

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS***

OF MARCH 11, 2020

CASE OF DACOSTA CADOGAN V. BARBADOS

**MONITORING COMPLIANCE WITH JUDGMENT AND
REIMBURSEMENT OF THE VICTIMS' LEGAL ASSISTANCE FUND**

HAVING SEEN:

1. The Judgment on preliminary objections, merits, reparations and costs (hereinafter "the Judgment") delivered by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") on September 24, 2009.¹ The Court declared the international responsibility of the State of Barbados (hereinafter "the State" or "Barbados") for the violation of the rights to life and to personal integrity of Tyrone DaCosta Cadogan. These violations were declared due to the imposition of the mandatory death penalty on the said victim who was convicted in May 2005 of the crime of murder, as established in section 2 of the Offences Against the Person Act of 1994. This law established that any person convicted of murder would be sentenced to, and suffer, death. On that matter, the Court considered that the mandatory imposition of the death penalty, mechanically and generally for all persons guilty of murder, violated the prohibition of the arbitrary deprivation of the right to life, since it did not allow to individualize the sentence in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused, and, furthermore, it did not restrict its application to the most serious crimes. In addition, the Court declared that the State did not comply with the obligation to adopt domestic legislative measures regarding the rights to life and to judicial protection, given that it maintained, *per se*, and also applied to the victim, section 2 of the Offences Against the Person Act, and because section 26 of the Constitution of Barbados prevented judicial scrutiny over section 2 of the Offences Against the Person Act. Lastly, the Court established that the State violated the victim's right to judicial guarantees because, in a criminal proceeding that could culminate in the death penalty, Mr. DaCosta was not guaranteed the adequate means for the preparation of his defense. In this regard, it was verified that the victim's mental health was never fully evaluated during the criminal proceedings against him, even though evidence and arguments were submitted concerning alleged alcohol dependence and mental disorders that, if verified, could have allowed for certain mitigating circumstances to be taken into account in the determination of the punishment.

2. The Court established that its Judgment constitutes by itself a form of reparation and, in addition, ordered the State certain reparation measures (*infra consideranda* 1 and 3).

* Judge Eduardo Vio Grossi did not participate in the deliberation and signing of this Resolution for reasons of *force majeure*.

¹ Cf. *Case of Dacosta Cadogan v. Barbados. Preliminary objections, merits, reparations and costs*. Judgment of September 24, 2009. Series C No. 204. The complete text is available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_204_ing.pdf. The Judgment was notified on October 20, 2009.

3. The Order on monitoring compliance with Judgment issued by the Court on November 21, 2011, jointly, in the case of *Boyce et al.* and in the case of *DaCosta Cadogan*.²
4. The report submitted by the State on March 1, 2012.
5. The written observations presented by the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") on May 2, 2012.
6. The written observations presented by the representatives of the victims (hereinafter "the representatives")³ on May 3, 2013.
7. The brief submitted by the representatives of the victims on October 28, 2014, in order to require the summoning of a monitoring compliance with judgment hearing.
8. The Order on reimbursement of the Victims' Legal Assistance Fund (hereinafter "the Assistance Fund") issued by the Presidency of the Court on August 2, 2015, jointly, in the case of *Boyce et al.* and in the case of *DaCosta Cadogan*, declaring admissible the request of the representatives to receive the support of such Fund.⁴
9. The joint private hearing on monitoring compliance with judgment in the cases of *Boyce et al.* and *DaCosta Cadogan* held on September 3, 2015 at the seat of the Court.⁵
10. The Order on reimbursement of the Victims' Legal Assistance Fund issued by the Court on November 14, 2017, jointly, in the case of *Boyce et al.* and the case of *DaCosta Cadogan*, regarding reimbursement of the expenses related to appearance at the above-mentioned hearing (*supra* having seen paragraph 8).⁶
11. The reports presented by the State between September 2015 and December 2018, in response to the requests made by the Court or its Presidency through notes of the Court's Secretariat.
12. The written observations presented by the victims' representatives between October 2015 and February 2019.
13. The written observations presented by the Commission on March 6, 2019.

CONSIDERING THAT:

1. In the exercise of its jurisdictional function of monitoring compliance with its decisions,⁷ the Court has been monitoring the execution of the Judgment delivered in this case more than 10 years ago (*supra* having seen paragraph 1). In the Judgment, the Court ordered five reparation measures (*infra consideranda* 3, 5, 17 and 23). The Tribunal issued an Order in November 2011 (*supra* having seen paragraph 2) in which it declared that

² Available at: http://www.corteidh.or.cr/docs/supervisiones/Boyce_21_11_11_%20ing1.pdf.

³ Messrs. Saul Lehrfreund and Parvais Jabbar of the Simons Muirhead & Burton law office.

⁴ Available at: http://www.corteidh.or.cr/docs/asuntos/dacostaboyce_3_08_15_eng.pdf.

⁵ They appeared at this hearing: (a) for the victims: Andrew Pilgram QC and Saul Lehrfreund, and (b) for the Inter-American Commission: Silvia Serrano Guzmán. Also, the plenary of the Court agreed that, for the State, Jennifer Edwards, the State Attorney General and Charles Leacock, Director of Public Prosecutions, would participate in the said hearing by videoconference.

⁶ Available at: http://www.corteidh.or.cr/docs/asuntos/boycedaco_fv_17_ing.pdf.

⁷ This authority is also derived from the provisions of Articles 33, 62(1), 62(3) and 65 of the American Convention on Human Rights and 30 of the Court's Statute, and is regulated in Article 69 of its Rules of Procedure.

Barbados had fully complied with one reparation measure,⁸ and also determined that it had partially complied with one reparation (*infra considerandum* 18).

2. Pursuant to Article 68(1) of the American Convention on Human Rights, “[t]he States Parties to the Convention undertake to comply with the Judgment of the Court in any case to which they are parties.” This obligation includes the State’s duty to inform the Court of the steps taken to comply with each measure ordered, and is essential to enable the Court to evaluate the status of compliance with the judgment as a whole.⁹ The States Parties to the Convention must ensure compliance with the provisions of the Convention and their practical effects (*effet utile*) in their respective domestic laws. These obligations must be interpreted and applied so that the guaranteed protected is truly practical and effective, recalling the special nature of human rights treaties.¹⁰

3. The Court will rule on all the reparation measures pending compliance and the reimbursement to the Legal Assistance Fund ordered in the year 2017 (*supra* having seen paragraph 9). The Tribunal will structure its considerations as follows:

- A. *Adoption of legislative or other measures to ensure that the laws and the Constitution of Barbados are in compliance with the American Convention* 3
- B. *To ensure that anyone accused of a crime whose sanction is the mandatory death penalty is duly informed of the right to obtain a psychiatric evaluation* 8
- C. *To set aside and not carry out the death sentence imposed on Mr. DaCosta Cadogan; as well as to provide him with a hearing for the determination of the appropriate sentence in his case and not impose a death sentence on him* 10
- D. *Reimbursement of the Victims’ Legal Assistance Fund* 12

A. Adoption of legislative or other measures to ensure that the laws and the Constitution of Barbados are in compliance with the American Convention

A.1. Measures ordered by the Court and monitoring of compliance in previous Order

4. In the Judgment the Court concluded that section 2 of the Offences Against the Person Act of 1994,¹¹ which regulated the death penalty in Barbados, was *per se* contrary to the American Convention because it “impede[d] the exercise of the right not to be arbitrarily deprived of life”¹². This was because it “mechanically and generically impose[d] the death penalty on all persons found guilty of murder”, thus “fail[ing] to individualize the sentence in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused”.¹³ Also, the Tribunal determined that section 26 of the Constitution of Barbados¹⁴ was incompatible with the obligations of the State pursuant to

⁸ The State fully complied with the measure relating to making the payment for reimbursement of costs and expenses.

⁹ *Cf. Case of the Five Pensioners v. Peru. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of November 17, 2004, *considerandum* 5, and *Case of Caballero Delgado and Santana v. Colombia. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of November 22, 2019, *considerandum* 2.

¹⁰ *Cf. Case of Ivcher Bronstein v. Peru. Jurisdiction.* Judgment of the Inter-American Court of Human Rights of September 24, 1999. Series C No. 54, para. 37, and *Case of Caballero Delgado and Santana v. Colombia, supra* footnote 9, *considerandum* 2.

¹¹ This article establishes that “[a]ny person convicted of murder shall be sentenced to, and suffer, death.” *Cf. Case of DaCosta Cadogan v. Barbados, supra* footnote 1, para. 70.

¹² *Cf. Case of DaCosta Cadogan v. Barbados, supra* footnote 1, para. 70.

¹³ *Cf. Case of DaCosta Cadogan v. Barbados, supra* footnote 1, para. 57.

¹⁴ Section 26 of the Constitution of Barbados indicates, in what is relevant: “[n]othing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of

Article 2 of the American Convention, in that it “prevent[ed] judicial scrutiny” over the said section 2 of the Offences Against the Person Act.¹⁵

5. When ruling on the corresponding reparations, in the ninth operative paragraph as well as in paragraph 104 of the Judgment, the Court established that the State had to “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”.

6. In its order of November 2011 (*supra* having seen paragraph 2), the Court assessed positively that the State “had decided to abolish the mandatory aspect of the death penalty [... and] section 26 of the Constitution of Barbados”, and that it had formed a “Committee to Study the Ramifications of Repealing Section 26 of the Constitution” in order to consider, *inter alia*, “the legislative changes necessary to repeal the mandatory death penalty” as well as “the repeal of section 26 of the Constitution”. However, since the Court had not yet received information that demonstrated that said legislative amendments had been made, it concluded that the measure was still pending compliance and required the State “an updated report on the status of the draft bills reviewed by the ‘Committee to Study the Ramifications of Repealing section 26 of the Constitution’, as well as a copy of those bills”.¹⁶

A.2. Considerations of the Court

7. The Court notes that, from the moment the Judgment was delivered up until mid-2018, Barbados, through the Committee to Study the Ramifications of Repealing section 26 of the Constitution (*supra* *considerandum* 6), prepared several bills in order to adapt its domestic law to what had been requested by the Inter-American Court, namely: (i) the “Offences Against the Person (Amendment) Bill, 2015,” which sought “to abolish the mandatory imposition of the penalty of death for the offence of murder”;¹⁷ (ii) the “Constitution (Amendment) Bill, 2014,” which purpose was, *inter alia*, to “remove the provision authorising a mandatory sentence of death in section 15” and “to amend section 26 to redefine the effect of existing law in relation to the fundamental rights provisions”,¹⁸ and (iii) the “Penal System Reform (Amendment) Bill, 2014”, in order to “improve (a) the guidelines applicable to the mitigation of an offender’s sentence, and (b) the general judicial

sections 12 to 23 to the extent that the law in question (a) is a law (in this section referred to as “an existing law”) that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day [...]”.*Cf. Case of Boyce et al. v. Barbados. Preliminary objection, merits, reparations and costs supra* footnote 1, para. 75, footnote 69.

¹⁵ *Case of Dacosta Cadogan v. Barbados, supra* footnote 2, para. 75.

¹⁶ In the said Order it was verified that said Committee had examined three bills: the “Constitution (Amendment) Bill, 2010”; the “Offences Against the Person (Amendment) Bill, 2014,” and the “Penal System Reform (Amendment) Bill, 2010.”

¹⁷ *Cf.* “Offences Against the Person (Amendment) Bill, 2015” (annex to the State’s report of September 2, 2015).

¹⁸ *Cf.* “Constitution (Amendment) Bill, 2014” (annex to the State’s report of September 24, 2015). In addition, previously, in its report of March 1, 2012, the State submitted a copy of the “Constitution (Miscellaneous Provisions) Bill, 2012,” which aimed at “the repeal and replacement of section 15 to remove the reference to the mandatory sentence of death” and “the repeal of section 26, that is, the provision that saves certain laws that are inconsistent with sections 12 to 23 of the Constitution, which sections set out the fundamental rights and freedoms of the individual”. However, in its subsequent reports, the State did not refer to this bill again, merely reporting on the “Constitution (Amendment) Bill, 2014”.

sentencing guidelines”.¹⁹ According to the information provided by the parties,²⁰ none of these bills had, up until mid-2018, passed the necessary steps to become law in force. Moreover, the State informed that two other bills, regarding prisons, had been enacted and were in force,²¹ although it did not explain the relationship between these bills and the compliance with the guarantees of non-repetition ordered in this case.

8. In their observations of July 6, 2018, the victims’ representatives informed that, on June 27 of that same year, the Caribbean Court of Justice (hereinafter “the CCJ”) issued a decision that resulted in that “the State can no longer impose the mandatory death penalty in Barbados”. Furthermore, the representatives attached a press release dated June 27, 2018, which indicated that this decision “means that all prisoners currently under sentence of death in Barbados will be removed from death row and all those previously sentenced to the mandatory death penalty will also be entitled to be re sentenced”, concluding that, “[t]he decision leaves Trinidad and Tobago as the only country in the Caribbean where the mandatory death penalty continues to be imposed”.²²

9. In this regard, the representatives clarified that this decision “br[ought] domestic legislation in Barbados into conformity with the American Convention with immediate effect”, since: (i) it rendered unlawful the mandatory death penalty in Barbados; (ii) it modified section 2 of the Offences Against the Person Act, allowing the death penalty to be imposed on a discretionary basis in cases in which an individual was found guilty of the crime of murder; (iii) it interpreted the “savings clause” of section 26 of the Constitution as “transitory” and “spent”, so that it is “no longer effective”, and (iv) it established that, within a reasonable time, those persons subject to the mandatory death penalty be re-sentenced.²³ Regarding the effects of this decision, the representatives indicated that “[a]s the CCJ is the highest domestic court in Barbados, its decisions are binding on the State and are effective without further implementation”.²⁴ Consequently, the representatives expressly recognized that, with the said actions, the State had complied with these measures.²⁵ The

¹⁹ Cf. “Penal System Reform (Amendment) Bill, 2014” (annex to the State’s report of September 24, 2015).

²⁰ Cf. State’s reports of February 27, 2012, September 24, 2015, and December 14, 2018, and observations of the representatives of May 3, 2012, and October 1, 2015.

²¹ These are the “Prisons (Amendment) Act, 2015” and the “Prison (Amendment) Rules, 2014,” which eliminated certain sections of these instruments and created a Prisoners Release Board, which replaced the executive powers that, until then, had been held by the Governor General. Cf. State’s reports of September 24, 2015 and report rendered by Barbados in the private hearing held in September 3, 2015. However, in its most recent report, the State clarified that, although the “Prisons (Amendment) Bill, 2015” had completed all the necessary steps and received the assent of the Governor General in March 2015, its entry into force depended on the date that would be fixed through the Parliament’s proclamation, which was not able to happen, due to the fact that Parliament was dissolved on March 5, 2018.

²² Cf. Written observations of the representatives of July 6, 2018.

²³ Cf. Written observations of the representatives of February 22, 2019.

²⁴ According to the agreement that established the CCJ, this court has two types of jurisdiction: (i) original jurisdiction, which it exercises in accordance with the provisions of Part II of said agreement, and (ii) appellate jurisdiction, in the exercise of which “the Court is a superior Court of record with such jurisdiction and powers as are conferred on it by this Agreement or by the Constitution or any other law of a Contracting Party”. Cf. Agreement establishing the Caribbean Court of Justice, Articles III and XXV. Available at: https://ccj.org/wp-content/uploads/2011/09/ccj_agreement.pdf (last seen: March 11, 2020). Meanwhile, section 79 (C) of the Constitution of Barbados establishes that “[t]here is established a Judicature consisting of: (a) the Caribbean Court of Justice [...] and (b) the Supreme Court and Magistrate’s Courts”. Additionally, section 79 (D) establishes that the CCJ shall be “the final Court of Appeal from any decision given by the Court of Appeal”; that the CCJ “shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court”, and that any “decision of the [CCJ] concerning Barbados shall be enforced in Barbados in like manner as if it were a decision of the High Court”. Cf. Constitution of Barbados, section 79, subsections (C) and (D). Available at: <https://www.barbadoslawcourts.gov.bb/wp-content/uploads/consolidatedlaws/actsofbarbados/ConstitutionofBarbados.pdf> (last seen: March 11, 2020).

²⁵ Cf. Written observations of the representatives of February 22, 2019.

State did not contest the information presented by the representatives and, in its subsequent reports, referred to laws it had adopted to implement the decision of the CCJ (*infra considerandum* 15).

10. Based on the documentation provided by the representatives, the Court notes that, on June 27, 2018, the CCJ handed down a judgment in the cases of *Jabari Sensimania Nervais v. The Queen* and *Dwayne Omar Severin v. The Queen*,²⁶ in which it concluded that section 2 of the Offences Against the Person Act was contrary to the Constitution of Barbados insofar as it established the mandatory death penalty.²⁷ The majority vote recognized that this ruling could affect other people who had been sentenced to death under the said law or whose death sentence had been commuted to life imprisonment, indicating its view that said persons should “be brought with reasonable expedition before the Supreme Court for re-sentencing”.

11. The Court appreciates that the CJC’s decision contains provisions that concur with the Inter American Court’s consistent case law concerning the incompatibility of the mandatory death penalty with the obligations derived from the American Convention. Indeed, the majority opinion expressly took into account the Judgment delivered by this Tribunal in this case and the case of *Boyce et al. v. Barbados*, as well as the 2011 joint Order on monitoring compliance with judgments delivered in these two cases in 2011, to state that “Barbados had already accepted that it had an obligation to modify its legislation to remove the mandatory imposition of the death penalty in conformity with international law provisions by which it was bound”. In this regard, the said judgment indicates that:

In 2007, the [Inter-American Court] in the case of *Boyce et al. v Barbados* ruled *inter alia* that through the imposition of the mandatory sentence of death [...] Barbados was in breach of the Convention. The [Court] found that the ‘failure of Barbados to amend or invalidate section 2 of the Offences Against the Person Act so as to bring its laws into compliance with the American Convention constituted a *per se* violation of Article 2 of the Convention’ and that [s]ection 26 of the Constitution effectively denied citizens in general, and the alleged victims of violation in particular, the right to seek judicial protection against violations of their right to life.

In 2009 the same [C]ourt, in the case of *Da[C]osta Cadogan v Barbados*, again found *inter alia* that Barbados was in breach of its obligations under the Convention as it related to section 2 of the [Offences Against the Person Act] and section 26 of the Constitution and made similar remedial orders.

In its order monitoring compliance with judgments in *Boyce* and [*DaCosta*] *Cadogan* of November 21, 2011 the [Court] referred to the fact that Barbados had accepted and given undertakings to the [C]ourt to comply with [its] rulings.

12. In this sense, it is notable that the CCJ’s judgment remarked that the imposition of the mandatory death penalty was arbitrary and deprived individuals of the most fundamental human rights, “without considering whether the death sentence as an exceptional form of punishment was appropriate in the particular circumstances of an individual’s case”, and emphasized that “they [did] not believe that the trial process stop[ped] at the conviction of the accused”, but that “the principle of a fair trial [had to] be accorded to the sentencing stage too”.

²⁶ Cf. Judgment of the Caribbean Court of Justice in the cases of *Jabari Sensimania Nervais v. The Queen* (CCJ Appeal No. BBCR2017/002) and *Dwayne Omar Severin v. The Queen* (CCJ Appeal No. BBCR2017/03) of June 27, 2018 (annex to the written observations of the representatives of July 6, 2018). The cases related to individuals who had been convicted of the crime of murder and sentenced to the mandatory death penalty in Barbados.

²⁷ Specifically, the CCJ concluded that this section was incompatible with sections 11(c), 12(1), 15(1) and 18(1) of the Constitution of Barbados.

13. Furthermore, regarding the effect of section 26 of the Constitution of Barbados of impeding scrutiny of the so-called “existing laws”, the CCJ’s judgment considered that the interpretation that the courts of Barbados had been making of this clause was erroneous, and rectified this situation by establishing the correct interpretation. In this regard, it noted that “[i]t is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution.” It recalled that section 26 of the Constitution should be read together with section 4(1) of the Independence Order²⁸, which refers to “existing laws”, so that “[w]here there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution”. Lastly, it clarified that this meant that the judges had “the duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights”.

14. These considerations of the CCJ concur with the spirit behind the guarantees of non-repetition ordered by this Tribunal in the present case. Thus, the Court highlights that this judgment of the CCJ is an example of the constructive dialogue and cooperation between other courts and the Inter-American Court with a view to the compliance with the latter’s judgments.²⁹

15. Lastly, the Court notes that there is a consensus amongst the parties that, only months after the said judgment, the State adopted, *inter alia*: (i) the “Offences Against the Person (Amendment) Act, 2018”; (ii) the “Prisons (Amendment) Act, 2018,” and (iii) the “Penal System Reform (Amendment) Act, 2018.” Even though neither of the parties provided the text of these laws, they both agree that they are in force,³⁰ while the representatives added that their purpose is to “implement the judgment” of the CCJ.³¹

16. Taking into account: (i) that the CCJ’s judgment declared that section 2 of the Offences Against the Person Act was unconstitutional insofar as it established a mandatory death sentence; (ii) that the said judgment interpreted section 26 of the Constitution of Barbados to the effect that the rights and freedoms established in that instrument should prevail over the so-called “existing laws”; (iii) the indication by the representatives, which was not contested by the State, that the CCJ is the highest court of the judicature of Barbados and its decisions do not require the State to take measures to implement them; (iv) that the parties agree on the adoption of legislation by the State which, according to the representatives, implements the CCJ’s judgment, and (v) that the representatives have expressly recognized that, with the said actions, the State has complied with this item, this Court concludes that the State has fully complied with the reparations relating to ensuring

²⁸ Section 4(1) of the Independence Order establishes, in what is relevant: “Existing laws 4. 1. Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Barbados Independence Act 1966 and this Order”. Cf. Judgment of the Caribbean Court of Justice in the cases of *Jabari Sensimania Nervais v. The Queen* and *Dwayne Omar Severin v. The Queen*, *supra* footnote 26.

²⁹ In the same sense, see *Case of Maldonado Vargas et al. v. Chile. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of August 30, 2017, *considerandum* 43.

³⁰ Cf. State’s report of December 14, 2018, and written observations of the representatives of February 22, 2019.

³¹ Cf. Written observations of the representatives of February 22, 2019. The State’s report of December 14, 2018, includes a similar indication. Despite this agreement and the information provided concerning the adopted legislation, in its written observations of March 6, 2019, the Commission welcomed the CCJ’s judgment and considered that “the State should take the legislative steps to amend the Offences Against the Person Act, so as to bring it into conformity with the judgment of the CCJ and the orders o[f]” this Court.

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 a mandatory sentence, and that the Constitution and laws of Barbados are brought into compliance with the American Convention and, specifically, remove the immunizing effect of section 26 of the Constitution of Barbados on existing laws.

B. To ensure that anyone accused of a crime whose sanction is the mandatory death penalty is duly informed of the right to obtain a psychiatric evaluation

B.1. Measure ordered by the Court and monitoring of compliance in previous Order

17. In the tenth operative paragraph and in paragraph 105 of the Judgment, the Court provided that, "in order to guarantee that events such as those analyzed in the [...] Judgment are not repeated", the State had to "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".

18. In its Order of November 2011, the Court declared that Barbados had "partially fulfilled" this measure. It took note of the information provided by the State that a committee charged with considering this issue and made up by different State authorities had considered that "the best procedural moment for the provision of such information would be at the initiation of the criminal proceeding - at the arraignment hearing (the moment when the individual is formally charged with the capital offence in a court of law)". In this regard, the Court considered that "the decision made by the State in order to ensure the fulfillment of this obligation [was] a positive step". However, it indicated that it was necessary for the parties to present "further information [...] on whether the measure decided upon has already been applied and on how it is functioning, if applicable".

B.2. Considerations of the Court

19. The Court recalls that, in the present case, it found that "[t]hough domestic law permits the presiding judge to solicit the opinion of an expert for this purpose, [...] 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". It considered that "[t]he 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", which resulted in that "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". 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",³² it concluded that

³² In particular, the Court highlighted that "[u]nlike 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 [...] such proceedings require[d] 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 [had] submitted before the jury the issue of the effect that alcohol and drugs may have had on the accused's mental

Barbados' omission to inform on the availability of such evaluation had resulted in the violation of Mr. DaCosta Cadogan's right to a fair and ordered the present reparation measure, so that all persons accused of a crime whose sanction is the mandatory death penalty would be duly informed of their right to obtain a psychiatric evaluation.³³

20. In its report of March 2012, Barbados advised that there was a "practice" in place by which "everyone accused of murder is taken to the Psychiatric Hospital for a psychiatric evaluation before their first appearance at court on the charge", which was "working satisfactorily". The representatives and the Commission did not contest the existence of this practice. In their observations, the representatives raised questions regarding what happened once the psychiatric evaluation had been carried out and regarding its nature.³⁴ Meanwhile, the Commission welcomed that this practice existed; however, it considered that it lacked sufficient information on the "effective prevention of similar occurrences", pointing out that it had not been codified.³⁵ Later on, Barbados reported that it had prepared three bills in order to comply with this measure: (a) "Mental Health (Amendment) Bill, 2012";³⁶ (b) the "Criminal Procedure (Amendment) Bill, 2014",³⁷ and (c) the "Criminal Procedure (Amendment) Bill, 2018", adding, with regard to the latter, that it had completed its passage through the House of Assembly and the Senate, and received the Governor General's assent on November 12, 2018³⁸. In addition, the State did not contest the information provided by the representatives concerning the CCJ's judgment declaring the mandatory imposition of the death sentence unconstitutional, on which basis this Court considered that Barbados had fully complied with the measure relating to adopt all necessary measures to ensure that Section 2 of the Offences Against the Person Act, which established the mandatory death penalty for cases of murder, was brought into compliance with the American Convention (*supra consideranda* 8 to 16).

21. Taking into account that the measure examined required the State to take the necessary measures to ensure that all persons accused of a crime whose sanction was the mandatory death penalty would be duly informed of their right to obtain a psychiatric evaluation, and considering that the provision that allowed for the imposition of the mandatory death penalty has been declared unconstitutional and is no longer in force, the

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". Cf. *Case of DaCosta Cadogan v. Barbados*, *supra* footnote 1, para. 89.

³³ Cf. *Case of DaCosta Cadogan v. Barbados*, *supra* footnote 1, paras. 88 and 90.

³⁴ The representatives noted that it was necessary that the State informed "whether a written psychiatric report is routinely provided to the trial judge, the prosecution and the defence", as well as further details on "the specific nature of the psychiatric evaluation" and, in particular, whether this "is limited to pre-trial issues such as competence and fitness to plead/ stand in trial, or whether it also includes an assessment for mental condition defenses relating to the defendants['] mental state at the time of [the] alleged offence". Cf. Written observations of the representatives of May 3, 2013.

³⁵ Written observations of the Commission of May 2, 2012.

³⁶ According to the text of the draft bill provided by the State, its purpose was "to make it a mandatory requirement that a Court must inform an accused person charged with the offence of murder or an indictable offence for which the penalty is death, of his entitlement to have a psychiatric evaluation carried out by a senior consultant psychiatrist before the commencement of his trial". Cf. Mental Health (Amendment) Bill, 2012 (annex to the State's report of March 1, 2012).

³⁷ According to the text of the draft bill provided by the State, its purpose was to "make provision for a person who is to be arraigned upon indictment for the offence for murder to undergo a psychiatric evaluation to determine whether that person is fit to plead; and [... to] allow judges to intervene where a defence should be raised in relation to an accused". Cf. Criminal Procedure (Amendment) Bill, 2014 (annex to the State's report of September 24, 2015).

³⁸ Cf. State's report of December 14, 2018. Barbados did not submit copy of said bill.

Court concludes that the State has fully complied with the reparation ordered in the tenth operative paragraph of the judgment.

22. Nonetheless, this Court considers it would be desirable for this type of evaluation to be conducted in all cases involving offenses that could result in the imposition of the death penalty, even though this is no longer mandatory, owing to the “exceptionally serious and irreversible nature of the death penalty”, and the fact that the obligation to respect and ensure the right to a fair trial is “most broad and demanding in those processes in which a penalty of death may be imposed”.³⁹

C. To set aside and not carry out the death sentence imposed on Mr. DaCosta Cadogan; as well as to provide him with a hearing for the determination of the appropriate sentence in his case and not impose a death sentence on him

C.1. Measures ordered by the Court and monitoring of compliance in previous Order

23. In the eleventh and twelfth operative paragraphs and in paragraphs 109 and 110 of the Judgment, the Court established the following reparation measures:

- i) to “set aside and not carry out the death penalty imposed on [Mr.] DaCosta Cadogan and provide him, within a reasonable time and [...] 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 had to be “carried out under the new legislative framework applicable in Barbados as a result of the legislative measures ordered by this Court in order to ensure that the imposition of the death penalty does not violate the rights and freedoms ensured in the Convention”, and
- ii) “not [to] impose a sentence of death on Mr. DaCosta Cadogan under the new legislative measures ordered” in the Judgement.

24. In its Order of November 2011, the Court welcomed the steps taken by the State to comply with these measures.⁴⁰ The Tribunal also underlined that, according to the information provided by the parties, their compliance “necessarily depend[ed] on [the] enactment of the legislative measures ordered in the [...] Judgment”. Therefore, it “f[ound] that [said] reparations ha[d] not been complied with and request[ed] that the State submit information specifying when Mr. Cadogan’s resentencing hearing is likely to occur”.

C.2. Considerations of the Court

25. The Court notes that, between March 2012 and mid-2018, the State informed that it had drafted several bills in order to bring domestic law into compliance with what had been required in the Judgment in relation to the mandatory nature of the death penalty,⁴¹ and

³⁹ Cf. *Case of DaCosta Cadogan v. Barbados*, *supra* footnote 1, paras. 84 and 85.

⁴⁰ The Court pointed out that the State had “highlighted that its draft legislation abolishing the mandatory death penalty [...] provide[d] for the judicial determination, at a review hearing, of the sentence of any person convicted of murder and sentenced to death prior to the date of entry into force of that legislation”, and that it “further provide[d] that a person whose sentence [was] reviewed [...] would] not be subjected to a sentence of death”; thus, Mr. DaCosta Cadogan would be provided with “a re-sentencing hearing [a]s soon as the legislative changes ha[d] been enacted”.

⁴¹ These are: (i) the “Offences Against the Person (Amendment) Bill, 2015”; (ii) the “Constitution (Amendment) Bill, 2014” and (iii) the “Penal System Reform (Amendment) Bill, 2014” (*supra considerandum* 15 and footnotes 30 and 31).

explained that the date of Mr. DaCosta Cadogan's re-sentencing hearing were dependent on the moment that these bills had passed all the necessary legislative stages to become binding law.⁴² Therefore, the State proposed several possible dates to hold the said hearing, accounting for the time that this process would require; nevertheless, since the bills had not yet been enacted (*supra considerandum* 7), the hearing had not been held.

26. As it was previously mentioned (*supra consideranda* 8 to 16), in June 2018, the CCJ declared that section 2 of the Offences Against the Person Act was unconstitutional insofar as it established the mandatory nature of the death penalty, also referring to the *erga omnes* effects of its ruling, by recognizing that it could affect other people who had been sentenced to death under the said law or whose death sentence had been commuted to life imprisonment. In this regard, it considered that these people should "be brought with reasonable expedition before the Supreme Court for re-sentencing".⁴³ Taking this into account, as well as the fact that, to date, Barbados has not carried out the death sentence imposed on Mr. DaCosta Cadogan, this Court concludes that the State has complied with the part of the reparation measure ordered in the eleventh operative paragraph of the Judgment, relating to setting aside and not carrying out the death sentence imposed on Mr. DaCosta Cadogan (*supra considerandum* 23, section "i"). As for the other part of such measure, relating to providing Mr. DaCosta Cadogan with a hearing for the judicial determination of the appropriate sentence in his case, this Tribunal notes that, even though the State has indicated that the celebration of the hearing depended on bringing the legislation of Barbados into compliance with what had been ordered in the Judgment (*supra considerandum* 25), now that this obstacle has been overcome, it still has not informed the date on which it will hold the said hearing.

27. Lastly, regarding the measure ordered in the twelfth operative paragraph, regarding the obligation not to impose the death penalty on Mr. DaCosta Cadogan under the new legislative measures ordered in the judgment (*supra considerandum* 25, section "ii"), the Court notes that the representatives indicated that Barbados had complied with this part of the measure on the basis of the CCJ's ruling and the legislative measures that, as indicated by both parties, are now in force, among which is the "Offences Against the Person (Amendment) Act, 2018" (*supra considerandum* 15). The Court notes that section 2(3) of this act establishes that "[w]here the Court sentences a person to death and the sentence of death is not executed within a period of 5 years from the date of the sentence," as is the case of the victim in the instant case, "the sentence shall be commuted by order of the Court, to a sentence of imprisonment that the Court shall specify having regard to the guidelines set out in sections 39 and 41 of the Penal System Reform Act, Cap. 139". In addition, section 2(A) specifically refers to the case of those persons who, like Mr. DaCosta Cadogan, were convicted of murder and sentenced to death prior to the entry into force of the amendment, and whose sentence was not commuted, establishing that, in such cases, the sentence shall be set aside and a new sentence imposed, which cannot consist of another death sentence.⁴⁴ Consequently, the Court considers that Barbados has complied with this part of the Judgment.

⁴² On this matter, the State clarified that, in order to enter into force, such bills required "among other things, [...] certification by the Attorney-General, approval by the Cabinet, enactment by Parliament, and publication in the Official Gazette". *Cf.* State's report of March 1, 2012.

⁴³ *Cf.* Judgment of the Caribbean Court of Justice in the cases of *Jabari Sensimania Nervais v. The Queen* and *Dwayne Omar Severin v. The Queen*, *supra* footnote 26.

⁴⁴ Both parties referred to the "Offences Against the Person (Amendment) Act, 2018" in the State's report of December 14, 2018, and the written observations of the representatives of February 22, 2019. Although none of the parties submitted a copy of its text, the Tribunal's Secretary consulted it at the official website of the Parliament of Barbados, which is available at <https://www.barbadosparliament.com/bills/details/307> (last visit: March 11, 2020).

28. Based on the above, the Court concludes that Barbados has partially complied with the measure ordered in the eleventh operative paragraph of the Judgment with regards to setting aside and not carrying out the death sentence imposed on Mr. DaCosta Cadogan, while it remains pending to provide him, within a reasonable time and “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 [his] participation and degree of culpability”, all in light of the new legislative adopted. Furthermore, the Tribunal considers that the State has fully complied with the measure ordered in the twelfth operative paragraph of the Judgment, relating to the obligation not to impose the sentence of death on Mr. DaCosta Cadogan under the new legislative measures.

29. Finally, the State is reminded that providing the victim with a hearing is the only measure pending compliance in order to consider archiving the case. Also, although the Judgment required that this measure be complied with within a reasonable time, to date more than ten years have passed without it being fulfilled because the legislative amendments required in order to comply with it were only enacted two years ago. Consequently, the State is required, within the term granted in operative paragraph 6, to inform any decision on the sentence imposed to Mr. DaCosta Cadogan and, in case the hearing ordered by this Court has not yet taken place, to proceed without delay to set the date for the judicial determination of the appropriate sentence in the case of Mr. DaCosta.

D. Reimbursement of the Victims’ Legal Assistance Fund

30. In the Order of November 2017, the Court required the State to carry out, within six months of its notification,⁴⁵ the reimbursement to the Legal Assistance Fund of the sum of US\$ 1,999.60 (one thousand nine hundred and ninety-nine United States dollars and sixty cents) for the expenses incurred for the cancellation of air tickets for the appearance of the representatives at the hearing on monitoring compliance originally scheduled for July 1, 2015, since it was delayed at the request of the State, which made this request with only seven days’ notice before the scheduled date.

31. To date, Barbados has not provided any information in this regard, even though more than a year and a half has elapsed since the six-month term established in the Order expired to make the said reimbursement.⁴⁶ Consequently, the State is reminded, with regards to the financing of the Court’s Assistance Fund, that the available resources are limited. Since it came into operation in 2010, it has depended on voluntary contributions from cooperation sources and one OAS Member State,⁴⁷ as well as on the reimbursements made by States found responsible. Accordingly, the failure of States to promptly comply with the reimbursement to the Assistance Fund of the amounts ordered in the corresponding decisions, directly affects its sustainability and, above all, the access to justice of the alleged victims, and if applicable, victims before this Tribunal.⁴⁸

⁴⁵ The Order was notified to the parties and the Commission on December 22, 2017.

⁴⁶ Said term expired on June 25, 2018.

⁴⁷ The Victims’ Legal Assistance Fund does not receive resources from the OAS regular budget. To date the funds have come from cooperation agreements signed by the Tribunal with Norway and Denmark, and from the voluntary contribution made by Colombia. In this regard, see: 2018 Annual Report of the Inter-American Court of Human Rights, Chapter X, section A, available [in Spanish] at: <http://www.corteidh.or.cr/tablas/informe2018/ingles.pdf>.

⁴⁸ Cf. *Case of Duque v. Colombia. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of November 22, 2018, *considerandum* 24.

32. Accordingly, the Court requires the State, in compliance with its treaty obligations, to proceed as soon as possible to make the said reimbursement to the Court's Legal Assistance Fund (*supra considerandum* 30).

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

by virtue of its authority to monitor compliance with its own decisions, and pursuant to Articles 33, 62(1), 62(3), 65, 67 and 68(1) of the American Convention on Human Rights, Articles 24, 25 and 30 of the Statute of the Court, and Articles 31(2) and 69 of its Rules of Procedure, as well as Articles 1, 4 and 5 of the Rules for the operation of the Victims' Legal Assistance Fund,

DECIDES:

1. To declare, in accordance with *consideranda* 7 to 16, 19 to 22 and 25 to 29 of this Order, that the State has fully complied with the following reparation measures:
 - a. to adopt such legislative or other measures necessary to ensure that the Constitution and laws of Barbados are brought into compliance with the American Convention, in particular, section 2 of the Offences Against the Person Act, and section 26 of the Constitution of Barbados (*ninth operative paragraph of the Judgment*);
 - b. to ensure that anyone charged with an offense punishable by the mandatory death penalty will be duly informed at the start of the criminal proceedings against them of their right to obtain a psychiatric evaluation conducted by a State-employed psychiatrist (*tenth operative paragraph of the Judgment*), and
 - c. not to impose a sentence of death on Mr. DaCosta Cadogan under the new legislative measures (*twelfth operative paragraph of the Judgment*).
2. To declare, in accordance with *consideranda* 25 to 29 of this Order, that the State has partially complied with the measure ordered in the *eleventh operative paragraph of the Judgment* relating to setting aside and not carrying out the death penalty imposed on Mr. DaCosta Cadogan, while it remains pending to provide him, within a reasonable time and without the need for a new trial, a hearing for the judicial determination of the appropriate sentence in his case, based on the specific characteristics of the crime and his participation and degree of culpability; all this, under the new legislative framework.
3. To keep open the procedure of monitoring compliance with the measure relating to providing Mr. DaCosta Cadogan, within a reasonable time and without the need for a new trial, with a hearing for the judicial determination of the appropriate sentence in his case, based on the specific characteristics of the crime and his participation and degree of culpability; all this, under the new legislative framework (*eleventh operative paragraph of the Judgment*).
4. To require Barbados, in accordance with *consideranda* 30 to 32 of this Order, to proceed to make the reimbursement of the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights for the sum indicated in the Order on reimbursement of the Victims' Legal Assistance Fund issued by the Court on November 14, 2017, jointly, in the case of *Boyce et al.* and the case of *DaCosta Cadogan*, as soon as possible.
5. To require the State to adopt, finally and as soon as possible, all necessary measures to comply effectively and promptly with the pending element of the Judgment on

preliminary objections, merits, reparations and costs handed down in this case, as established in this order, and with the provisions of Article 68(1) of the American Convention on Human Rights.

6. To require the State of Barbados to submit to the Inter-American Court of Human Rights, by July 23, 2020, at the latest, a report on the measures pending compliance as indicated in the first and third operative paragraphs and *consideranda* 29 and 32 of this Order.

7. To require the victim's representatives and the Commission to present observations on the State's report mentioned in the preceding operative paragraph, within four and six weeks, respectively, of receiving the report.

8. To require the Secretariat of the Court to notify this order to the State, the victim's representatives, and the Inter-American Commission on Human Rights.

I/A Court H.R. Case DaCosta Cadogan v. Barbados. Monitoring Compliance with Judgment.
Order of the Inter-American Court of Human Rights of March 11, 2020.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Registrar

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Registrar