf. Case of the 19 Merchants v. Colombia. Merits, Reparations, and Costs. Judgment of July 5, 2004. Series C No. 109, para. 173; Case of Boyce et al., supra note 20, para. 52, and Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2006. Series C No. 158, para. 77.

[FN27] Case of Hilaire, Constantine, and Benjamin et al., supra note 22, para. 99, and Case of Raxcacó-Reyes, supra note 22, para. 56. See also Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 21, para. 57.

A.1) The limitation of the application of the death penalty to the "most serious crimes"

50. The Court has previously held that the

intentional and illicit deprivation of another's life (intentional or premeditated murder, in the broad sense) can and must be recognized and addressed in criminal law under various categories (criminal classes) that correspond with the wide range of seriousness of the surrounding facts, taking into account the different facets that can come into play: a special relationship between the offender and the victim [e.g. infanticide], motives for the behavior [e.g. for reward or remunerative promise], the circumstances under which the crime is committed [e.g. brutality], the means employed by the offender [e.g. poison], etc. This approach allows for a graduated assessment of the seriousness of the offence, so that it will bear an appropriate relation to the graduated levels of gravity of the applicable punishment. [FN28]

[FN28] Case of Hilaire, Constantine, and Benjamin et al., supra note 22, para. 102, and Case of Boyce et al., supra note 20, para 53.

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51. The Convention thus reserves the death penalty for the most serious crimes. Notwithstanding, Section 2 of the Offences Against the Person Act compels the indiscriminate imposition of the same punishment for conduct that can be vastly different, [FN29] which is contrary to what the Convention establishes.

[FN29] Cf. Case of Hilaire, Constantine, and Benjamin et al., supra note 22, para. 103, and Case of Boyce et al., supra note 20, para. 54.

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52. In the Boyce et al. case, this Court held that Section 2 of OAPA contravenes Article 4(2) of the Convention, as it does not confine the application of the death penalty to the most serious crimes. [FN30] In the present case, Mr. DaCosta Cadogan was sentenced to death pursuant to Section 2 of OAPA. The Court sees no reason to depart from its previous jurisprudence, and therefore finds that the application of Section 2 of OAPA to Mr. DaCosta Cadogan resulted in a violation of Article 4(2) of the Convention to his detriment.

[FN30] Cf. Case of Boyce et al., supra note 20, para. 55.

A.2) The arbitrariness of the mandatory death penalty

53. This Tribunal has previously held that a lawfully sanctioned mandatory sentence of death may be arbitrary where the law fails to distinguish the possibility of different degrees of culpability of the offender and fails to individually consider the particular circumstances of the crime. [FN31] With regard to Section 2 of OAPA, the Court has previously found that it lawfully sanctions the death penalty as the one and only possible sentence for the crime of murder, [FN32] and that the law does not allow the imposition of a lesser sentence in consideration of the particular characteristics of the crime or the participation and degree of culpability of the defendant. [FN33]

[FN31] Cf. Case of Boyce et al., supra note 20, para. 57.

[FN32] The definition of murder is not provided in any written law, as it remains a common law offense, and it is understood that "[m]urder is committed where a person of sound mind and the age of discretion unlawfully kills any reasonable creature in being under the Queen's peace with malice aforethought either expressed by that person or implied by law, so that the party wounded or hurt dies of that wound or hurt within a year and a day of same." Cf. Case of Boyce et al., supra note 20, footnote 52.

[FN33] Cf. Case of Boyce et al., supra note 20, para. 57.

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54. In this regard, the Court has previously held that to consider all persons responsible for murder as deserving of the death penalty is to "trea[t] all persons convicted of a designated

offense 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." [FN34]

[FN34] Cf. Case of Hilaire, Constantine, and Benjamin et al., supra note 22, para. 105, and Case of Boyce et al., supra note 20, para. 58, citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Supreme Court of the United States of America held that the mandatory death penalty constituted a violation of the due process guarantees of the Fourteenth Amendment and the right to not be subjected to cruel and unusual punishment of the Eighth Amendment of the Constitution of the United States of America. The Court also indicated that the imposition of the death penalty generally necessitates a consideration of the relevant facets of the character and record of the individual offender and the circumstances of the particular offence.

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55. The strict observation of certain due process rights and procedures is essential in evaluating whether the death penalty has been imposed arbitrarily. [FN35] In accordance with the law in Barbados, the availability of statutory and common law defenses and exceptions for defendants in death penalty cases are relevant only for the determination of the guilt or innocence of the accused, not for the determination of the appropriate punishment that should be imposed once a person has been convicted. That is, a defendant in a capital punishment case may attempt to escape a guilty verdict by claiming certain common law defenses to a charge of murder. [FN36] These defenses seek to escape a conviction for murder and replace it with one for manslaughter, for example, which carries a sentence of life imprisonment, or even to totally exclude criminal liability for murder. [FN37] Nevertheless, if and when a defendant is found guilty of the crime of murder, the law does not allow the judge any latitude to consider the degree of culpability of the defendant or other forms of punishment that may be better suited for that particular person in light of all circumstances. That is, courts have no authority to individualize the sentence in conformity with information on the offense and the offender.

[FN35] Cf. Case of Boyce et al., supra note 20, para. 59. In Advisory Opinion OC-16/99, the Court made it clear that when due process guarantees are affected, the "imposition of the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life, in the terms of the relevant provisions of the human rights treaties (e.g. The American Convention on Human Rights, Article 4 […]) with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations." Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, supra note 24, para. 137.

[FN36] Cf. Offenses Against the Person Act 1994, (defining, for example, diminished responsibility and provocation), ss. 4 and 5, (case file of appendices to the application, volume I, appendix A.4, folios 120 and 121).

[FN37] Cf. Offenses Against the Person Act 1994, supra note 36, s. 6, (case file of appendices to the application, volume I, appendix A.4, folio 122).

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56. On the other hand, the Court has previously considered that in analyzing the mandatory death penalty system in Barbados, a distinction must also be made between the right under Article 4(6) of the Convention of every convicted person to "apply for amnesty, pardon, or commutation of sentence," and the right recognized in Article 4(2) to have a "competent court" determine whether the death penalty is the appropriate sentence in each case, in accordance with domestic law and the American Convention. In that regard, the Court has held that sentencing is a judicial function. Although the executive branch may well grant pardon or commutation of a sentence already imposed, the judicial branch may not be stripped away of its responsibility to impose the appropriate sentence for a particular crime. In the present case, the judicial branch had no other option than to sentence the alleged victim to death when he was found guilty of murder, and no judicial review of the punishment of death was allowed because it is a punishment specifically fixed by law. [FN38]

[FN38] Cf. Case of Boyce et al., supra note 20, para. 60. After a murder conviction, an appeal against conviction can be pursued to the Court of Appeal of Barbados, and following that, to the Judicial Committee of the Privy Council. Since 2005, the Caribbean Court of Justice replaced the latter. Grounds for appeal to the Court of Appeals are based on questions of law, fact, mixed law and fact, or any other grounds sufficient for appeal, and in mandatory death penalty cases, it is an appeal against the conviction, not the death sentence, which is specifically fixed and mandated by law. Grounds for appeal to the Judicial Committee of the Privy Council were based on questions of law, interpretation of the Constitution, general or public importance, and mixed law and fact. Cf. Criminal Appeal Act, Ch. 113A (Case of Boyce et al. v. Barbados case file of appendices to the final written submissions presented by all parties, folios 6867 and 6887). Grounds for appeal to the Caribbean Court of Justice on criminal proceedings are mainly based on the interpretation of the Constitution. Cf. Caribbean Court of Justice Act, Ch. 117 (Case of Boyce et al. v. Barbados case file of appendices to the final written submissions presented by all parties, folios 6903-6904).

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57. In sum, regardless of the available defenses for the determination of a murder conviction, and despite the possibility to apply to the executive branch for a commutation of a death sentence, the Court considers that in the determination of punishment, Section 2 of the Offences Against the Person Act mechanically and generically imposes the death penalty on all persons found guilty of murder. This, as the Tribunal has previously held, [FN39] is in contravention of the prohibition of the arbitrary deprivation of the right to life recognized in Article 4(1) of the Convention, as it fails to individualize the sentence in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused.

[FN39] Cf. Case of Hilaire, Constantine, and Benjamin et al., supra note 22, para. 108; Case of Boyce et al., supra note 20, para. 61, and Case of Raxcacó-Reyes, supra note 22, paras. 81-82.

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58. 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 application of the aforementioned law to Mr. DaCosta Cadogan violated the prohibition against the arbitrary deprivation of life and failed 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.

59. Therefore, the Court considers that Barbados has violated Article 4(1) and 4(2) of the Convention, in conjunction with Article 1(1) thereof, to the detriment of Mr. DaCosta Cadogan.

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60. With regard to the Commission and representatives' allegations that the mandatory death penalty in Barbados is also in violation of Article 8 of the Convention, the Court already declared, as in previous cases, [FN40] that the strict observation of certain due process rights and procedures are essential in evaluating whether the death penalty has been imposed arbitrarily. [FN41] Nevertheless, the Court will further address in Chapter VIII of this Judgment some of the additional issues submitted by the representatives with regard to Mr. DaCosta Cadogan´s right to a fair trial in this case.

[FN40] Cf. Case of Raxcacó-Reyes, supra note 22, para. 106, and Case of Boyce et al., supra note 20, para. 64.

[FN41] Cf. Case of Boyce et al., supra note 20, para. 59, and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, supra note 24, para. 137.

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61. Furthermore, the Court considers, as in previous cases, [FN42] that the allegations regarding a violation of Article 5 of the Convention due to the mandatory imposition of a death sentence, without due consideration of the particular circumstances of the crime and of the accused, properly fall under the framework of Article 4 of that treaty, which has already been analyzed (supra paras. 50 to 59).

[FN42] Cf. Case of Raxcacó-Reyes, supra note 22, para. 106, and Case of Boyce et al., supra note 20, para. 64.

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62. The representatives alleged, additionally, that the State violated Article 5 of the Convention because the imposition of the death penalty "on someone suffering from a mental illness" constitutes cruel and inhumane treatment (supra para. 44). With regard to this second

allegation, the Tribunal considers that such an analysis requires that the Court deem proven that Mr. DaCosta Cadogan in fact suffered or suffers from a mental illness. In this regard, the Court observes that this alleged fact is precisely the subject of the controversy that will be analyzed in chapter VIII of this Judgment in relation to the alleged violation of Mr. DaCosta Cadogan´s right to a fair trial due to the refusal of the domestic courts to allow him to submit additional evidence on his mental state. Since the alleged fact on which the representatives wish to sustain the alleged violation of Article 5 of the Convention has not been proven, the Tribunal does not find that the international responsibility of the State has been established.

VII. FAILURE TO COMPLY WITH ARTICLE 2 [FN43] OF THE CONVENTION, IN CONJUNCTION WITH ARTICLES 1(1), [FN44] 4(1), [FN45] 4(2), [FN46] AND 25(1) [FN47] THEREOF

[FN43] Article 2 stipulates 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."
[FN44] Article 1.1, supra note 19.
[FN45] Article 4.1, supra note 17.
[FN46] Article 4.2, supra note 18.
[FN47] Article 25.1 stipulates that: "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

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63. In this chapter, the Court will address the parties' arguments regarding whether Section 2 of the Offenses Against the Person Act 1994 of Barbados and Section 26 of the Constitution of Barbados are incompatible with the State's obligations under Article 2 of the American Convention.

64. "The Commission submit[ted] before the Court that both [S]ection 2 of the Offences Against the Person Act 1994 of Barbados and Section 26 of the Constitution of Barbados are incompatible with the State's obligations under Article 2 of the American Convention, insofar as these legislative provisions fail to comply with or give effect to the rights and freedoms protected under the Constitution of Barbados and the American Convention on Human Rights." Specifically, "[S]ection 2 of the Offences Against the Person Act 1994 prescribes the death penalty as the automatic and mandatory punishment for murder [and is] thus a law that impedes the exercise of the right not to be arbitrarily deprived of life[; therefore, it] is per se contrary to the Convention and the State has a duty to eliminate or modify it pursuant to Article 2 of [that] instrument." Furthermore, "[t]he Commission submit[ted] that similar arguments apply to Section 26 of the Constitution of Barbados[, because it] prevents the courts in that country from declaring certain laws to be inconsistent with the fundamental rights prescribed under […] the

Constitution." Thus, "[S]ection 26 is referred to as a 'Savings Clause[']because it immunizes pre-constitution laws from constitutional challenge even if those laws are inconsistent with fundamental rights and freedoms enshrined in the [C]onstitution." "In this context, the Commission consider[ed] that [S]ection 26 of the Constitution of Barbados is incompatible with the obligation of State[s] Parties under Article 2 of the Convention to give domestic legal effect to the rights protected under the Convention."

65. Finally, the Commission "reiterate[d] its acknowledgment of the importance of the State's decision regarding the abolition of the mandatory aspect of the death penalty and the repeal of [S]ection 26 of its Constitution." Nevertheless, "the Commission observe[d] that the contravening laws still exist and are in effect in Barbados and[,] therefore, the measures planned must be codified in law and implemented in practice before they can be considered to have an effect on the resolution on the instant case."

66. The representatives submitted that "[t]he Constitution of Barbados is drafted so as to immunize from challenge on grounds of incompatibility with fundamental rights any law that is deemed to be 'an existing law' by [S]ection 26 of the Constitution. Since the OAPA 1994 is such a law, the mandatory death penalty cannot be challenged domestically on grounds of incompatibility with fundamental human rights. Therefore, this Court and the Commission are the only fora in which the alleged victim can raise the complaints set out in these submissions." Based on the Court's jurisprudence, the representatives argued that "Barbados has failed to abide by its obligation under Article 2 of the Convention [because] it has failed to take any steps to bring [S]ection 2 of the OAPA 1994 into conformity with its international obligations under the Convention[, and because] it has failed to take any step to repeal [S]ection 26 of the Constitution."

67. The State alleged that, due to the binding nature of the Court's decision in Boyce et al. v. Barbados, it has decided to repeal Section 26 of the Barbados Constitution. The State submitted that its actions taken in compliance with the Boyce et al. Judgment are solemn commitments and that the State will notify the Court when the necessary legislative reforms have been effected. Therefore, with the repeal of Section 26, the State will be able to amend or derogate the Offenses Against the Person Act 1994. Nonetheless, "these measures require full legislative scrutiny and consideration. […] A large number of laws may be affected and all of the likely implications and consequences must be appropriately addressed." On the other hand, "[i]n relation to the amendment of [Section] 2 of the Offences Against the Person Act, although the section itself could be readily amended, such amendment can only be made after careful consideration of the other, consequential legislative changes which may be required."

68. The Court has previously held that a State Party to the Convention "must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires." [FN48] The Court has also stated that, in complying with the general obligation to respect and guarantee rights, States are obliged to "take affirmative action, avoid taking measures that restrict or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right." [FN49] That is, pursuant to Article 2 of the American Convention, States not only have an affirmative obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognized in

the Convention, but must also refrain both from promulgating laws that disregard or impede the free exercise of these rights and from suppressing or modifying the existing laws protecting them. [FN50] These obligations derive from and are a natural consequence of the State's ratification of the American Convention.

[FN48] Cf. Case of the "Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations, and Costs. Judgment of February 5, 2001. Series C No. 73, para. 87; Case of Heliodoro Portugal, supra note 11, para. 150, and Case of Boyce et al., supra note 20, para. 78.
[FN49] Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 81.
[FN50] Cf. Case of Castillo-Petruzzi et al. v. Peru. Merits, Reparations, and Costs. Judgment of May 30, 1999. Series C No. 52, para. 207; Case of Heliodoro Portugal, supra note 11, para. 57, and Case of Salvador-Chiriboga v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 6, 2008 Series C No. 179, para. 122.

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69. In the present case, the Court is being asked to analyze once again whether the State of Barbados has failed to comply with Article 2 of the American Convention in light of Section 2 of its Offences Against the Person Act and Section 26 of the Constitution of Barbados. This Tribunal has already declared the State's international responsibility as it relates to said laws in the Boyce et al. case. However, as this issue has again been brought before the Court, it must reiterate the findings established in the Boyce et al. case on this matter (supra para. 46).

70. With regard to Section 2 of OAPA, which reads: "[a]ny person convicted of murder shall be sentenced to, and suffer, death," [FN51] the Court declared in Boyce et al. that said law impedes the exercise of the right not to be arbitrarily deprived of life, and as such, is per se [FN52] contrary to the Convention and the State has a duty to eliminate or modify it pursuant to Article 2 of that instrument.

[FN51] Offenses Against the Person Act 1994, supra note 36 s. 2, (case file of annexes to the application, volume I, annex A.4, folio 120).
[FN52] The Court has held on previous occasions that a law may per se violate the American Convention. Cf. Case of Suárez-Rosero v. Ecuador. Merits. Judgment of November 12, 1997. Series C No. 35, para. 98; Case of Boyce et al., supra note 20, para. 50, and Case of La Cantuta v. Peru. Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162, paras. 167,174. Cf. also Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50, and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 26, and International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, paras. 41-43.

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71. Furthermore, in the present case, the law in question does not merely exist formally, which is sufficient for the Court to declare a breach of the Convention, but has also been applied to Mr. DaCosta Cadogan by way of judgment. Thus, just as it did in the Boyce et al. case, [FN53] the Court considers that, even though the alleged victim has not been executed, the State has failed to comply with Article 2 of the Convention by both maintaining, per se, and also applying to the alleged victim, a law that restricts his rights recognized under Article 4 thereof (supra paras. 58 and 59).

[FN53] Cf. Case of Boyce et al., supra note 20, paras. 72-74.

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72. With regard to Section 26 of Barbados's Constitution, the Tribunal determined in the Boyce et al. case that:

[it] prevents courts from declaring the unconstitutionality of current laws that were enacted or made before the Constitution came into force on November 30, 1966. It is referred to as the 'savings clause' because it effectively 'saves' such laws from constitutional scrutiny. In effect, Section 26 immunizes pre-constitution laws that are still in effect from constitutional challenge even if the purpose of [that] challenge is to analyze whether the law violates fundamental rights and freedoms. Such is the case with [S]ection 2 of OAPA, which has existed since the enactment of the Offences Against the Person Act of 1868. That is, [S]ection 2 of OAPA is a law that existed before the current Constitution came into force, and continues to be the law of Barbados. Thus, by virtue of the 'savings clause,' the constitutionality of Section 2 of OAPA may not be challenged domestically. [FN54]

[FN54] Case of Boyce et al., supra note 20, para. 75.

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73. In that case, the Tribunal found that "[S]ection 26 of the Constitution of Barbados effectively denie[d] its citizens in general, and the alleged victims in particular, the right to seek judicial protection against violations of their right to life." [FN55] The Court reached a similar decision in another case against Trinidad and Tobago, where a "savings clause" found in that State's Constitution also had the effect of protecting from judicial scrutiny certain laws that would otherwise breach fundamental rights. [FN56] In both cases, the Tribunal found that the State had failed to abide by its obligations under Article 2 of the Convention. In this case, the Court sees no reason to depart from its previous jurisprudence on this issue.

[FN55] Case of Boyce et al., supra note 20, para. 79.

[FN56] Cf. Case of Hilaire, Constantine, and Benjamin et al., supra note 22, para. 152(c), and Case of Caesar v. Trinidad and Tobago. Merits, Reparations, and Costs. Judgment of March 11, 2005. Series C No. 123, para. 115-117.

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74. The Tribunal notes the State's commitment to comply with the Boyce et al. Judgment and modify its domestic legislation to conform to the American Convention, specifically with regard to Section 2 of OAPA and Section 26 of the Constitution. Nonetheless, the Tribunal emphasizes that, in the present case, the international responsibility of the State arose when it applied to the alleged victim legislation that was incompatible with the American Convention, regardless of the State's intention to modify that legislation in the near future (supra paras. 29 and 30).

75. Accordingly, in light of the Court's jurisprudence, and to the extent 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, 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) and 4(2), and 25(1) thereof.

VIII. VIOLATION OF ARTICLE 8(1) AND 8(2) [FN57] (RIGHT TO A FAIR TRIAL) OF THE AMERICAN CONVENTION, IN RELATION TO ARTICLES 1(1) [FN58] AND 4(1) [FN59] THEREOF

[FN57] Article 8 of the Convention establishes, in its pertinent part, that:

[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. [e]very 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. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

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

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

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;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

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

[FN58] Article 1.1, supra note 19.

[FN59] Article 4.1, supra note 17.

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76. The Commission and the representatives' allegations that the mandatory death penalty in Barbados violates Article 5(1) and 5(2) of the Convention, as well as Article 8(1) and 8(2) thereof, have already been examined in Chapter VI of this Judgment regarding the violation of

Article 4 of that instrument (supra paras. 40 to 59). Nonetheless, several issues have been raised by the representatives regarding the alleged violation of Mr. DaCosta Cadogan's right to a fair trial.

77. First, the representatives argued that Mr. DaCosta Cadogan suffers from a personality disorder and alcohol dependence, which, according to Dr. Green, "are recognized as formal mental disorders." [FN60] Nonetheless, the State did not order an evaluation of Mr. DaCosta Cadogan´s mental heath during trial, nor did it allow him to obtain evidence to this effect when his attorneys so requested during the appeals process before the Caribbean Court of Justice. The representatives argued that this evidence would have allowed Mr. DaCosta Cadogan to raise a defense of diminished responsibility in his murder trial. According to the representatives, the failure of the State to provide psychiatric assessments in all mandatory death penalty cases in general, and to Mr. DaCosta Cadogan specifically, with the consent of the accused and his or her counsel, as well as the State's failure to inform defendants of the availability of such assessments, violates Article 8(2)(c) and 8(2)(f) of the Convention.

[FN60] Clinical Psychology Report of Dr. Timothy Green of January 13, 2009, indicating that Mr. DaCosta Cadogan "suffers from a Personality Disorder as well as Alcohol Dependence," and 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" (case file of affidavits, folio 1691, para. 6.6).

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78. The State indicated that the laws and practices of Barbados "fully compl[y] with its [obligations under the Convention] by providing free access to highly trained, professional[,] and independent psychiatrists [who are available] throughout the entire criminal prosecution process." The State emphasized that Mr. DaCosta Cadogan chose not to seek out these services, though he "had every opportunity" to do so. It highlighted that Section 18(2)(e) of the Constitution of Barbados guarantees defendants the right to call witnesses, including expert witnesses, to testify on their behalf. The State contended that the representatives' proposed system of "mandatory, full psychiatric assessment," which the State could not find "anywhere in the world," is neither "desirable [n]or necessary." On one hand, it highlighted the wide range of safeguards already in place to prevent the criminal prosecution for murder of a person who suffers from a mental illness or other mental impairment that could negate his or her criminal liability. [FN61] On the other, the State asserted that the representatives' proposal would infringe various "fundamental rights of the accused." [FN62] Additionally, the State pointed out that the Barbados Court of Appeal and "the Caribbean Court of Justice fully considered the relevance of [the defense of diminished responsibility, and the latter] weighed the evidential value of [Dr. Mahy's letter regarding DaCosta Cadogan's state of mind in order to hold] that the [representatives'] submission in this area was baseless." Therefore, the State considered the representatives' arguments "inappropriate and clearly […] an attempt to use th[e Inter-American] Court as a fourth instance of appeal."

[FN61] For example: a) “[i]n a murder trial, […] the accused must be assessed by a psychiatrist for fitness to plea within 24-48 hours of being charged. Such assessment provides an opportunity to detect psychiatric illness and was provided in the case Mr. Cadogan”; b) “[i]f the accused is detained in prison while awaiting trial he will have the opportunity to see one of the psychiatrists that periodically visits the prison”; c) “[w]hen appearing before a magistrate or judge, both the defen[s]e and prosecution may request and obtain a psychiatric assessment of the accused, free of charge”; d) “if evidence before the magistrate or judge suggests the possibility of diminished responsibility or the existence of some form of psychiatric illness[,] the magistrate or judge should require a psychiatric assessment; failure to do so can provide a ground for appeal”; e) “[f]ollowing trial, if the accused has been convicted and is being detained in prison, defen[s]e counsel may request a psychiatric assessment of the individual to use in the appeal process”; f) “if at any time during incarceration following conviction a prisoner is classified as insane by a properly qualified medical officer, then provision will be made for his or her removal to the Psychiatric Hospital. Following successful treatment the prisoner will be returned to prison. If treatment is unsuccessful, the individual will remain in the Psychiatric Hospital”; g) “[a]n accused at all times has access to free psychiatric services at the Barbados Psychiatric Hospital”; h) “[t]he defen[s]e of diminished responsibility prevents a conviction for murder”; and i) “the Crown must prove its case against the accused, including the requisite level of intent, beyond a reasonable doubt.” Additionally, the State indicated that “[e]veryone in Barbados knows that there is a Psychiatric Hospital and that someone seeking treatment can obtain it for free.”
[FN62] The State indicated that mandatory psychiatric testing would infringe the rights of an accused to: “a) liberty and security of the person; b) equality before the law; c) protection of hon[o]r, dignity, reputation[,] and private life; d) recognition as a person, having rights and obligations; e) apply to a court to ensure respect for his or her rights; f) be presumed innocent and to be tried according to law; g) a hearing, with due guarantees and within a reasonable time, in the substantiation of any accusation of a criminal nature made against him. Such due guarantees include the right to defend oneself, the right to be assisted by counsel of one’s own choosing, and the right to call and examine witnesses; h) have his physical, mental, and moral integrity respected, and i) equal protection of the law.”
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79. First, the Tribunal observes that the parties agree that all criminal defendants in Barbados undergo a basic psychiatric evaluation in order to determine whether he or she is fit to plead. The purpose of this preliminary evaluation is to examine, inter alia, whether the accused understands the charges against him or her, and whether the accused is capable of communicating with his or her legal representative in a clear and coherent fashion. Similarly, there is no controversy as to the fact that Mr. DaCosta Cadogan was preliminarily evaluated by a state-employed psychiatrist at the beginning of the criminal process, who determined that he was mentally fit to plead. The representatives nevertheless submitted that this preliminary evaluation was not sufficient to determine whether Mr. DaCosta Cadogan had any mental condition relevant to a defense of diminished responsibility. [FN63]

[FN63] Section 4(1) [defense of diminished responsibility] of The Offenses Against the Persons Act 1994, states the following: "[w]here a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind, whether

arising from a condition of arrested or retarded development of mind for any inherent cause or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing." Also, Section 4 (2) states that "on a charge of murder, it shall be for the defence to prove that the person is by virtue of this section not liable to be convicted of murder." In such cases, Section 4(3) requires that the conviction be reduced to that of manslaughter instead of murder.

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80. It is also undisputed that a full psychiatric evaluation by a state-employed mental health professional from Barbados's Psychiatric Hospital is available, free of charge, to all criminal defendants in Barbados, including those on trial for a capital offense. The parties agree that such an evaluation will be provided at the request of a defendant or if the judge deems one necessary. According to the parties, the judge is not under an obligation to request such an evaluation if he or she does not deem it necessary, nor is the judge under any obligation to explicitly inform the accused that such an evaluation is available. It is agreed that Mr. DaCosta Cadogan was never fully evaluated by a mental health professional during his trial, since neither his attorney nor the presiding judge requested such an evaluation.

81. On appeal, Mr. DaCosta Cadogan obtained new legal representation that submitted as evidence a preliminary psychological evaluation by Dr. Mahy, a mental health professional whose "impression" was that Mr. DaCosta Cadogan could qualify, upon further examination, for a "[d]ual [d]iagnosis of [a]nti-[s]ocial personality disorder and substance abuse." [FN64] In light of this preliminary diagnostic, Mr. DaCosta Cadogan´s new legal representation requested that the Caribbean Court of Justice allow him to submit a further, definitive, psychiatric report. [FN65] The Caribbean Court of Justice summarily denied this request, stating that Dr. Mahy's preliminary opinion was "very weak material upon which to hope to establish a basis for a diminished responsibility plea," "f[ell] short of the standard required for presenting an arguable case on abnormality of the mind," and did not give rise to concern about the safety of the verdict. [FN66] Thus, the Caribbean Court of Justice affirmed the judgments of both the trial court and the Court of Appeal on this point, satisfying itself that no further examination of Mr. DaCosta Cadogan's mental state was necessary in order to ensure a fair trial.

[FN64] "Letter/Report from Dr. Mahy, 27th June 2008" (case file of appendices to the representatives´ brief, volume I, appendix 2, folios 1352 to 1354).

[FN65] Cf. Tyrone DaCosta Cadogan v. The Queen [2006] CCJ 4 (AJ), CCJ Appeal No. AL 6 of 2006, Judgment of 4 December 2006 (case file of appendices to the application, volume II, annex B4, folios 1008 and 1009, para. 10).

[FN66] Tyrone DaCosta Cadogan, supra note 65, paras. 11 and 13.

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82. During the proceedings of this case before this Tribunal, the representatives had Mr. DaCosta Cadogan examined by Dr. Green, a chartered clinical psychologist, who concluded, after a 4 hour interview with the alleged victim, that "Mr. Cadogan suffers from a [p]ersonality [d]isorder as well as [a]lcohol [d]ependence[, which] could both lead to a disposal of diminishing

responsibility in a [m]urder trial in the U[nited] K[ingdom,] as they are recognized as formal mental disorders." [FN67]

[FN67] Affidavit of Dr. Timothy Green (case file of affidavits, folio 1690, para. 6.4).

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83. Thus, this Court must analyze whether the State violated Mr. DaCosta Cadogan´s right to a fair trial recognized under Article 8 of the Convention, in light of the fact that no detailed evaluation of his mental health was made during his criminal trial. [FN68] Specifically, this Tribunal must evaluate whether the mere availability of a psychiatric evaluation upon the request of Mr. DaCosta Cadogan or the trial judge was sufficient to guarantee him a fair trial. The Court observes that this is the first time that this issue has been submitted before it in a contentious case.

[FN68] As the Court mentioned in Chapter II of the present Judgment (supra paras. 24-25), on numerous occasions, this Tribunal has held that clarification of whether the State has violated its international obligations owing to the actions of its judicial bodies may lead to a situation in which the Court must examine the respective domestic proceedings in order to establish their compatibility with the American Convention.

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84. In that regard, the Court recalls that, due to the exceptionally serious and irreversible nature of the death penalty, its imposition or application is subject to certain procedural requirements that limit the punitive power of the State and whose compliance must be strictly observed and reviewed. [FN69] Accordingly, the Tribunal observes that Article 8(1) of the Convention establishes that the State must provide, "in the substantiation of any accusation of a criminal nature made against [a person]," "due guarantees […] within a reasonable time." The terms of this Article clearly indicate that the subject of the right is the accused, that is, the person before the judge that is to decide the case. [FN70] As such, he or she must be able to demand that all the "guarantees" that "due process" entails are observed; these, in turn, may be determined by the tribunal depending on the particular circumstances of each case. That is, every judge has the obligation to ensure that proceedings are carried out in a manner that guarantees and respects those due process rights necessary to ensure a fair trial in each case. Accordingly, Article 8(2) of the Convention specifies which of these constitute "minimum guarantees" to which all persons have an equal right during proceedings. Specifically, Article 8(2)(c) of the Convention requires that individuals are able to adequately defend themselves against any act of the State that may affect their rights. [FN71] Additionally, Article 8(2)(f) recognizes the right of defendants to examine witnesses against them and those testifying on their behalf, under the same conditions as the State, with the purpose of defending themselves. [FN72] In any case, the Convention does not impede States from adopting additional measures than those recognized under Article 8(2) of the Convention in order to guarantee a fair trial.

[FN69] Cf. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 21, para. 55; Case of Boyce et al., supra note 20, para. 50, and Case of Fermín-Ramírez, supra note 24, paras. 78-79.
[FN70] Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 146.
[FN71] Cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27; Case of Claude-Reyes et al. v. Chile. Merits, Reparations, and Costs. Judgment of September 19, 2006. Series C No. 151, para. 116; Case of Tiu Tojín v. Guatemala. Merits, Reparations, and Costs. Judgment of November 26, 2008. Series C No. 190, para. 95, and Case of the Miguel Castro Castro v. Peru. Interpretation of the Judgment of Merits, Reparations, and Costs. Judgment of August 2, 2008 Series C No. 181, para. 140.
[FN72] Cf. Case of Castillo-Petruzzi et al., supra note 50, para. 154; Case of García-Asto and Ramírez-Rojas v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 25, 2005. Series C No. 137, para. 152, and Case of Palamara-Iribarne v. Chile. Merits, Reparations, and Costs. Judgment of November 22, 2005. Series C No. 135, para. 179.

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85. In analyzing whether the State respected and ensured Mr. DaCosta's due process rights, the Court recalls that this obligation is most broad and demanding in those processes in which a penalty of death may be imposed. [FN73] This is so because such a penalty entails the deprivation of the most fundamental of rights, [FN74] the right to life, with the consequent impossibility of reversing the penalty once it has been carried out. Otherwise, a violation of the due process rights of a defendant in a capital case, such as the failure to provide him or her with reasonable and adequate means for his or her defense, in light of Articles 8(2)(c) and 8(2)(f) of the Convention, may result in an arbitrary deprivation of the right to life recognized under Article 4 thereof (supra paras. 55 to 59). The failure to guarantee these rights in a death penalty case could undoubtedly result in a grave and irreversible miscarriage of justice, with the possible outcome being the execution of a person who was not given a fair trial. Accordingly, this Tribunal has stated on multiple occasions that the object and purpose of the Convention, as an instrument for the protection of the human person, requires that the right to life be interpreted and applied in such a manner that its safeguards become practical and effective (effet utile). [FN75] Therefore, this analysis – regarding the due process rights that the State should have guaranteed to Mr. DaCosta Cadogan – must be done in light of the ample protections that correspond to the right to life.

[FN73] Cf. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984); para. 4 and 5, available at http://www1.umn.edu/humanrts/instree/i8sgpr.htm.
[FN74] Cf. Case of the "Street Children" (Villagrán-Morales et al.), supra note 9, para. 144; Case of Albán Cornejo et al. v. Ecuador. Merits, Reparations, and Costs. Judgment of November 22, 2007. Series C No. 171, para. 117, and Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of January 31, 2006. Series C No. 140, para. 120.
[FN75] Cf. Case of Ivcher-Bronstein v. Peru. Competence. Judgment of September 24, 1999. Series C No. 54, para. 37; Case of Zambrano-Vélez et al. v. Ecuador. Merits, Reparations, and

Costs. Judgment of July 4, 2007. Series C No. 166, para. 56, and Case of La Cantuta, supra note 52, para. 171. See also Eur.C.H.R., McCann and Others v. the United Kingdom, Judgment of 27 September 1995, Series A No. 324, paras. 146-147.

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86. With these criteria in mind, this Tribunal observes that Mr. DaCosta Cadogan's mental health was never fully evaluated during his trial even though evidence was submitted that indicated that he had been drinking an excessive amount of alcohol the day of the murder and that he had the intention of carrying out a robbery in order to obtain money to purchase more alcohol. [FN76] The Court observes that the supposed mental illnesses that the representatives alleged Mr. DaCosta Cadogan suffered or suffers are alcohol dependence and anti-social personality disorder, which could have allowed Mr. DaCosta Cadogan to raise a defense of diminished responsibility (supra paras. 77 and 81). The absence of such an evaluation was due to the failure of both Mr. DaCosta Cadogan's defense attorney and the trial judge to request it, even though the judge instructed the jury to determine Mr. DaCosta Cadogan´s mental state at the time of the offense. On this point, the judge indicated to the jury that it had to determine "whether […] the actions of the accused described in this case are those of a man who has no control over his actions or is so consumed of alcohol and drugs that he did not form the intent to kill […] or cause […] some serious bodily harm." Consequently, the judge instructed the jury that if it were to find that the accused "was so consumed of alcohol and drugs that he did not form the intent to kill or cause serious bodily harm, [it must] find him not guilty of murder, but guilty of manslaughter." [FN77] Additionally, the Caribbean Court of Justice's denied a request that could have allowed Mr. DaCosta Cadogan to submit further evidence on this matter. [FN78] As indicated by the State, the trial judge did not request a more detailed psychiatric evaluation because "the trial judge found no evidence that would lead him to raise the defense of diminished responsibility on his own accord; nor did the trial judge find any evidence of mental impairment or incapacity."

[FN76] Cf. The Queen v. Tyrone DaCosta Cadogan (May 18, 2005), Supreme Court of Barbados (Criminal Division) - Record of the proceedings (1-226) (case file of appendices to the application, volume II, annex B1, folio 941).
[FN77] Cf. The Queen, supra note 76.
[FN78] Cf. Tyrone DaCosta Cadogan, supra note 65, paras. 11, 13.

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87. In that regard, this Tribunal finds that in order to establish the criminal liability of a defendant, it is necessary to determine the effect that a mental disease may have on that defendant not only during his proceedings, but also at the time that the crime was committed. In the case of Mr. DaCosta Cadogan, the determination of the effect that an alleged mental illness may have had on him was relevant inasmuch as it could have allowed him to raise a defense of diminished responsibility. [FN79] In this regard, the Court notes that the "anti-social personality disorder" and alcohol dependency allegedly suffered by Mr. DaCosta Cadogan are not necessarily externally apparent, and usually require a determination by a mental health professional, particularly for the differentiation between common drunkenness and a disease

related to substance dependency. This differentiation, in a death penalty case, particularly in a mandatory death penalty case, could be the difference between the defendant's life or death.

[FN79] The Tribunal hereby reiterates that it is not a criminal court wherein an individual's criminal responsibility can be adjudicated; therefore, it may not determine whether Mr. DaCosta Cadogan in fact suffered from a mental illness for the purposes of determining his criminal responsibility. This matter befalls on domestic courts. Cf. Case of Velásquez-Rodríguez, supra note 14, para. 134; Case of Yvon Neptune v. Haiti. Merits, Reparations, and Costs. Judgment of May 6, 2008 Series C No. 180, para. 37, and Case of Boyce et al., supra note 20, footnote 37.

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88. Though domestic law permits the presiding judge to solicit the opinion of an expert for this purpose, this was never ordered in the proceedings against Mr. DaCosta Cadogan. That is, the State failed to order that a psychiatric evaluation be carried out in order to determine, inter alia, the existence of a possible alcohol dependency or other "personality disorders" that could have affected Mr. DaCosta Cadogan at the time of the offense, and it also failed to ensure that Mr. DaCosta and his counsel were aware of the availability of a free, voluntary, and detailed mental health evaluation in order to prepare his defense in the trial. The fact that the State did not inform either Mr. DaCosta Cadogan or his attorney of his right to obtain such an evaluation may have resulted in the exclusion of evidence relevant to the preparation of his defense. Consequently, Mr. DaCosta Cadogan's mental health at the time of the offense was never fully evaluated by a mental health professional for the purpose of preparing his defense in a case where the death penalty was the only possible sentence.

89. Unlike other criminal proceedings in which the State's passive conduct with regard to the availability of mental health evaluations would be admissible, Mr. DaCosta Cadogan's case is different for a number of reasons. First, the case involved the possibility of a mandatory death sentence, and, as stated above, such proceedings require the most ample and strict observation of due process rights. Second, the particular situation of the accused at the time of the offense reasonably required at least an assessment of whether a situation of alcohol dependency or some personality disorder existed, especially because the judge submitted before the jury the issue of the effect that alcohol and drugs may have had on the accused´s mental state. Third, considering that Mr. DaCosta Cadogan was afforded state-appointed legal counsel, the presiding judge had the duty to adopt a more active role in ensuring that all necessary measures were carried out in order to guarantee a fair trial. Fourth, Mr. DaCosta Cadogan requested during his appeal process that he be allowed the opportunity to submit a more detailed evaluation of his alleged personality disorder and alcohol dependence, which was denied.

90. Therefore, taking into account the particular circumstances of the case and the strict procedural requirements that the State was obliged to observe due to the possibility of a mandatory imposition of a death sentence, the Tribunal considers that the State's omission referred to above constituted a violation of Mr. DaCosta Cadogan's right to a fair trial recognized under Article 8(1), 8(2)(c), and 8(2)(f) of the Convention, in relation to Article 1(1) thereof.

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91. Finally, the representatives contended that the State had provided Mr. DaCosta Cadogan, who was indigent, with incompetent counsel, in violation of his rights under Article 8(2)(e) of the Convention. They argued that the "failure of [the alleged victim's] trial attorney to request an independent forensic psychiatric or psychological assessment was grossly incompetent, [since] the question as to whether a defen[s]e of diminished responsibility might be available [was] critical and [should have been] considered by any competent defen[s]e counsel. […] However, [trial counsel gave] no account as to why, having recognized the potential [effects] of excessive liquor and drugs [on Mr. DaCosta Cadogan's state of mind], he took no steps to have the alleged victim medically assessed in that regard."

92. The State asserted that the Caribbean Court of Justice "addresse[d]" and "firmly dismiss[ed]" contentions regarding the ineffectiveness of Mr. DaCosta Cadogan's trial attorney, expressly noting that he was represented by a very experienced counsel, and that therefore this Tribunal was barred from reviewing this issue.

93. The Court considers that there were a number of available defenses that the state-appointed defense counsel could have pursued at trial. However, his failure to pursue a defense of diminished responsibility and his decision to choose instead other available defenses certainly did not amount to gross incompetence. Consequently, the Court considers that the failure of the state-appointed counsel to request an independent psychiatric or psychological assessment in this case does not amount to a violation of Mr. DaCosta Cadogan's right to a fair trial. Therefore, the State is not responsible for a violation of Article 8(2)(e) of the Convention with regard to the issue of incompetency of counsel.

IX. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION) [FN80]

[FN80] Article 63(1) establishes that: "[i]f 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."

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94. It is a principle of International Law that every violation of an international obligation that has caused damage gives rise to a duty to provide adequate reparations therefor. [FN81] The obligation to redress is regulated by International Law. [FN82] The Court has based its decisions in this respect on Article 63(1) of the American Convention.

[FN81] Cf. Case of Velásquez-Rodríguez v. Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of Escher et al., supra note 6, para. 221, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 108.

[FN82] Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, para. 44; Case of Escher et al., supra note 6, para. 221, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 108.

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95. In accordance with the considerations on the merits of the case and the violations of the Convention determined in the previous chapters, and in light of the criteria established in the Court's jurisprudence regarding the nature and scope of the obligation to redress, [FN83] the Court will proceed to analyze the parties' arguments concerning reparations, so as to order measures aimed at redressing the violations.

[FN83] Cf. Case of Velásquez-Rodríguez, supra note 81, paras. 25-26; Case of Escher et al., supra note 6, para. 222, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 109.

A) Injured Party

96. The Commission and the representatives considered Tyrone DaCosta Cadogan to be the "injured party" in the present case.

97. The Court reiterates that those who have been declared victims of a violation of a right recognized in the Convention are considered "injured parties." [FN84] Furthermore, this Court's jurisprudence has stated that the alleged victims in a case must be indicated in the application and in the Report of the Commission issued in accordance with Article 50 of the Convention. [FN85]

[FN84] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 82; Case of Escher et al., supra note 6, para. 223, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 112.

[FN85] Cf. Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2006 Series C No. 148, para. 91; Case of Escher et al., supra note 6, para. 82, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 112.

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98. Therefore, in accordance with Article 63(1) of the American Convention, this Tribunal considers Tyrone DaCosta Cadogan the "injured party" in the present case. Consequently, in light of the violations declared in the present Judgment (supra paras. 52, 57, 58, 59, 71, 75, and 90), the Court considers Mr. DaCosta Cadogan beneficiary of the reparations to be ordered.

B) Measures of Satisfaction and Guarantees of Non-Repetition

99. The Court will determine the measures of satisfaction that seek to repair immaterial damages and that are not of a pecuniary nature, and will order measures of public scope or consequence. [FN86]

[FN86] Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 84; Case of Escher et al., supra note 6, para. 236, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 135.

B(i) Judgment as a form of reparation

100. First, the Court considers that the present Judgment per se is a form of reparation [FN87] that should be understood as a measure of satisfaction that recognizes that the rights of Tyrone DaCosta Cadogan addressed in the present Judgment have been violated by the State.

[FN87] Cf. Case of Neira-Alegría et al. v. Peru. Reparations and Costs. Judgment of September 19, 1996. Series C No. 29, para. 57; Case of Escher et al., supra note 6, para. 233, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 133.

B(ii) Legislative Reform

101. The Commission requested that the Court order the State to "adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed [in Barbados] in contravention of the rights and freedoms guaranteed under the Convention […], and to adopt such legislative or other measures as may be necessary to ensure that [Section 26 of] the Constitution and [Section 2 of] the Offences Against the Person Act of Barbados confor[m] with Article 2 [of the Convention]." The Commission further indicated that while it "welcomed" the efforts of the State to comply with the judgment of the Court in the Boyce et al. case and recognized the importance of the decisions it had reported, the State's commitments "must be codified in law and implemented in practice before they can be considered to have an effect on the resolution" of this case.

102. The representatives also requested "[a] direction that the State […] 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 "the domestic courts have full jurisdiction to uphold fundamental [c]onstitutional rights." To that end, the representatives argued that the "immunizing effect of [S]ection 26 of the Constitution of Barbados in respect of 'existing laws'" should be removed. Furthermore, the representatives requested that the Court order the State to adopt "such legislative or other measures as may be

necessary to ensure [that] indigent persons charged with murder are provided with adequate facilities for the conduct of psychiatric/psychological examinations in every case, in compliance with the requirements of the American Convention, including the right to a fair trial under Article 8 and the right to humane treatment under Article 5 of the Convention." Specifically, the representatives proposed the "establishment of a protocol whereby: i) the State […] would inform the accused and his [c]ounsel 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 [would be] 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 [would] make enquiries as to whether a psychiatric assessment has been carried out."

103. For its part, the State indicated that, in compliance with the order of this Court in the Boyce et al. case, it "is undertaking the necessary legislative and other measures to safeguard against any imposition of the death penalty not in conformity with […] the American Convention" and to bring its laws into compliance thereof. In particular, the State expressed its intention to remove the immunizing effect of Section 26 of the Constitution of Barbados in respect of "existing laws." However, it also declared that the laws and practices of Barbados "fully compl[y] with its [obligations under the Convention] by providing free access to highly trained, professional[,] and independent psychiatrists [who are available] throughout the entire criminal prosecution process."

104. The Court notes once again the State's expressed willingness to comply in full with the Boyce et al. Judgment. Nevertheless, considering that the legislative or other measures ordered in Boyce et al. have not yet been implemented – and in order to remedy the violations declared in the present Judgment – the Tribunal reiterates that the State must adopt 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 this regard, the State must adopt such legislative or other measures as are necessary to ensure that the Constitution and laws of Barbados, particularly Section 2 of the Offences Against the Person Act and Section 26 of the Constitution, are brought into compliance with the American Convention. The State must comply with these measures of reparation within a reasonable time as of the date of notification of the present Judgment.

105. Additionally, as a measure of reparation and in order to guarantee that events such as those analyzed in the present Judgment are not repeated, the State shall ensure that all persons accused of a crime whose sanction is the mandatory death penalty are duly informed, at the initiation of the criminal proceedings against them, of the right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist recognized under Barbados's domestic law.

B(iii) Set aside the death penalty

106. The Commission requested that the Court order the State to commute Mr. DaCosta Cadogan's death sentence. It argued that Mr. DaCosta Cadogan "has no legal certainty that he will not face execution unless and until his sentence is formally commuted."

107. The representatives initially requested "[a] direction that the State of Barbados commute the death sentence of the victim and substitute there[for] a sentence of life imprisonment with appropriate opportunity to apply for parole." Alternatively, the representatives later requested that the victim "be afforded a full sentencing hearing, at which a judge determines the just and appropriate sentence after hearing oral representations from the […] victim." They argued that if Mr. DaCosta Cadogan's sentence of death is automatically substituted to a life sentence without the possibility of parole, he will again be subjected to a violation of his conventional and constitutional rights, given that such a sentence would "permi[t] no distinction to be drawn between one offen[s]e of murder and another[…], [no consideration of the] circumstances of the individual offender, [and] no opportunity to plead for a lesser penalty." The representatives observed, additionally, that it is the "usual practice" in Barbados to substitute a sentence of life imprisonment when "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." However, "[u]nder the laws of Barbados, a sentence of life imprisonment does not mean in practice that the prisoner will actually or […] 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." "The decision on release is, however, made by the Executive and not the Judiciary." The representatives further argued that commutation of the death penalty through the Mercy Committee "would not afford the alleged victim a judicial determination of his sentence," and would therefore not be an appropriate remedy. However, if the Court were not to accept this submission, the representatives maintained that the alleged victim must "at the very least be given the right to make representations" to the Mercy Committee.

108. On this point, the State submitted that it will provide the following information to the Governor General of Barbados, so that he may consider the exercise of the prerogative of mercy: (1) the judgment of the Court in the case of Boyce et al. v. Barbados; (2) the Report on the Merits of the Commission (Report No. 60/08), and (3) the "Report of Barbados on Measures Adopted to Comply with [the] Judgment of the Inter-American Court of Human Rights in the Case of Boyce et al. v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Series C No. 169, Judgment of November 20, 2007, and its appendices." According to the State, "the commutation of a death sentence is an appropriate and sufficient form of reparation." Therefore, further "reparations are unnecessary and inappropriate in the present case." It indicated, also, that the Barbados Privy Council has not yet convened to consider Mr. DaCosta Cadogan's case because, pursuant to the decision of the CCJ in the case of Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce, it should refrain from doing so until all of the applicant's legal processes, including international petitions, are concluded. [FN88] Moreover, the State asked that the Court "reject any requirement that the Petitioner be entitled to a re-sentencing hearing before either a High Court judge or the Court of Appeal." It argued that admitting such a request would place the Court in "the uncomfortable and inappropriate role of being a further [l]egislature for Barbados[, since the] modalities of compliance with a judgment of this […] Court are matters [to be decided upon by] the State, within its margin of appreciation." Additionally, the State argued that "issues related to re-sentencing [will] only become relevant for the Court once [a new] legislative framework [in which the mandatory death penalty is abolished] has been adopted. At that time, only if the solutions enacted by Barbados in compliance with the Court's order in the case of Boyce et al. v. Barbados are considered

inappropriate […] will such questions arise. In the unlikely event that this happens, then this Court is fully capable of addressing all such matters." Finally, the State indicted that the issues regarding the commutation of the death penalty raised by the defendants "are likely to be resolved by the Barbadian Court of Appeal in the near future. An application has been made seeking leave to appeal the decision […] in the case of Frank Anderson Carter v. Attorney General and Anthony Leroy Austin v. Attorney General to clarify certain aspects of the law. [That case] establishe[d, inter alia,] that […] the Privy Council […] must allow the applicant to see and comment upon the documents being considered when making a recommendation in relation to the prerogative of mercy."

[FN88] The CCJ indicated in the case of Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce that it "would recommend that the [Barbados' Privy Council] should meet only once and that they should do so at the very end of all the domestic and international processes. At that stage they should make available to the condemned man all the material upon which they propose to make their decision, give him reasonable notice of the date of the meeting and invite him to submit written representations. This does not of course preclude the Governor-General in his or her discretion from convening at any time a meeting of the [Barbados' Privy Council] 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 fav[o]r of commutation, then further deliberation would have to be adjourned." Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006) (case file of appendices to the application, volume 2, folios 502 to 567).

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109. In the Boyce et al. case, this Tribunal ordered the State to commute the death sentence imposed on one of the victims. Nevertheless, contrary to what was ordered in that case, the Tribunal considers that the proper reparation in the present case should take into account that "sentencing is a judicial function" (supra para. 56), [FN89] and that the commutation of a sentence corresponds to a non-judicial process. Therefore, the Court considers that, in the present case, as a measure of reparation for the violations declared in the present Judgment, the State must set aside and not carry out the death sentence already imposed on Tyrone DaCosta Cadogan. Furthermore, the State must provide him, without the need for a new trial, a hearing for the judicial determination of the appropriate sentence in his case, in consideration of the particular characteristics of the crime and the participation and degree of culpability of the defendant. All of the above must be carried out under the new legislative framework applicable in Barbados as a result of the legislative measures ordered by this Tribunal in order to ensure that the imposition of the death penalty does not violate the rights and liberties guaranteed in the Convention (supra para. 104).

[FN89] Case of Boyce et al., supra note 20, paras. 47 and 60.

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110. In light of the violations declared in the present Judgment, the Court also orders, as an additional measure of reparation, that the State shall not impose a sentence of death on Mr. DaCosta Cadogan under the new legislative measures that the Court has ordered it to adopt.

C) Costs and expenses

C(i) Material and immaterial damages

111. The Court has developed the concepts of material and immaterial damages, and indicated the circumstances under which these categories of damage must be redressed. [FN90]

[FN90] This Tribunal has established that material damages include "the loss or detriment to the income of the victims, the expenses they have incurred due to the facts of the case, and the pecuniary consequences that have a causal nexus with the facts of the case." Case of Bámaca-Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 43; Case of Escher et al., supra note 6, para. 224, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 115. This Tribunal has also established that inmaterial damage "can include the suffering and affliction caused to the direct victim and to those close to him, infringement of significant values, and alterations of a non-pecuniary character in the living conditions of the victim or his or her family." Case of the "Street Children" (Villagrán-Morales et al.), supra note 86, para. 84; Case of Escher et al., supra note 6, para. 224, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 118.

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112. The Court observes that, "in order to emphasize that this action [was] brought not to enrich the […] victim, but rather to preserve his life and to secure his humane treatment, [the representatives did] not seek financial compensation in respect of any violations." Likewise, the Commission submitted no arguments to the Tribunal regarding material or immaterial damages.

113. The State "expressly denie[d] that compensation is required by law or that it is either necessary or appropriate in this case." It emphasized that the representatives had "expressly waived" claims to compensation, and that the Commission "d[id] not request monetary damages in its [a]pplication." The State also submitted that "the Court must accord the greatest respect to the will of the [p]etitione[r] regarding such matters," adding that doing so "is the accepted practice in international and regional human rights tribunals." Furthermore, the State argued that in cases such as these, "a judgment of the Court per se would amount to full and complete satisfaction of any wrong[,] and no compensation is required."

114. The Court acknowledges that the representatives and the Commission have not requested monetary compensation in the present case. The Tribunal also considers that the appropriate measures to redress the violations declared in the present Judgment must be those that provide satisfaction for the injured party and that guarantee the non-repetition of such violations. Therefore, no compensation will be ordered.

C(ii) Costs and expenses

115. As previously noted by the Court, costs and expenses constitute part of the concept of reparation under Article 63(1) of the American Convention. [FN91]

[FN91] Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 79; Case of Escher et al., supra note 6, para. 255, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 146.

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116. The Commission requested that the Court "consider the submissions of the victim's representatives in determining what order for costs and expenses may be appropriate."

117. The representatives did not seek any legal fees in the present case. They argued, however, 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, accommodation for the legal representatives [that attended] the hearing[,] and an additional amount representing […] courier, photocopying[,] and travel expenses incurred in visiting prisons[,] as well as affidavit fees."

118. The State requested that the Court award no costs or expenses, emphasizing that the representatives have waived all legal fees. In the alternative, the State asked the Court to "award a nominal sum for expenses directly incurred by counsel for the [p]etitioner" in relation to the oral hearing held in the present case before the Tribunal. Furthermore, "if costs and expense in relation to [the] hearing are to be assessed, the State submit[ted] that under the Inter-American [S]ystem of human rights such costs must be reasonable."

119. As the Court has indicated on previous occasions, costs and expenses are included in the concept of reparations embodied in Article 63(1) of the American Convention, since the actions taken by the victims, their next of kin, or their representatives to obtain justice at both the national and the international levels entail expenditures that must be compensated when a State's international responsibility has been declared in a judgment against it. The Court must prudently assess the reimbursement of costs and expenses arising both before domestic authorities and before the Inter-American System, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, provided their quantum is reasonable. [FN92]

[FN92] Cf. Garrido and Baigorria v. Argentina, supra note 91, para. 82; Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 6, para. 146, and Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 192, para. 243.

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120. The Court notes that the representatives have submitted receipts that purportedly support said request for a total amount of US$ 12,799.06 (twelve thousand seven hundred and ninety nine United States dollars and six cents). The State and the Commission indicated they had no observations on this matter (supra para. 12).

121. This Court has analyzed the documentation submitted by the representatives and has found sufficient evidence to support a claim of US$ 9,306.21 (nine thousand three hundred and six United States dollars and twenty one cents). Although the representatives did not submit receipts pertaining to photocopying and courier expenses related to the litigation of the present case, the Court deems that such expenses, in a reasonable amount, are evident, and thus orders that they be reimbursed. Additionally, the Court deems it pertinent to order the payment of an amount corresponding to the future expenses that may arise in domestic proceedings or during the monitoring of the State's compliance with this Judgment. Therefore, the Tribunal considers reasonable to order the State to reimburse the amount, in equity, of US$ 18,000.00 (eighteen thousand United States dollars) for the costs and expenses related to the present case, including future expenses related to the monitoring of compliance with this Judgment. Considering that the victim is currently in prison in Barbados and some of his legal representatives work in England, the State shall pay that amount directly to the representatives, within one year as of the notification of the present Judgment.

C(iii) Terms of compliance of the payments ordered

122. The amount set forth in the present Judgment as reimbursement of costs and expenses may not be affected, reduced, or conditioned by tax laws currently in force or taking effect in the future.

123. The State may fulfill its pecuniary obligations by tendering United States Dollars or an equivalent amount in Barbadian dollars, which will be calculated according to the exchange rate at the New York stock exchange, United States of America, that is in effect on the day before payment is made.

124. If the State falls in arrears, Barbadian banking default interest rates shall be paid on the amount owed.

X. PROVISIONAL MEASURES

125. On October 31, 2008, the Inter-American Commission submitted to the Court, in accordance with Articles 63(2) of the Convention and 25 of the Court's Rules of Procedure in effect at that time, a request for the adoption of provisional measures in favor of Mr. DaCosta Cadogan, who was sentenced to death in Barbados, so that "Barbados take all measures necessary to preserve [his] life and physical integrity […], so as not to hinder the processing of his case […] before the Inter-American System." On November 4, 2008, the President issued an Order requiring the State to adopt urgent measures of protection. [FN93] On December 2, 2008, the Tribunal decided "[t]o ratify all the terms of the Order of the President […] of November 4, 2008, […] and to require the State to maintain the provisional measures necessary to protect the

life and physical integrity of Mr. Tyrone DaCosta Cadogan, so as not to hinder the processing of his case before the Inter-American system." [FN94]

[FN93] Order issued by the President of the Inter-American Court on November 4, 2008.
[FN94] Order issued by the Inter-American Court on December 2, 2008.

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126. As of the date of this Judgment, the State has not executed the beneficiary of the provisional measures ordered by this Tribunal.

127. The Court had ordered the State to adopt provisional measures on behalf of Tyrone DaCosta Cadogan for the purpose of preserving his "life and physical integrity […] so as not to hinder the processing of his case before the Inter-American system" (supra paras. 125). Since his case has been heard by this Tribunal, pursuant to its contentious jurisdiction, which has already declared that the State violated the American Convention to the detriment of Mr. DaCosta Cadogan, the Court considers that the purpose of the provisional measures has been met. In light of the foregoing, this Court hereby lifts the provisional measures ordered on his behalf. Accordingly, the Tribunal considers that the State's obligations within the framework of these provisional measures, particularly the obligation to refrain from executing Mr. DaCosta Cadogan, are superseded by those that are ordered in the present Judgment as of the date of its notification. [FN95]

[FN95] Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 2, 2004. Series C No. 107, para. 196; Case of Boyce et al., supra note 20, para. 129, and Case of Raxcacó-Reyes, supra note 22, operative paragraph 15.

XI. OPERATIVE PARAGRAPHS

128. Therefore,

THE COURT

DECIDES,

unanimously,

1. To dismiss the preliminary objections submitted by the State, in accordance with paragraphs 20, 25, and 30 of the present Judgment.
2. To lift the provisional measures ordered in favor of Tyrone DaCosta Cadogan, as the obligations of the State within the framework of those provisional measures are hereby superseded by those ordered in the present Judgment, in accordance with paragraph 127 hereof.

DECLARES,

unanimously, that:

3. The State violated, to the detriment of Tyrone DaCosta Cadogan, the rights recognized in Article 4(1) and 4(2) of the American Convention on Human Rights, in relation to Article 1(1) thereof, in accordance with paragraphs 46 to 59 of this Judgment.
4. The State is not responsible for the violation of Article 5(1) and 5(2) of the American Convention on Human Rights, in accordance with paragraph 62 of this Judgment.
5. The State failed to comply with Article 2 of the American Convention on Human Rights, in relation to Articles 1(1), 4(1), 4(2), and 25(1) thereof, in accordance with paragraphs 68 to 75 of this Judgment.
6. The State violated, to the detriment of Tyrone DaCosta Cadogan, the rights recognized under Article 8(1), 8(2)(c), and 8(2)(f) of the American Convention on Human Rights, in relation to Article 1(1) and 4(1) thereof, in accordance with paragraphs 79 to 90 of this Judgment.
7. The State is not responsible for the violation of Article 8(2)(e) of the American Convention on Human Rights, in accordance with paragraph 93 of this Judgment.

AND HOLDS,

unanimously, that:

8. This Judgment constitutes, per se, a form of reparation.
9. The State shall adopt, within a reasonable time and in accordance with paragraph 104 of this Judgment, the legislative or other measures necessary to ensure that the Constitution and laws of Barbados, particularly Section 2 of the Offences Against the Person Act and Section 26 of the Constitution, are brought into compliance with the American Convention.
10. The State shall ensure that all persons accused of a crime whose sanction is the mandatory death penalty will be duly informed, at the initiation of the criminal proceedings against them, of their right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist, in accordance with paragraph 105 of the present Judgment.
11. The State shall set aside and not carry out the death penalty imposed on Tyrone DaCosta Cadogan and provide him, within a reasonable time and in accordance with paragraph 109 of this Judgment, without the need for a new trial, a hearing for the judicial determination of the appropriate sentence in his case, in consideration of the particular characteristics of the crime and the participation and degree of culpability of the defendant. This must be carried out under the new legislative framework applicable in Barbados as a result of the legislative measures ordered by this Tribunal in order to ensure that the imposition of the death penalty does not violate the rights and liberties guaranteed in the Convention.
12. The State shall not impose a sentence of death on Mr. DaCosta Cadogan under the new legislative measures ordered herein, in accordance with paragraph 110 of this Judgment.
13. The State shall make the payment for reimbursement of costs and expenses established in paragraph 121 of this Judgment, in accordance with paragraphs 121 to 124 hereof.
14. The Court shall monitor full compliance with this Judgment, in exercise of its attributes and in compliance with its obligations under the American Convention, and shall close this case once the State has integrally complied with its terms. Within one year of notification of the

Judgment, Barbados shall provide the Court with a report on the measures adopted in compliance thereof.

Judge Sergio García Ramírez informed the Court of his concurring opinion, which accompanies this Judgment.

Drafted in English and Spanish, the text in both languages being authentic, in San Jose, Costa Rica, on September 24, 2009.

Cecilia Medina Quiroga
President

Diego García-Sayán
Sergio García Ramírez
Manuel E. Ventura Robles
Leonardo A. Franco
Margarette May Macaulay
Rhadys Abreu Blondet

John A. Connell
Ad hoc

Pablo Saavedra Alesandri
Registrar

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri
Registrar

SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS OF SEPTEMBER 24, 2009, IN THE CASE OF DACOSTA CADOGAN (BARBADOS)

1. The case of DaCosta Cadogan, to which I attach this opinion, provides the Court another opportunity to repudiate the obligatory or compulsory death penalty, still included in some domestic legal systems, which is contrary – for reasons that the Court has set out on numerous occasions – to the provisions of Article 4 of the American Convention. Indeed, this domestic legal concept does not restrict capital punishment to the most serious offenses, as established in said Article, as it attributes the same degree of seriousness to unlawful acts that should be typified as different offenses and give rise to different punishments.

2. It is worth mentioning that this does not mean merely individualizing punishments in specific cases arising from the same legal offense, but entails the inadequate typification of punishable conduct. In other words, the requirement of Article 4 extends to both the typification of the conduct and selection of the punishment, and to judicial individualization for the purposes of a conviction. This duality has not always been highlighted. Analysis is usually focused on the second aspect, leaving the first at the margins.

3. Taking this observation into account, it seems pertinent to examine the possible violation of Article 9 of the American Convention, in relation to Articles 2 and 4. Criminal legality – both formal and material, and included in the concept of law supported by the Inter-American Court – is not satisfied by the mere typification, in terms that are reasonably clear and unambiguous, of punishable conduct. This typification must meet all the provisions of the Convention that legitimate or provide grounds for an incriminating norm. For that reason, the domestic legislator has an obligation not to criminalize conduct that should not constitute an offense, to typify conduct whose typification arises from norms of international human rights law (for example, genocide, torture, and forced disappearance), and must separate the different types of unlawful acts that should not receive the same treatment (including offenses of the same kind with different degrees of severity, such as simple homicide, manslaughter, and aggravated homicide) into different types of crimes with different punishments. All this is significant from the point of view of international human rights law and its projection on domestic criminal law, which must be "re-thought," as some scholars have said, in light of the former and of the jurisprudence of the Inter-American Court, which has already ruled on this matter specifically in relation to the obligatory or compulsory death penalty.

4. I will not make further reference to the reasons on which the Court's clear and constant position on the so-called obligatory or compulsory death penalty is based, since it has been set out, as I mentioned, on several occasions, leading the Court to decline responding to the advisory opinion requested by the Inter-American Commission on this issue, as stated in the Court's Order of June 24, 2005.

5. However, the DaCosta Cadogan judgment allows the Court to observe the promising signs that are appearing on the horizon of domestic legislation on capital punishment. Evidently, the goal should be the total and definitive abolishment of this sanction, which many people – myself included – have considered and consider unlawful, as well as proven to be ineffective for achieving its proposed objective: reducing crime. The day must come when universal consensus – which for now does not appear to be near – establishes the prohibition of capital punishment within the framework of jus cogens, as in the case of torture.

6. Nevertheless, abolition is not included in the provisions of the American Convention on Human Rights, which tends towards this, but does not eliminate the punishment; it merely reduces, minimizes, and conditions it. The penalty is limited, as much as it was possible to do so at the 1969 Conference of San José, through different kinds of restrictions: (a) substantive, regarding the offenses to which it applies (the point at which the issue of the obligatory or compulsory death penalty appears); (b) procedural, regarding the characteristics of the proceedings and the means of objection, appeal or substitution that should be observed therein; (c) subjective, regarding persons – groups or categories of persons – to which this punishment

cannot be applied or who cannot be executed even if it has been imposed on them, and (d) for reasons of progressive development, inasmuch as the death penalty may not be re-introduced once it has been abolished.

7. The abolition sought by the fourteen States that signed an abolitionist declaration presented during the 1969 Conference (even by some that delayed excluding it from their domestic law or that have still not done so), has again been proposed in a specific protocol on the matter. It should be said that it does not, as of yet, involve complete abolition, as would be desirable: only relative abolition, inasmuch as the possibility of retaining the death penalty remains open for very serious alleged offenses in a situation of war. Also, it is remarkable, in a negative sense, that this protocol has been ratified by the least number of States of all the instruments that make up the Inter-American human rights corpus juris: only 11 States have ratified it, in contrast, for example, to the 24 that have ratified or adhered to the American Convention itself (still a very reduced number; the aspiration continues to be the universalization of rights and their guarantees: rights and courts for everyone), or in contrast to the Convention for the Elimination of Violence against Women (Belem do Para), which has been ratified by 32 States, the greatest number in our regional experience, in the same way that a large number of States are parties to CEDAW.

8. In any case, we must observe what I have called the promising signs on the horizon that are materializing in recent developments in the Caribbean countries. We should welcome these developments and encourage their continuation. They are part of the indispensable national appropriation of international human rights law, and, specifically, Inter-American human rights law, which is fortunately increasing. This appropriation has been occurring in recent years, as I have often stated, through different effective means: constitutional, legal, jurisdictional, political, and cultural. It must continue. We should not lose sight of the fact that the international system for the protection of human rights is subsidiary or complementary to national systems of protection. It is at the national level where the greatest battle in favor of human rights must be won, encouraged by the domestic forces that militate for human rights and supported by international bodies – such as the Inter-American Court – that are called on to perform their tasks in accordance with their nature and attributions.

9. In some countries of the Caribbean, capital punishment has remained in force despite provisions which disfavor them in constitutional texts. Secondary provisions in criminal matters, specifically those that include obligatory capital punishment, have enjoyed a sort of immunity from the new constitutions. This is the case in Barbados, with regard to Section 2 of the Offenses Against the Person Act, the constitutionality of which cannot be contested because it is prohibited by the "savings clause" contained in Article 26 of the Constitution. In other words, capital punishment prevails even when it collides with values and principles contained in the Constitution. Of course, the Inter-American Court has ruled against secondary provisions that prevent constitutional norms that are more favorable to the respect and protection of human rights from having full effect. Fortunately, some rulings of the Caribbean domestic courts or of the Privy Council have gone in that direction.

10. Important legislative changes have been made on the subject in Jamaica, which has initiated a new era. Also important is the decision announced by the Government of Barbados,

embracing decisions of the Inter-American Court, that it will reform its criminal law and adapt it to constitutional principles so as to exclude the obligatory or compulsory death penalty. It is true that these reforms are still pending – and the Inter-American Court notes this in the DaCosta Cadogan judgment when considering that there has been a violation of Article 2 of the American Convention – but it is also true that an explicit political will can be observed, formally expressed and with broad commitment, which allows us to suppose that greater changes will soon be adopted in the laws of Barbados.

11. In this opinion, I wish to refer to an issue that is important, in my view, and which the Inter-American Court has also noted in this judgment, that is, the failure of the State to ensure the most thorough defense of the accused who confronts the death penalty due to the nature of the offense committed and in consideration of particular personal circumstances. This relates to how due process was understood and applied in this case, and further, in my opinion, in any similar case. This involves the restriction on the death penalty arising from procedural issues, in addition to its restriction based on substantive issues to which I referred in the preceding paragraphs.

12. According to the law in force in Barbados (or, more broadly, the norms of Barbados, in order to include the provisions of formal statutes, practice, and jurisprudence, under the framework of the common law), the death penalty is not applicable in the case of individuals who have committed offenses sanctioned with this punishment but who, at the time they committed them, suffered from mental health problems or other situations (alcohol or drug addiction) with which this normative associates the same juridical consequence. Thus, there are hypotheses for excluding the death penalty which, logically, constitute presumptions to be considered when conducting proceedings and delivering the judgment. The presence or absence of these exclusions influences the alternative that looms over the individual: life or death, as stated in the Court's judgment.

13. It is not merely a question of the ability of the individual to undergo the trial lucidly, or of his competence to take part in the oral proceedings and understand the charges against him. Although this is significant, it is not everything. It is a question of the pertinence or irrelevance of undertaking proceedings and formulating claims – both the State's responsibility – that will lead to the death penalty or, in contrast, undertaking proceedings which have consequences that do not entail this very serious punishment. In this regard, one can speak of the relevance of the definition adopted as a basis for the State's punitive action.

14. In these circumstances, it seems evident that the State should take into account the regime of international human rights law on the trying of individuals that may be sentenced to capital punishment. It is clear that very demanding standards exist in this regard, as can be seen from the 1984 United Nations Safeguards, which require the most complete defense of the accused – points 4 and 5 – and as can be seen from Article 4 of the American Convention. Criminal proceedings should be particularly careful about guaranteeing rights, and the State's criminal action should proceed in the same direction – and in the same spirit – through the different public agents who intervene in these matters: the police, prosecutors, courts, among others. No State body can exempt itself from these essential requirements.

15. The tribunal is charged with guaranteeing the human rights of the accused, and this responsibility may not be evaded. Thus, the tribunal's first concern in a case such as that before the Court should be the precise verification that the conditions on which the trial was based were satisfied; in other words, that the factors necessary for the initiation of a trial that would culminate in the death penalty really existed. This required the tribunal to verify that it had reasonably exhausted, if applicable, the possibility of the exclusion of the death penalty due to the mental health of the accused at the time that the crime was committed, and not merely at the time of the trial.

16. In view of the judge's function as guarantor, and of the very high procedural standards in the application of the death penalty, the judge could not depend, nor should he have depended, on the diligence and professional expertise of the defense counsel – also a State official – but should have himself verified that possibility, ordering an appropriate psychiatric examination to that end. This does not rule out the defense lawyer's obligations, but the latter's obligations do not relieve the court of those that are inherent to its elevated responsibility.

17. It should be recalled that the judge instructs the jury to consider the mental situation of the accused as an important element in establishing the verdict. How can the jury – a group of laymen – do this if they have not received sufficient and clear information – necessarily professional, qualified information – on this point? It cannot be left to the discretion of citizens or even of the judge, who is not a psychiatrist.

18. I cannot endorse the idea that, according to the strict rules of the accusatory criminal procedural system, the judge should abstain from assuming probative initiatives and wait for the parties to request essential measures. I refer to the production of evidence on points on which much more than a secondary procedural advantage depends: the determination of the pertinence of a trial that must necessarily culminate in the death penalty. I consider it unacceptable for a judge to act passively in such a case – the omission referred to in the DaCosta judgment – which can lead to the most serious violation of the applicable norms and lead to an injustice. In this situation, the court – a body that "administers justice" – should take upon itself the effective protection of the legal order and not limit itself to waiting for the other participants in the proceedings to do so. Clearly, the requirement for judicial initiative is not limited to one case, but should be a general rule applicable to all cases in which elements exist to justify it.

19. I agree with my fellow members of the Inter-American Court on the advance implied by the judgment in the case of DaCosta Cadogan in relation to the equivalent decision in the Boyce case. To rectify the violation committed in this case, the punishment imposed must be modified – at the very least. A court should be charged with determining this modification – by its nature a judicial act – through a judicial proceeding. It is worth insisting that the application of punishments – and consequently the modification of punishments that have been applied – is clearly part of the judicial function. The administrative procedure of commutation (if this were the case) or the remedy of pardon, with its component of "mercy," is not sufficient. When international courts have dealt with the rectification of very serious violations of due process, they have decided that it should proceed through judicial channels, with a hearing and the defense of the individual involved. The Inter-American Court has ruled similarly.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Registrar