IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Case 12.480

LENNOX BOYCE — First alleged victim

JEFFREY JOSEPH — Second alleged victim

FREDERICK ATKINS (Deceased) — Third alleged victim

MICHAEL HUGGINS — Fourth alleged victim

AND

BARBADOS — State Party

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WRITTEN SUBMISSIONS OF ALLEGED VICTIMS

CONTENTS

ANNEXURES

INTRODUCTION

1. In accordance with the Order of the President of the Inter-American Court of Human Rights dated 29th May 2007, the representatives of the alleged victims submit their final written submissions.

2. In these written submissions, the alleged victims will deal (*inter alia*) with five issues of importance:

   i) The imposition of the mandatory death sentence on each of the alleged victims (contrary to Article 4, 5 and 8 of the American Convention).
   ii) The "savings clauses" in the Constitution of Barbados preventing the alleged victims challenging domestically the sentences wrongly imposed on them (violation of Article 2 of the American Convention).
   iii) The method of execution in Barbados – death by hanging - to which they were sentenced and to which they came very close on two occasions. This method is inhuman (contrary to Article 5 of the American Convention).
   iv) The two occasions the alleged victims were wrongly exposed to near execution when the State of Barbados read warrants for their execution, notwithstanding their pending appeals to the Judicial Committee of the Privy Council ("JCPC") on the first occasion and to the Inter-American Commission on Human Rights on the second. This was cruel and inhuman (contrary to Article 5 of the American Convention).
   v) The conditions of imprisonment to which the alleged victims were subjected to in Glendiary Prison and Harrison's Point Prison. Such conditions were and are inhuman (in violation of Article 5 of the American Convention).

3. The submissions will also seek to deal with the State's argument on:

   i) The exhaustion of domestic remedies.
   ii) The issue of reparation and costs.

SECTION A: DOMESTIC LAW

The mandatory death sentence

4. The punishment for the offence of murder is prescribed by law in Barbados under section 2 of the Offences Against the Person Act Cap. 141:

> "Any person convicted of murder shall be sentenced to, and suffer, death."

5. This means that all those convicted of murder must be sentenced to death - the sentencing judge has no discretion to pass any other form of sentence, no matter what the particular circumstances of the offence or of the offender.

6. The only exceptions are if the convicted person is:

   i) under 18 years of age; or

   ii) is a pregnant woman [Sentence of Death (Expectant Mothers) Act Cap. 153].

   In all other cases, the death sentence must be passed.

Definition of murder

7. In order to comprehend the breadth of the class of cases which fall within the offence of murder, it is necessary to look at the definition of this offence.

8. Although the *punishment* for murder is specified by statute in Barbadian law, the definition of the offence itself is not contained in any written law: murder remains a common law offence. The traditional definition at common law is:

> "the crime of murder is committed when a person of sound mind and discretion unlawfully kills any reasonable creature in being under the Queen's peace, with intent to kill or cause grievous bodily harm" [Derived from Coke's Institutes, 3 Co. Inst. 47]

9. In 1953, following its inquiry into the mandatory death penalty in the United Kingdom, the British Royal Commission on Capital Punishment 1949-1953 (Cmd. 8932) made the following observations on the common law definition of murder:

> "...there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder. To illustrate their wide range we have set out briefly... the facts of 50 cases of murder that occurred in England and Wales and in

> Scotland during the 20 years 1931 to 1951. From this list we may see the multifarious variety of the crimes for which death is the uniform sentence. Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all."

10. In 1993, an independent enquiry into the mandatory life sentence for murder sponsored by the Prison Reform Trust and chaired by Lord Lane in 1993 found:

> "There is probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder." [cited in *Reyes v The Queen* (2002) 2 WLR 1034 at para. 12]

11. The breadth of the common law offence of murder can be seen on an analysis of its constituent elements:

    (i) **Actus reus**: any act which is a substantial cause of death renders the doer responsible for that death if the other elements of murder are proved. It is not necessary that there should be any contact between the killer and his victim, nor is it necessary that the act in question be the sole, or even the principal cause of death. So, for example, each of the following scenarios would constitute the *actus reus* for murder:

        (a) a person (A) stabs another (B) in the arm, causing a wound that is not, in itself life-threatening. B develops an infection in the wound and dies;

        (b) a person caring for a terminally ill relative withholds medication, thereby hastening death;

        (c) a person (A) strikes another (B), B is drunk and loses his balance more easily than might otherwise be the case. B falls over, bangs his head and dies.

(ii) **Mens rea:** the mental element required to be proved for murder is an intention to kill or to cause grievous bodily harm. "Grievous bodily harm" means "really serious bodily harm". It is a matter for the jury to decide whether a particular injury amounts to "really serious bodily harm", but the case law establishes that an injury may be "grievous bodily harm" even if it is not permanent or dangerous [*R v Ashman* (1858) 1 F & F 88]. It is not a pre-requisite that the injury should require treatment, nor that the harm should have lasting consequences. It can include psychiatric as opposed to physical harm if the jury consider this to be "really serious". So, for example, the following would be sufficient in law to constitute the *mental* element of murder:

(a) an intention to cause psychiatric shock (but *unintentionally,* the person dies, e.g. from a heart attack);

(b) an intention to cause a broken rib (but *unintentionally,* the rib punctures a lung and causes death);

(c) a person (A) strikes another (B) intending to render B unconscious. B collapses and A mistakenly thinks he is dead. A panics and throws, what he thinks is the already dead body into a river. B drowns: *R v Church* [1966] 1 QB 59.

12. Indeed, in Barbados, the breadth of the common law is further expanded by s.8 of the Offences Against the Person Act ["OAPA"]:

"8(1) A person charged with the murder or manslaughter of another shall, although his act was not the immediate or the sole cause of that other's death, be deemed to have killed that other where

(a) he inflicted bodily injury on that other person in consequence of which that other person underwent surgical or medical treatment which caused death;
(b) he inflicted bodily injury on that other person which would not have caused the death of that other person had he submitted to proper surgical or medical treatment or observed proper precautions as to his mode of living;
(c) by actual or threatened violence he caused that other person to perform an act which caused his death, such act being a means of avoiding such violence which in the circumstances would have appeared natural to the person whose death was so caused;
(d) by any act or omission he hastened the death of that other person from any disease or injury which apart from such act or omission would have caused death; or
(e) his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

(2) In the circumstances specified in paragraph (a), it is immaterial whether the treatment was proper or mistaken if it was employed in good faith and with common knowledge and skill."

13. Once any of the above factual scenarios is made out, the distinction as to whether the killing constitutes murder or manslaughter will depend on the *mens rea* of the accused. Since there is no requirement for proof of an intent to kill for the offence of murder to be made out, a person will be guilty of murder provided he is proved to have intended to cause grievous bodily harm.

14. **Secondary parties:** those who "aid, abet, counsel or procure" a crime of murder are themselves liable to be tried, indicted and punished as a principal offender, i.e. if found guilty, are guilty of murder. So, for example, the following would be guilty of murder:

(ii) a person (A) supplies another (B) with a gun, knowing that B is going to use the gun to kill C. B shoots C with the gun. C dies;

(ii) A advises B to kill C. B follows A's advice;

(iii) A drives B to C's house, knowing that B intends to kill C. B kills C.

15. Liability as a secondary party is linked to the principle of **joint enterprise:** this is an important *extension* to the definition of murder. The authoritative statement of the principle of joint enterprise comes from the House of Lords case of *R v Powell; English* [1999] AC 1 HL. This case also represents the law in Barbados. The principle states that where two or more persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise. This includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise. Thus, an example of joint enterprise liability for murder is as follows:

> A and B plan to burgle a house together. A knows that B has a gun. A believes that the house will be unoccupied during the burglary, but he also foresees that if someone were to come home unexpectedly, B would use the gun. A does not want B to use the gun, but decides to go ahead with the burglary in the hope that the situation does not arise. C comes home during the burglary and B shoots her. C dies. Both A and B are guilty of murder.

16. The principle of joint enterprise is to be distinguished from the **felony-murder rule**. The latter has been abolished in Barbados, whilst the principle of joint enterprise remains part of the law. The felony-murder rule was even broader than the principle of joint enterprise in that it made a participant in a felony criminally responsible for any death occurring during or in the furtherance of that felony. Thus, in the example given above, A would be guilty of murder under the felony-murder rule even if he had no idea that B had a gun. Indeed, both A and B would be guilty of murder under the felony-murder rule if neither of them had had a gun, but C had died of shock when she found them in her home.

17. It is of note in this context that duress is *not* a defence to murder. Thus, continuing the above scenario, if, on discovering that B had a gun, A had said he wanted no more to do with the burglary, but B had said "you drive me to the house or I'll shoot you", if A had complied and B had subsequently fatally shot C, A would still be liable for murder, because by driving B to the scene, he had assisted him. Duress is no defence. See *R v Howe* [1987] A.C. 417.

Statutory exceptions to the definition of murder

18. It is right that there exist a number of statutory exceptions and common law defences which either reduce or absolve criminal liability for acts that would otherwise fall within the definition of murder. These are set out below.

19. The **abolition of the felony-murder rule** contained in s.3 OAPA has already been noted.

20. S.4 of the OAPA reduces a person's liability from murder to manslaughter if, at the time of the killing:

> "he was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind or any inherent cause or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing."

This is known as a defence of **"diminished responsibility".**

21. The burden of proving diminished responsibility is on the accused – s.4(2) OAPA.

22. **Counselling, aiding or procuring another to commit suicide** is not murder and is punishable with imprisonment of 14 years – s.12 OAPA. Killing another in the course of a suicide pact is also not murder, but the burden is on the accused person to show that they were so acting – s.13 OAPA.

23. The killing of a child under 12 months by its mother at a time when the balance of her mind was disturbed by reason of child birth or lactation is not murder, but **infanticide** and is punishable as manslaughter – s.14 OAPA.

Common law exceptions or defences

24. At common law, a person who perceives him or herself to be under attack may lawfully do what is reasonably necessary to defend him or herself in the circumstances as he or she honestly believes them to be [*Palmer v R* [1971] AC 814]. This is the defence of **self-defence** and is a complete defence to a charge of murder. In other words, if A kills B, because A honestly believes that B is attacking him and the jury assesses that A's reaction was reasonable in the circumstances as A honestly believed them to be, then A is entitled to be acquitted absolutely: he is guilty of neither murder nor manslaughter. Further, where the issue of self-defence is raised, it is for the prosecution to prove beyond reasonable doubt that the accused was not acting in lawful self-defence.

25. The concept of "**provocation**" provides a partial defence to murder. If provocation is proved, it does not result in acquittal, but it reduces the accused's liability for the killing from murder to manslaughter. Once there is evidence sufficient to raise the issue of provocation, the burden rests on the prosecution to disprove the defence. S.5 OAPA defines the test the jury must apply in assessing a defence of provocation:

> "Where on a charge of murder there is evidence on which the jury can find that the accused was provoked, whether by things done or by things said or by both together, to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

Insanity

26. If, at the time of committing the act of killing, the accused was legally insane, then he is entitled to be found "not guilty by reason of insanity". This is not strictly a defence, but rather a plea which bars the accused from conviction. It applies to all criminal offences and not just to murder. The burden is on the accused to show that at the time of the offence he:

> "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." [*M'Maghten's Case* (1843) 10 CL. & F. 200]

The offence of manslaughter

27. The offence of manslaughter falls into two categories: (i) voluntary manslaughter; and (ii) involuntary manslaughter.

28. Voluntary manslaughter occurs when all of the elements of murder are present, including an intent to kill or cause grievous bodily harm, but the crime is reduced to manslaughter by reason of (a) provocation; (b) diminished responsibility or (c) death being caused in pursuance of a suicide pact.

29. Involuntary manslaughter is unlawful killing without intent to kill or cause grievous bodily harm. An accused is guilty of involuntary manslaughter if:

i) he does an unlawful act (for example an assault) which all sober and reasonable people would inevitably realise must subject the victim to, at least, the risk of some harm, albeit not serious harm. It is immaterial whether or not the accused knew that the act was unlawful and dangerous, and whether or not he intended harm; the mens rea required is that appropriate to the unlawful act in question. A classic example of unlawful act manslaughter is where A throws stones off a road bridge intending to cause criminal damage. A's stone hits B's car causing a traffic accident resulting in death;

ii) he performs an otherwise lawful act which results in the death of another and the act was so grossly negligent as to amount to a crime. A standard example of this type of manslaughter is the case of a medical

professional attending to a gravely ill patient who provides treatment that is so wholly and obviously wrong that, having regard to the risk of death involved in the accused's activities, a jury would properly class them as criminal.

30. The punishment for manslaughter in Barbados is a sentence of up to life imprisonment – s.6 OAPA.

The Circumstances of the Alleged Victims Offences

Lennox Boyce and Jeffrey Joseph

31. Jeffrey Joseph was 24 years of age at the date of the events leading to his conviction for murder. Lennox Boyce was aged 21. Both had been present at Alexandra School, attending a football match with two other friends, Romaine Benn and Rodney Murray. The four young men left the Alexandra School and took a bus to where the deceased, Mark Hippolyte, was playing basketball. A fight ensued between the men, resulting in Mark Hippolyte being chased and ultimately beaten by Boyce, Joseph, Benn and Murray. Witnesses at the trial testified to having seen all four men striking Hippolyte with pieces of wood, although both Boyce and Joseph denied having done so. Members of the public called for help and the four assailants ran away. Hippolyte was taken to the accident and emergency department at a nearby hospital, but his mother subsequently moved him to another hospital. He died five days later as a result of a blood clot on the brain.

32. Prior to the trial, the prosecution offered a plea of manslaughter to both Benn and Murray who both accepted the plea. It is not known whether the prosecution adopted this course on the basis of provocation, since there was some evidence of Hippolyte having thrown stones at his assailants, or on the basis of unlawful act manslaughter. The record of the evidence led at the trial of Boyce and Joseph does not disclose any greater culpability on the part of these men than on the part of Benn and Murray. Indeed, the Crown had indicated prior to trial that pleas of manslaughter would also be acceptable from Boyce and Joseph, but they maintained their innocence and elected to stand trial. Benn and Murray were later sentenced to 12 years imprisonment and it is understood that they are due to be released from prison next year.

33. At trial, the judge did direct the jury that they must be satisfied beyond reasonable doubt that there must have been an intention to kill or to cause really serious bodily harm and that there was no provocation. However, he also gave the following direction in respect of joint enterprise:

> "Where a crime is committed by two or more persons each of them may play a different part but if they are acting together, in concert, as part of a joint plan or agreement to commit it, they are each guilty. Now this plan or agreement does not need any formality about it. It may arise at the very scene and it can be made by whatever words and signals and body language they use to communicate among themselves.
>
> The essence of joint responsibility for a criminal offence is that each defendant shares a common intention to commit the offence and played his part in it however great or small. In such a case it would not matter who had the 1x2 or the 2x3 or whatever or who did what. To put it simply, as simply as I can, the question for you is were they in it together and did they do it together. That is the question." [summing-up p.283 li.4-12]

34. In relation to the issue of causation, the judge gave the following direction:

> "...ladies and gentlemen, even if you find that taking the injured man from the Casualty to QEH aggravated his injuries or even contributed to his death, that does not automatically provide any defence to the accused. The Crown does not have to show that the injuries inflicted by the accused were the only cause of his death. The law is that if at the time of death those injuries were an operating cause and a substantial cause of death then the death in law was caused by those injuries. Therefore it would make no difference whatsoever if there were some other contributing factors provided that you are satisfied that the injuries inflicted by the accused were a significant contribution to his death. That is the law." [summing-up p.289 li.2-16]

Frederick Atkins

35. Frederick Atkins was 28 at the date of the events leading to his conviction. The prosecution case against him was that on the evening of 10 October 1998, he had picked up the deceased, Sharmaine Hurley, in his taxi-mini van. He had driven her to a remote piece of land, fatally stabbed her and taken a number of items of jewellery. The evidence at trial came from witnesses who had also been passengers in the mini-van on the evening of the murder, prior to the offence being committed; circumstantial evidence of the deceased's jewellery being found at Atkins' home and a ring belonging to the deceased

being found in Atkins' girlfriend's possession; and a number of confession statements from Atkins – the veracity of these was disputed at trial.

36. In short, the case against Atkins was that he committed murder in the course or furtherance of a robbery.

Michael Huggins

37. Michael Huggins was aged 25 at the date of the events leading to his conviction. There was an admitted history of violence between Huggins and the deceased, Stephen Wharton. Indeed, the deceased's brother, who had testified for the prosecution at trial, admitted that the deceased had previously stabbed Huggins causing him to be hospitalised. It was nonetheless the Crown's case that on 30 November 1999, Huggins had approached Wharton without provocation and shot him dead. It was Huggins case that Wharton had pulled a gun on him and that this gun had accidentally discharged and shot Wharton while Huggins had struggled to defend himself. This defence was rejected by the jury, who found Huggins guilty of murder.

Submissions on the facts of these cases

38. It is submitted that the facts of these three cases illustrate a number of the features of the common law definition of murder, and of the Barbadian trial process, which make the ambit of the offence of murder so exceptionally broad.

39. In particular, the case of Boyce and Joseph highlights that:

i) the principle of joint enterprise means that Boyce and Joseph may have been found guilty of murder on the basis of common cause with Benn and Murray, even if the jury found Boyce and Joseph to have played a lesser role;

ii) the law on causation means that even if the jury concluded that Hippolyte's injuries were materially exacerbated by his move from one hospital to another, Boyce and Joseph would still have been guilty of murder;

iii) even in a case where the prosecution, at the start of the trial, has indicated that it would be content for the case to be dealt with by way of

a manslaughter conviction, the trial judge has no discretion in respect of disposal once a murder conviction has been returned: he must impose the death penalty.

The Constitution of Barbados

40. Barbados gained full independence on 30 November 1966. On this date, the Constitution became the supreme law of Barbados. Chapter I provides:

> "This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

41. Chapter II sets out the conditions of citizenship. Chapter III sets out provisions for the protection of fundamental rights and freedoms of the individual. The following sections are of particular relevance to the claims of the alleged victims:

> "15(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966."[1]

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[1] By virtue of the Constitution Amendment Act No. 14 of 2002, a new sub-section 3 has been inserted into the Constitution in the following terms:

"(3) The following shall not be held to be inconsistent with or in contravention of this section:
(a) the imposition of a mandatory sentence of death or the execution of such a sentence;
(b) any delay in executing a sentence of death imposed on a person in respect of a criminal offence under the law of Barbados of which he has been convicted;
(c) the holding of any person who is in prison, or otherwise lawfully detained, pending execution of a sentence of death imposed on that person, in conditions, or under arrangements, which immediately before 5th September 2002
  (i) were prescribed by or under the Prisons Act, as then in force; or
  (ii) were otherwise practised in Barbados, in relation to persons so in prison or so detained."

This amendment does not apply to the alleged victims Boyce, Joseph, Atkins and Huggins, because the amendment is expressly stated not to apply in relation to a

s.18 – provisions to secure the protection of the law[2].

...

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

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

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

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

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

42. The Constitution does also, of course, contain a provision protecting the right to life (s.12). However, unlike article 4 of the American Convention, the Constitutional provision does not protect against the arbitrary deprivation of life, nor does it specify that the imposition of the death penalty must be limited to only the most serious crimes.

43. In the case of *Boyce and Joseph v The Queen* [2005] 1 AC 400, a majority of the Judicial Committee of the Privy Council ("JCPC") held the effect of s.26 of the Constitution to be that it immunises existing laws, including the mandatory death penalty, from Constitutional Challenge, notwithstanding that it is inconsistent with the current interpretations of various human rights treaties to which Barbados is a party [*Boyce and Joseph*, judgment of Lord Hoffmann at para. 6].

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person sentenced to death before 5th September 2002. Nonetheless, it is submitted that the fact and scope of the amendment are pertinent to the question of the State Party's compliance with Articles 1 and 2 of the American Convention.

[2] This section is lengthy and is not reproduced here in full. It can be found at appendix 17 to the written submissions of the State Party dated 18 December 2006.

Appeals to the Court of Appeal

44. If the defendant is convicted of murder he has the right to apply to the Court of Appeal for leave to appeal against his conviction. Obviously, because the sentence of death is mandatory, it is not open to him or her to appeal against the sentence.

45. In recent years appeals to the Court of Appeal have typically been heard within six to nine months of the conviction.

46. Although legal aid is available for legal representation on appeal, there is a continuing problem with securing adequate representation for appeals in murder cases. In the majority of cases where the defendant is represented under the Legal Aid Scheme, his attorney ceases to act once the trial is concluded because legal aid does not extend to preparing the appeal. Therefore, in the majority of cases, the defendant himself has to prepare and file the Notice of Appeal. Blank Notice of Appeal forms are distributed to condemned prisoners on their arrival at the State Prison. Many defendants are simply not equipped to draft Notices of Appeal. The problem is not merely a lack of legal training; many defendants are ill-educated and have problems reading and writing and some suffer from mental health problems.

47. Once the appeal has been listed, the Notice of Appeal is sent to the defendant, and where that person has applied for a lawyer through the Legal Aid and Advisory Authority a copy of the Notice is usually sent to the appointed lawyer.

48. Whether (and when) a lawyer is appointed depends largely on how soon the Legal Aid and Advisory Authority receive a request from the convicted person. It is difficult to lay down any general rule as to the timing of the appointment of appeal lawyers However it is not uncommon for them to be appointed only a matter of days before the appeal. In the short period before the appeal, the attorney is expected to obtain the record of the trial, review it, consider the grounds of appeal lodged by the prisoner, identify, develop and draft further and/or supplementary grounds of appeal, obtain additional evidence, meet the client and take his instructions and research the law and prepare for the hearing in the Court of Appeal.

49. It is obvious that in some cases the system for appointing appellate attorneys does not allow for sufficient preparation time unless the Court of Appeal is prepared to grant an adjournment. Appeals against conviction in Barbados are usually restricted to complaints of errors made at the trial by the judge in his summing-up. It is very rare indeed for there to be fresh evidence presented because defence attorneys are simply not given the resources to re-investigate cases even where the defendant asserts actual factual innocence of the crime and potentially relevant fresh evidence can be identified.

50. A further deficiency is that given the low remuneration offered by the Commission, more often than not Junior Counsel are appointed.

51. Once the defendant has filed his or her Notice of Appeal and the transcript of the trial and the summing-up are available, the Registrar of the Court of Appeal (Clerk of Appeals) lists the matter for hearing. The defendant's counsel is expected to supply the grounds of appeal no later than seven days before the appeal along with Skeleton Arguments and Summary of Evidence.

Appeals to the Caribbean Court of Justice

52. Defendants whose appeals are dismissed have the right to apply to the Caribbean Court of Justice (CCJ) for leave to appeal against their conviction. Appeals to the CCJ are governed by the Caribbean Court of Justice Act, 2003 – 9, as amended, and the Constitution (Amendment) Act 2003 – 10 and The Practice Direction Statutory Instrument No 1 of 2005.

53. Prior to the establishment of the CCJ, appeals were made to the Judicial Committee of the JCPC in London, whose Board also had a screening process. During that time, the Board was sparing in the grant of leave to appeal. The practice of the CCJ has not been refined as yet, although it would be safe to assume that the CCJ will adopt a similar attitude to applications for leave to appeal.

54. Attorneys therefore take the position that the CCJ frequently will not interfere with a decision that depends on its own facts even where the allegation is that there was insufficient evidence to be left for the jury.

55. Invariably, defendants convicted of murder are unable to pay privately, and, as a consequence, they are obliged to seek leave to appeal as a poor person i.e., they ask the CCJ to relieve them of the need to pay filing fees and security for costs.

56. Appeals to the CCJ are again presented by attorneys-at-law in Barbados. There is no provision in the Community Legal Services Act for any Legal Aid Certificate to be issued for this representation. However, the Crown has been prepared in some cases to provide some financial assistance. Consequently, attorneys must be prepared to act on a *pro bono* basis. This will include the necessity for the attorney-at-law to pay for his accommodation and travel to Trinidad where the CCJ is located. Although it is assumed that like the JCPC, the CCJ has the power to recommend that the Crown bear the costs of the appeal if leave is granted, there is nothing to suggest that the Crown will not adopt its previous practice of not following these recommendations, except unsatisfactorily.

57. It is also to be presumed that the CCJ will follow the previous practice of the JCPC of not awarding costs against the Crown in criminal matters save in exceptional circumstances and so it is not possible for work to be undertaken on a contingency basis.

The Barbados Privy Council (BPC)

58. The Governor General of Barbados is empowered by the Constitution of Barbados to grant pardons, either free or subject to lawful conditions, to any person convicted of any offence against the laws of Barbados, to grant any such person a respite from the execution of any punishment imposed on that person for such an offence, to substitute a less severe form of punishment than that imposed on any such person, and to remit the whole or part of any punishment imposed on any such person.[3] In the exercise of these powers, the Governor General is required to act in accordance with the advice of a

[3] Section 78(1)

body called the Privy Council (BPC)[4] which is established by the Barbadian Constitution.[5]

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Appointment and removal of members of the Barbados Privy Council

59. The members of the BPC are appointed by the Governor General after consultation with the Prime Minister.[6] There is no limit on the number of such members who may be appointed nor are there any specific qualifications which members of the BPC must possess. The composition of the BPC, its size and expertise, is therefore entirely at the discretion of the Governor General.

60. The appointment of a member of the BPC may be revoked at any time by the Governor General, after consultation with the Prime Minister.[7] The Constitution does not require that any such revocation be for cause. The membership of the BPC is accordingly entirely within the gift of the Governor General. Unless revoked sooner, a member of the BPC holds office for a period, not exceeding fifteen years, as may be specified in his or her instrument of appointment or until the age of seventy-five.[8]

Procedure

61. The BPC meets only after being summoned by the Governor General, acting in his discretion.[9] The Governor General is required, so far as is practicable, to attend and preside at all meetings of the BPC which is empowered to regulate its own procedure.[10]

62. In the case of any person who has been sentenced to death for an offence against the laws of Barbados, the BPC is required to meet to advise the Governor General on the exercise of his or her powers of pardon. In respect of any such meeting, the Governor General is required to cause a written report of the case from the trial judge to be put before the BPC for its

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[4] Section 78(2)
[5] Section 76(1)
[6] Section 76(1)
[7] Section 76(3)(c)
[8] Section 76(3)(a) and (b)
[9] Section 77(1)
[10] Section 77(2) & (3)

consideration, along with such other information derived from the record of the case or elsewhere as the Governor General may require. In determining what information should be put before the BPC, the Governor General is required, as a general rule, to act on the recommendation of the BPC but he may act in his discretion in any case in which, in his judgment, the matter is too urgent to admit of such recommendation.[11]

63. Prior to the commencement of the Constitution (Amendment) Act No. 14 of 2002 on 5th September 2002, the BPC's obligation to accord a condemned prisoner a hearing before determining what advice it should give the Governor General was governed by the opinion of the Judicial Committee of the Privy Council in *Neville Lewis v Attorney General of Jamaica* [2001] 2 AC 50 delivered on 12th September 2000. In that case, the JCPC held that even though there was no legal right to mercy, condemned prisoners were nevertheless entitled to be given sufficient notice of the date when the local BPC was to consider his or her case in order to enable him or her or his or her advisers to prepare representations which the BPC was bound to consider. In addition, the condemned man was entitled to be provided with the documents which were put before the BPC for its consideration. It was not sufficient that he or she be provided with the gist of the documents only. As a general rule, representations were to be made in writing, unless the BPC developed a practice of oral hearings, but the JCPC was not satisfied that there was any need for a right to an oral hearing.[12] Where a recommendation from an international human rights body was available, the BPC was required to take it into account and if they did not accept it, it had to explain why. In this case, the JCPC also decided that the local BPC was bound to await any pending decision of an international human rights body.

64. Apart from the above, there are no provisions in the Barbados Constitution or elsewhere which establish the criteria the BPC must apply in the exercise of its functions or discretion.

65. In short, therefore, prior to the constitutional amendment, a condemned prisoner was entitled to be heard by the BPC but only by way of written representations. There was no right to an oral hearing. Neither was there any

[11] Section 78(4)
[12] Lewis p.80

general right to be provided with reasons for the BPC's decision not to advise the Governor General to commute a death sentence. Reasons were only required where the BPC decided not to accept the recommendation of an international human rights body.

The Constitution (Amendment) Act No. 14 of 2002

66. The Constitution (Amendment) Act no. 14 of 2002 confirms the right of the condemned prisoner to submit written representations to the BPC and makes clear that there is no entitlement to an oral hearing. It also preserves the existence of the right declared in *Lewis v A.G.* to have the BPC await the determination of any petition before an international human rights body. However, the Governor General, acting in accordance with the advice of the BPC, is empowered to set time limits within which a condemned prisoner may petition any such body, and the Amendment Act further provides that where the time limit expires the BPC may proceed to consider the condemned man's case and advise the Governor General, notwithstanding that such a petition has not been concluded.

Reviewability

67. There is no right of appeal against any decision of the BPC. Further, the merits of any such decision is not subject to judicial review.[13] On the other hand, judicial review is available i) to compel the BPC to consider a condemned prisoner's case; ii) where the Governor General proposes to reject a petition without receiving the advice of the BPC; iii) where the Governor General refuses to require information recommended to be obtained by the BPC; or iv) where the BPC refuses to look at information which the Governor General duly puts before it. Similarly, judicial review would be available where persons who were not qualified to sit (say because of bias) or were not members of the BPC purport to participate in the BPC's deliberations.[14] It goes without saying that a decision of the BPC may also be judicially reviewed if a condemned prisoner is not accorded the right to be heard or if the BPC refuses to await the decision of an international human rights body. Finally, judicial review is available where the BPC acts in an arbitrary or perverse way,

[13] Ibid p. 75
[14] Ibid.

for example, where its opinion is arrived on the throw of a dice or on the basis of a prisoner's hairstyle, race, gender or religion or is otherwise arrived at in an improper or unreasonable way.[15] However, in the absence of such egregious errors or other procedural missteps, the merits of the BPC's decision are not reviewable by the courts. This position is buttressed by section 77(4) of the Constitution which provides that "the question whether the BPC has validly performed any function vested in it ... shall not be inquired into in any Court."

Comparison to other jurisdictions

68. Belize, St. Kitts, St. Lucia and Trinidad and Tobago all have Mercy Committees similar in structure and function to that of the BPC, but there are varying degrees of independence of the members of the Committees. In Belize, members are required to be persons of integrity and high national standing, at least two of whom must hold or have held the office of Commissioner of Police, Commander of the Belize Defence Force, Secretary to the Cabinet or other such high public offices, at least one of whom must hold or have held the office of judge of a superior court of record, and at least one of whom must be a member of a recognised profession.[16] Members hold office for a maximum period of ten years and during such term cannot be removed against their will except by resolution of the House of Representatives supported by a two-thirds majority that he or she is unable to discharge the functions of his or her office by reason of persistent absence or infirmity of body or mind or is in breach of the provisions of section 121 of the Constitution (which require persons to whom it applies to conduct themselves with the highest degree of integrity).[17]

69. In St. Lucia[18] and St. Kitts[19] the membership of the Committee must comprise a Minister and the Attorney General, among others, but all members are removable at the discretion of the Governor General without the need to show cause.[20]

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[15] Ibid p. 76
[16] Section 54(1) of the Belize Constitution.
[17] Section 54(6).
[18] Section 75(1) of the St. Lucia Constitution.
[19] Section 67(1) of the St. Kitts Constitution.
[20] Section 75(2) of the St. Lucian Constitution; section 67(2) of the Kittitian Constitution.

70. In Belize, St. Lucia and St. Kitts, the Governor General exercises the power of pardon on the advice of the Mercy Committee.[21]

71. In Trinidad and Tobago, on the other hand, the President of the Republic exercises the power of pardon on the advice of a Minister appointed for the purpose by the Prime Minister.[22] In the case of condemned prisoners, the Minister so appointed consults with the Mercy Committee before tendering his or her advice to the President[23] but is not obliged in any case to act in accordance with the advice of the Mercy Committee.[24]

72. Despite the existence of constitutionally established authorities empowered to commute the sentences of death of persons convicted of murder, there have been determinations in each of Belize, St. Lucia, St. Kitts and Trinidad and Tobago that the mandatory death penalty is a cruel and unusual punishment or otherwise violates fundamental rights and freedoms. In relation to Belize, St. Lucia and St. Kitts, the JCPC ruled in the trilogy *Reyes v The Queen* [2002] 2 A.C. 235, *Regina v Hughes* [2002] 2 A.C. 259 and *Fox v The Queen* [2002] 2 A.C. 284, that since the character of the offence of murder could vary widely, the imposition of the death penalty in all cases would be plainly excessive and disproportionate, Accordingly, to deny a person convicted of murder the opportunity to persuade the court, before sentence was passed, that in all the circumstances of his or her case the sentence of death would be disproportionate and inappropriate, would be to treat him or her as no human being should be treated and thus would deny him or her basic humanity. This would accordingly infringe the right not to be subjected to inhuman or degrading punishment.

73. The JCPC further held that this constitutional defect was not remedied by the subsequent opportunity to seek mercy from the executive. The Board explained its position in the following passage in its judgment in *Reyes*, at p. 257:

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[21] Belize s. 52(2); St. Lucia s. 74(2); St. Kitts s. 67(2).
[22] Section 87(3) of the T&T Constitution
[23] Section 89(1) & (2)
[24] Section 89(3)

> In reaching this decision the Board is mindful of the constitutional provisions, summarised above, governing the exercise of mercy by the Governor General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the Constitution. Mercy, in its first meaning given by the *Oxford English Dictionary*, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. Appropriately, therefore, the provisions governing the Advisory Council appear in Part V of the Constitution, dealing with the executive. It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions. Such was the effect of the decisions in *Hinds v The Queen* [1977] AC 195, 226D, *R v Mollison (No 2)* (unreported) 29 May 2000; Court of Appeal of Jamaica (Supreme Court Criminal Appeal No 61/97) and *Nicholas v The Queen* (1998) 193 CLR 173, 186, 206-207, 219-220, paras 16, 68, 110, 112. The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process: see *Edwards v Bahamas* Report No 48/01, paras 167-168, *Downer and Tracy v Jamaica* Report No 41/00, paras 224-226 and *Baptiste v Grenada* Report No 38/00, paras 117-119

74. In relation to Trinidad and Tobago, this Honourable Court has likewise held in *Hilaire, Constantine et al v Trinidad and Tobago* (Judgment of June 21, 2002, Inter-Am. Ct. H.R. (Ser. C) No.94 (2002) that the mandatory death penalty is inconsistent with Convention rights even though the possibility of commutation of the sentence by the executive exists under the constitution – see further para 122 below.

75. One of the arguments which the State of Barbados has put at the forefront of its case is that the apparent harshness of the mandatory death penalty is substantially ameliorated by the availability of a process before the Barbados BPC through which the individual circumstances of a condemned prisoner may be taken into consideration. It is sufficient to note at this point, that in none of Belize, St. Kitts, St. Lucia or Trinidad and Tobago did the existence of the right to be considered for mercy affect the initial determination that the mandatory death penalty violated fundamental rights. The right to the consideration of

mercy by the executive is no substitute for the right to a judicially determined sentence.

SECTION B: THE DOMESTIC PROCEEDINGS

The Appeal to the Privy Council (JCPC)

76. On 2 February 2001, Jeffrey Joseph and Lennox Ricardo Boyce were convicted of the murder of Marquelle Hippolite and sentenced to death. They had been jointly charged with Romaine Curtis Bend and Rodney Ricardo Murray. The evidence was that the four accused pursued and attacked Hippolyte while he was playing basketball near his home. At the beginning of the trial of the four, the Crown accepted pleas from Bend and Murray on the lesser charge of manslaughter and *Payne J* sentenced them both to 12 years' imprisonment. However, Joseph and Boyce rejected the prosecution's offer to accept a plea of guilty of manslaughter.

77. Their appeals to the Court of Appeal against conviction and sentence were dismissed on 27 March 2002. On the very next day, Mr. Andrew Pilgrim, attorney-at-law, prepared and had signed the necessary documents indicating Joseph's intention to petition for special leave to appeal to JCPC *in forma pauperis*. By letter dated 2 April 2002, Mr. Pilgrim informed the BPC that arrangements were being made to apply for special leave to appeal and formal notice of the petition was served on the BPC on 5 April 2002. By that letter, Mr Pilgrim requested that Joseph should not be executed until he had exhausted his right of appeal. He further stated that if it was the intention of the BPC to consider whether the sentence should be commuted, all documentation and information should be made available to Joseph so that his instructions on the same could be taken.

78. A notice dated 6 April 2002 from the BPC was sent to Joseph informing him that the BPC would meet to advise the Governor-General on the exercise of his powers of pardon under the Constitution. He was invited to submit written representations within 21 days. On 16 April 2002, the BPC forwarded copies of the following documents to Mr. Pilgrim: (1) the Report of the Trial Judge, (2) the Court of Appeal's Decision, (3) the Record of the Criminal Appeal, (4) A Report of the Superintendent of Prisons, (5) A Report of the Medical Officer of

the Prison, (6) A Report of the Chaplain of the Prison and (7) Joseph's Antecedent History from the Commissioner of Police.

79. On 16 April 2002, Boyce was also given notice of his right to make written representations and he was provided with similar documents. On 16 April 2002, Mr. Alair Shepherd Q.C., prepared documents on behalf of Boyce indicating Boyce's intention to petition for special leave to the JCPC *in forma pauperis* and served notice of such intention on the BPC on 17 April 2002. By letter dated 3 May 2002, Mr Shepherd asked the BPC to make no decision on execution prior to Boyce exhausting his domestic remedies and being afforded the opportunity to petition human rights bodies. However, he did not object to a preliminary decision being made, provided that that decision was to commute the sentence.

80. In the meantime, by letter dated 2 May 2002, the State of Barbados' London solicitors advised solicitors acting for Boyce and Joseph that they had until 26 July 2002 to file an application for special leave to appeal and the BPC was made aware of this date. Nevertheless, on 3 June 2002 and 4 June 2002 the BPC wrote to Mr Shepherd and Mr Pilgrim respectively drawing their attention to the notice dated 6 April 2002 and noting that no written representations had been made on behalf of Boyce and Joseph. The Clerk of the BPC informed the appellants' attorneys-at-law that the BPC would be meeting on 24 June 2002, to advise the Governor-General as to the exercise of the prerogative of mercy. No representations were submitted by or on behalf of Boyce and Joseph and the BPC advised the Governor-General against commuting the sentences. Death warrants were read to Boyce and Joseph on 26 June 2002 informing them that they were scheduled to be executed on 2 July 2002.

81. On 27 June 2002, constitutional motions were filed on behalf of Boyce and Joseph complaining of the reading of death warrants to them even though they had not yet exhausted their legal remedies. On 28 June 2002, an order staying the executions was granted pending the filing of the applications for leave to appeal to the JCPC.

82. On 25 July 2002, Boyce and Joseph lodged their petitions for special leave to appeal to the JCPC. They appealed against sentence only. The sole ground of appeal was that the mandatory sentence of death was unconstitutional. In its

judgment delivered on 7 July 2004, the JCPC was of the unanimous opinion that the mandatory death penalty was not consistent with current thinking on the right guaranteed by section 15(1) of the Barbados Constitution against inhuman and degrading punishment and was likewise inconsistent with the current interpretation of the various human rights treaties to which Barbados was a party. Nevertheless, by a majority of five to four, the board held that since the law decreeing the mandatory death penalty for murder was in force when the Constitution came into effect, it was protected from challenge for inconsistency with the fundamental rights by the savings clause in section 26 of the Constitution – see *Boyce v The Queen* [2005] 1 AC 400.

The Reading of the Second Warrants

83. On 9 July 2004, London solicitors acting for Boyce and Joseph advised the State of Barbados' London solicitors that Boyce and Joseph intended to file an application to the IACHR and requested that no warrants be read until any application was heard and determined. By letter dated 29 July 2004, Mr. Shepherd informed the BPC of Boyce and Joseph's intention to petition the IACHR and submitted that in the circumstances it would be premature for the BPC to convene. In this regard, he had the support of the decision of the JCPC in *Lewis v Attorney General of Jamaica* which had ruled that the Jamaican equivalent of the BPC was bound to await the decision of the IACHR before considering the case of a condemned prisoner. For good measure, Mr Shepherd further requested that, before any final decision was taken by the BPC, Boyce and Joseph be given "proper notice, disclosure and an opportunity to make informed representations".

84. On 3 September 2004, the application to the IACHR was filed on behalf of Boyce and Joseph and by letter dated 4 September 2004, Mr Shepherd informed the BPC of this development. Nevertheless, on 13 September 2004 the BPC met and advised the Governor-General that a date for execution should be fixed for the second time. On 15 September 2004, Boyce and Joseph were informed that they would be executed on 21 September 2004.

Constitutional Proceedings

85. On 16 September 2004, Boyce and Joseph filed a second set of constitutional proceedings alleging breaches of their fundamental rights. They complained, inter alia, about the conditions in which they were held on death row and that:

i) They were treated unfairly and/or in breach of the principles of natural justice in that

a) They were denied an opportunity to be heard when it was decided in June 2002 and September 2004 that the sentence of death imposed on them would not be commuted; and

b) They were was not permitted to pursue their petition before the Inter American Commission on Human Rights before the decision was made not to commute their sentence of death;

ii) The warrants for their execution were issued and read to them in June 2002 and again in September 2004 even though

a) In the first instance, the authorities knew that they intended before July 26th 2002 to seek the leave of the Judicial Committee of the JCPC to appeal against conviction and sentence; and

b) In the second instance, the authorities knew that they intended to and indeed had already petitioned the Inter American Commission on Human Rights and by so doing deliberately or recklessly and/or cynically subjected them to unnecessary mental torture and thereby threatened to take their lives in violation of their rights to the protection of the law and subjected them to torture and to inhuman or degrading punishment or other treatment.

86. The trial judge held that he was "not satisfied that the BPC must wait until whenever (if ever) the IACHR reached its decision"; that Boyce and Joseph had "chosen not to send written representations asking instead for the right to be heard, (but) they never had such a right"; that "the BPC met again only after the exhaustion of the applicants' domestic appeals in September 2004 ... it

has acted in conformity with the Constitution"; and that accordingly, they were not entitled to any of the relief claimed. The trial judge also found as a fact that the conditions in which Boyce and Joseph were held in prison were satisfactory.

Appeal to the Barbados Court of Appeal

87. On appeal by Boyce and Joseph, the Barbados Court of Appeal (judgment, 31 May 2005) held that it was bound by the decision of the JCPC in *Lewis* to find that the protection of the law guaranteed by the Barbados Constitution entitled Boyce and Joseph to the right to have consideration by the BPC as to whether their death sentences should be carried out postponed until after the IACHR had rendered its decision.[25] However, the Court rejected the contention that Boyce and Joseph were denied the right to be heard by the BPC. Instead, the Court held that Boyce and Joseph "failed to exercise their right to submit written representation and sought an oral hearing to which they were not entitled"[26] and that "the issues about which they complained, such as the difference between their punishment and that of their co-accused, could have been the subject of written representation, and was in any event part of the record of the proceedings."[27]

88. With regard to the complaints that warrants were read to Boyce and Joseph while, in the first instance, they had expressed the intention to appeal to the JCPC and, in the second, while their petition before the IACHR was pending, the Court held that:

> The BPC's advice in 2002 that the appellants be executed at a time when they had not exhausted their domestic remedies and had intimated their intention to appeal to the JCPC, which they did, was manifestly unfair to the appellants and a denial of natural justice. Similarly, the BPC's advice in 2004 that the JCPC's Order be carried out without regard to the appellants' expressed intention to petition the IACHR, which they did, was contrary to the binding authority of *Lewis*, and therefore a denial of the appellants' rights. The death warrants were therefore improperly read to the appellants in both 2002 and 2004.[28]

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[25] Para 34.
[26] Para 42
[27] Para 53
[28] Para 70

89. In light of these breaches, the question was what relief should be granted. The Court took into account the fact that the five-year norm established in *Pratt and Morgan* was due to expire on 2 February 2006. There was therefore another eight months within the five-year period during which a report could be received from the IACHR.[29] The Court further observed that the State of Barbados "failed to comply with the Order of the Inter-American Court dated 17 September 2004, to provide a report, as stated in its further Order dated 25 November 2004."[30] In the circumstances, it was highly unlikely that a report from the IACHR would be forthcoming within the time frame of *Pratt and Morgan*. It was in this context that the Court ordered that the sentences of death imposed on Boyce and Joseph be commuted to life imprisonment. The factors which the Court took into account in arriving at this decision appear from the following paragraphs:

> (A)part from the serious delay, which is close to the five-year period and which is not attributable to the appellants, we are of the opinion that there is another factor in favour of commutation of the sentences in this case: the undesirability and inappropriateness of subjecting the BPC to directions of the court. The BPC has the right to regulate its own procedure, subject to judicial review of the procedural fairness of its decision-making. Judicial deference to the BPC and the limited time before the expiry of the five-year period therefore dictate that we should not order a stay of execution pending the report from the IACHR. In view of the time frame and the circumstances of this case, the proper order is to commute the sentences.....[31]

> We may add three further considerations that favour a decision to commute the sentences. First, the death warrants have already been read to the appellants on two occasions with an interval of two years between the readings. In *Briggs* at *page 55B, Lord Millett* stated that the repeated reading of the death warrant did not amount to cruel and unusual treatment, but was rather a matter to be taken into account in advising on the exercise of the prerogative of mercy. It would be undesirable to expose the appellants to a third reading of the death warrants and the likelihood of further court proceedings. Secondly, although we have no jurisdiction to examine the merits of the advice given by the BPC, we nevertheless may take into account all the facts and circumstances so as to determine the order that we should make under section 24 of the Constitution. The difference in punishment between the twelve year sentences for manslaughter given to the two co-accused of the appellants and the mandatory death sentences

[29] Para 80
[30] Para 81
[31] Para 82

> passed on the appellants is disproportionate; albeit that the appellants refused to accept the prosecution's offer of a guilty plea to the lesser offence of manslaughter. Thirdly, the appellants have no access to adequate funding to effectively pursue any further rights they may have, but instead are dependant on local and overseas lawyers, who are prepared to act for them *pro bono*.[32]

90. Although, the Court did indicate[33] that it was in the context of the improper reading of the warrants to Boyce and Joseph that it had to consider the appropriate manner in which the appeal should be disposed of, it is apparent from the paragraphs just quoted that the decision to commute was not in the end influenced by these breaches. As such, Boyce and Joseph have not yet had any relief for the improper and illegal reading of the warrants.

Appeal to the Caribbean Court of Justice

91. The State of Barbados appealed to the Caribbean Court of Justice. By the time this appeal was heard, the five year period stipulated in *Pratt and Morgan* had expired. Nevertheless, as is apparent from the judgments of the Court, the State of Barbados' initial position was not merely to ask that the specific findings of law made by the Court of Appeal be overturned but also that the death sentences be re-imposed. It was only at the end of their submissions that, when pressed by the Court, Counsel for the State of Barbados conceded that "even if this appeal by the Crown were successful, it would not be appropriate for this Court to re-impose the death penalty on Joseph and Boyce" since "over five years had elapsed since their conviction and sentence and the Crown made no attempt to challenge the applicability to them of the time-limit for carrying out the death penalty laid down in *Pratt and Morgan*."[34]

92. On the question whether there was a right to have any consideration of mercy delayed until after a petition before an international body had been determined, the Court held in the first place that the Barbadian Courts were bound by the decision in *Lewis* and that accordingly the Court of Appeal of Barbados was right to hold that Boyce and Joseph's right to the protection of the law had

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[32] Para 84
[33] At para 70
[34] Para 15 of the joint judgment of the President and Saunders J (judgment, 8 November 2006).

been infringed by the reading of the second warrant even though they had recently lodged a petition with the IACHR. The Court said:[35]

> we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court. Accordingly we reject the submission of counsel for the appellants that such decisions were and are not binding in Barbados.

93. However, the Court considered itself entitled to depart from decisions of the JCPC where it thought it appropriate to do so. In this instance, while agreeing with the final result in *Lewis*, the Court did not agree that there was a constitutional right to have petitions before international human rights bodies completed before consideration of mercy. Rather, the Court held that the ratification of the relevant treaties in this instance created a legitimate expectation in Boyce and Joseph that they would not be executed pending the determination of their petitions before the IACHR and their rights to the protections of the law would be infringed if that expectation was frustrated without good cause.

94. On the question of the timing of the reading of warrants in the face of pending appeals, the Court gave the following guidance:[36]

> We would recommend that the BPC should meet only once and that they should do so at the very end of all the domestic and international processes. 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 BPC with a view to achieving a consensus on commutation if the Governor-General considers there is a strong case for a commutation. If there is no decision in favor of commutation, then further deliberation would have to be adjourned.

[35] Ibid, at para 18
[36] Ibid, para 143.

SECTION C: THE MANDATORY DEATH PENALTY

95. The alleged victims complain that, for the reasons set out below, the mandatory death penalty is contrary to Articles 4(1), 4(2), 5(1), 5(2) and 8, in conjunction with Article 1 of the Convention.

Summary of worldwide case law on the mandatory death penalty for murder

96. No Constitutional or senior national court, or international body that has considered the legality of the mandatory death penalty for murder has found it to comply with the basic tenets of fundamental rights.

The position in the United States

97. The history of the mandatory death penalty in the United States discloses clear evidence that, by the 1960s (if not much earlier), it was recognised that the imposition of a mandatory death sentence on all those convicted of murder was "disproportionate" and "inappropriate" and thus inhuman.

98. The history of the mandatory death penalty in the United States was examined by the Supreme Court in *McGautha v California* [1971] 402 US 183, *Furman v Georgia* (1972) 408 237, and *Woodson v North Carolina* (1976) 428 US 280.

99. At the time the Eighth Amendment was adopted in 1791, States uniformly imposed an exclusive and mandatory death sentence for murder and other specified offences. This was in accordance with the common-law at the time of the American Revolution, which provided that all homicides that were not involuntary, provoked, justified, or excused constituted murder and were automatically punished by death (*Woodson,* at p.952, citing H. Bedau, *The Death Penalty in America*, at pp.5-6, 15, 23-24, 27-28 (rev. ed. 1967) and R. Bye, *Capital Punishment in the United States*, at pp. 1-2 (1919)).

100. Almost from the outset jurors reacted unfavourably to the harshness of mandatory death sentences (*Woodson*, at p.952, citing Bedau at p.27; Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa.L.Rev. 1099, 1102 (1953); Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U L.Rev. 32 (1974); *McGautha v. California*, supra, 402 U.S., at 198-199, 91 S.Ct., at 1462-1463; *Andres v. United States*, 333 U.S. 740, 753, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1948) (Frankfurter, J., concurring);

Winston v. United States, 172 U.S. 303, 310, 19 S.Ct. 212, 214, 43 L.Ed. 456 (1899)).

101. States initially responded by limiting the classes of capital offences (*Woodson,* at p.290, citing Bye, at p.5; Hartung, *Trends in the Use of Capital Punishment*, 284 Annals of Am. Academy of Pol. and Soc. Sci. 8, 9-10 (1952)).

102. This failed to resolve the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences.

103. In 1794, Pennsylvania attempted to redress this by confining the mandatory death penalty to "murder of the first degree" encompassing all "wilful, deliberate and premeditated" killings (*Woodson,* at p.290, citing Pa.Laws 1794, c. 1766; Bedau p.24).

104. Within a generation most States had divided murder into capital and non-capital offences (*Woodson,* at p.290, citing Bedau p.24; Davis, *The Movement to Abolish Capital Punishment in America*, 1787-1861, 63 Am.Hist.Rev. 23, 26-27, n.13 (1957)).

105. By 1900, 23 States and the Federal Government had made death sentences discretionary for first-degree murder. During the next two decades 14 other States followed suit (*Woodson*, at p.291).

106. By the end of World War I, all but 8 States, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether (*Woodson*, at p.291). [The essential principle that a penalty may be cruel (or inhuman) because it is excessive was laid down as long ago as 1910 in *Weems v US* 217 US 349 (see the analysis in *Furman* at pp.398-402). And since the 1937 case of *Pennsylvania ex rel. Sullivan v Ashe* 302 US 51 (summarised in *Woodson* at p.961), the Supreme Court has recognised that the Eighth Amendment requires that sentences be individualised.]

107. The transformation in attitudes towards mandatory sentences was underscored by the Supreme Court in *Williams v New York* in 1949 (see the analysis in *Woodson* at p.956). There the Supreme Court observed that:

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

108. By the late 1950s only 10 States retained a single category of murder as defined at common law (*Woodson,* at FN 21; citing American Law Institute, Model Penal Code s 201.6, Comment 2, p. 66 (Tent. Draft No. 9, 1959)).

109. However, this proved to be an unsatisfactory means of identifying persons appropriately punishable by death as juries, unwilling to impose the death penalty in a significant number of first-degree murder cases, refused to return guilty verdicts for that crime (*Woodson,* at p.290, citing Bedau at p.27; Mackey, n. 18 (1974); *McGautha v. California*, at 199, 91 S.Ct., at 1463).

110. By 1963, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing (*Woodson,* at pp.952-953).

111. In *Woodson* the Supreme Court further observed that:

> "The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society, jury determinations and legislative enactments, both point conclusively to the repudiation of automatic death sentences" [pp.292-293]
>
> "Although the Court has never ruled on the constitutionality of mandatory death penalty statutes, on several occasions dating back to 1899 it has commented upon our society's aversion to automatic death sentences." [p.296]
>
> "Perhaps the one important factor about evolving social values regarding capital punishment upon which the Members of the *Furman* Court agreed was the accuracy of *McGautha's* assessment of our Nation's rejection of mandatory death sentences." [p.297]

112. In *Furman*, Chief Justice Burger, speaking for the four dissenting judges, observed that:

> "I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of 'the

common-law rule imposing a mandatory death sentence on all convicted murderers.'"

113. Against that background, it is submitted that what the Supreme Court identified in the cases of *McGautha*, *Furman* and *Woodson* was not a (then) recent appreciation that the mandatory death penalty was disproportionate and inappropriate, but a long and well-established history reflecting a well-established appreciation that the mandatory death penalty was disproportionate and inappropriate.

The position in Belgium, the Union of South Africa and Lesotho

114. The position in Belgium and the Union of South Africa was considered by the Royal Commission (pp.204-208). In Belgium, courts have had power to reduce the death penalty since 1919; and in the Union of South Africa, a judge has had power to impose a sentence other than death upon conviction for murder since 1935.

115. The position in Lesotho was examined in Amnesty International's publication, *When the State Kills*, 1989 at p.166. Since 1938, the Criminal Procedure and Evidence Proclamation No.59 of 1938 (with subsequent amendments) has permitted the imposition of a mandatory death sentence only where the court concludes that there are no extenuating circumstances.

The position in Canada

116. The position in Canada was also examined in the United Nations' publication, *Capital Punishment*, 1962, at pp.11-12. By 1962 in Canada, the death penalty was only mandatory in the event of conviction for capital murder or piracy and also in the military courts for certain crimes against national defence and for treason in time of war.

The position in India

117. In India, classification was introduced on 22nd November 1969 and the mandatory death penalty was abolished for nearly all types of murder by (at

the very latest) 1973. The 1973 Criminal Code in India, provides in s.354(3) that:

> "When the conviction is for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of the sentence of death, the special reasons for such sentence."

118. The Supreme Court of India in *Bachan Singh v The State of Punjab* 2 SCC 684 determined that the death penalty was not unconstitutional in that case because there existed a judicial discretion as to whether it be imposed. It was in the later case of *Mithu v Punjab* (1983) 2 SCR 690, where no such discretion existed in a narrow class of cases, that the mandatory death sentence on those convicted of murder while under a life sentence was struck down.

The position in Belize, St Lucia, St Christopher and Nevis, St Vincent and the Grenadines, Jamaica and the Bahamas

119. In the cases of *Hughes v R; Spence v R* (2001) 60 WIR 156, the Eastern Caribbean Court of Appeal, having considered the case law of other common-law jurisdictions and of the Inter-American Court and Commission held that:

> "the requirement of humanity in our Constitution does impose a duty for consideration for the individual circumstances of the offence and the offender before a sentence of death could be imposed in accordance with its provisions." [para. 46]

120. This finding was subsequently endorsed by the JCPC in *R v Hughes* [2002] 2 WLR 1058. At the same time, in *Reyes v The Queen* [2002] 2 WLR 1034, Lord Bingham, delivering the unanimous judgment of the JCPC, declared the mandatory death penalty in Belize to be unconstitutional:

> "A law which denies a defendant the opportunity, after conviction, to seek to avoid the imposition of the ultimate penalty, which he may not deserve, is incompatible with [the prohibition on inhuman and degrading treatment and punishment] because it fails to respect his basic humanity." [para.29]

121. Similar provisions in St Christopher and Nevis were likewise struck down [*R v Berthill Fox* [2002] 2 WLR 1077. In, *R v Lambert Watson* [2005] 1 AC 472, the JCPC unanimously found the mandatory death penalty in Jamaica to be contrary to the right to life guarantee in the Constitution and the prohibition on

cruel and unusual punishment, notwithstanding that Jamaica had legislated to restrict the class of capital murders to more serious cases.

122. It is right that in both *Boyce and Joseph v The Queen* [2005] 1 AC 400 and *Matthew v The State* [2005] 1 AC 433, a majority of the JCPC (5 members against 4), held the mandatory death penalties of Barbados and Trinidad and Tobago respectively not to be unconstitutional. However, this was only because of the immunizing effect of the savings clauses contained in those Constitutions and not because they would, but for the savings clauses, be compatible with fundamental rights.

123. In *R v Bowe and Davis* [2006] 1 WLR 1623, the JCPC held, in declaring the mandatory death penalty in The Bahamas to be unconstitutional, that the following five principles, which undermine the compatibility of the mandatory death penalty with fundamental human rights, have been clearly established in legal systems around the world since at least the early 1970s (and in many cases for centuries before):

> "(1) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be proportionate to the gravity of the crime of which he has been convicted.
> (2) The criminal culpability of those convicted of murder varies very widely.
> (3) Not all those convicted of murder deserve to die.
> (4) Principles (1), (2) and (3) are recognised in the law or practice of all, or almost all, states which impose the capital penalty for murder.
> (5) Under an entrenched and codified constitution on the Westminster model, consistently with the rule of law, any discretionary judgment on the measure of punishment which a convicted defendant should suffer must be made by the judiciary and not by the executive." [paras. 29-43]

The decisions of International bodies

124. In *Hilaire, Constantine et al v Trinidad and Tobago* (Judgment of June 21, 2002, Inter-Am. Ct. H.R. (Ser. C) No.94 (2002), this Honourable Court held:

> "that the *Offences Against the Person Act* [of Trinidad and Tobago] automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness. Consequently, this Act prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels

> the indiscriminate imposition of the same punishment for conduct that can be vastly different. In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely human life, and is arbitrary according to the terms of Article 4(1) of the Convention." [para 103]
>
> ...
>
> "The Court concurs with the view that to consider all persons responsible for murder as deserving of the death penalty, 'treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty'." [para 105]
>
> "In countries where the death penalty still exists, one of the ways in which the deprivation of life can be arbitrary under Article 4(1) of the Convention is when it is used, as is the case in Trinidad and Tobago due to the Offences Against the Person Act, to punish crimes that do not exhibit characteristics of utmost seriousness, in other words, when the application of this punishment is contrary to the provisions of Article 4(2) of the American Convention." [para 107]
>
> "the Court concludes that because the *Offences Against the Person Act* submits all persons charged with murder to a judicial process in which the individual circumstances of the accused and the crime are not considered, the aforementioned Act violates the prohibition against arbitrary deprivation of life, in contravention of Article 4(1) and 4(2) of the Convention." [para 108]

125. This finding accords with the reasoning of the Inter-American Commission in *Downer v Tracey v Jamaica* (Report No.41/00; 13th April 2000); *Rudolph Baptiste v. Grenada* Report No. 38/00, 13th April 2000; *Donnason Knights v. Grenada* Report No. 47/01, 4th April 2001; *Leroy Lamey & Others v. Jamaica* Report No. 49/01, 4th April 2001; *Damion Thomas v. Jamaica* Report No. 50/01, 4th April 2001; *Joseph Thomas v. Jamaica* Report No. 127/01, 3rd December 2001; *Paul Lallion v Grenada* Report No. 55/02, 21st October 2002; *Benedict Jacob v Grenada* Report No. 56/02, 21st October 2002; *Denton Aitken v Jamaica* (Report No. 58/02, 21st October 2002); and *Dave Sewell v Jamaica* (Report No. 76/02, 27th December 2002).

126. Likewise, it accords with the findings of the United Nations Human Rights Committee in *Lubuto v Zambia* (Case No.390/1990; 17th November 1995); *Thompson v. Saint Vincent and the Grenadines* (Case No. 806/1998, 5 December 2000); *Kennedy v. Trinidad & Tobago* (Case No. 845/1998, 28 March 2002); *Carpo v. The Philippines* (Case No.1077/2002; 15th May 2003).*Chan v. Guyana* (Case No. 913/2000; 23rd January 2006); *Hussain and Singh v.* Guyana (Case No. 862/1999; 14th December 2005); *Persaud and*

Rampersaud v. Guyana (Case No. 812/1998; 16th May 2006); *Larrañaga v. The Philippines* (Case No. 1421/2005; 14th September 2006).

The significance of universal judicial condemnation of the mandatory death penalty

127. The alleged victims do not cite the above body of national Constitutional and international jurisprudence against the mandatory death penalty in an attempt to establish any rule of customary international law. As set out in their supplemental written submissions served in April 2007, the alleged victims complain of violations of articles 1, 2, 4, 5 and 8 of the American Convention, which do not depend on breaches of customary international law. Rather, the cases cited above are relied upon to demonstrate the exceptional and overwhelming congruence of reasoning against the mandatory nature of the death penalty amongst every senior court to have considered the issue in recent times. It is submitted that such weight of authority must fortify this Honourable Court in following and reaffirming its own reasoning in the *Hilaire* case.

The State Party's claim to be unique amongst all of the jurisdictions considered in the cases above

128. It is understood that the State Party seeks to argue that its capital punishment provisions can be distinguished from those considered by this Honourable Court in *Hilaire,* because:

i) The State's system of capital punishment is only applied to the most serious offences, namely murder and treason, and there is available, under the laws of Barbados, a range of statutory defences and exceptions to the offence of murder [see written submissions on behalf of the State Party dated 18 December 2006, paras.260-268];

ii) The BPC is able to consider individualised factors relating to the offence and the offender when considering the prerogative of mercy [written submissions of 18 December 2006, paras. 270-296].

129. It is respectfully submitted that both of these suggestions are wholly without merit:

i) because there is no material distinction between the legal provisions governing murder and the mandatory death penalty in Barbados and Trinidad and Tobago (nor, for that matter between Barbados and the other Caribbean jurisdictions in which the mandatory death sentence has been held to be inhuman). The State Party has not pointed to any provision of Barbadian law or procedure that is not also applicable in Trinidad and Tobago;

ii) because, even where the application of the mandatory death penalty has been more closely restricted than in Barbados (for example in Jamaica, where murder has been classified into capital and non-capital murder), it has still been held to be arbitrary in its automatic application In *Lambert Watson*, cited above, the JCPC rejected an argument that the reservation of the mandatory death penalty for what Parliament considered were the more serious murders cured the constitutional infringement. The JCPC said (at p. 490):

> But these points of difference do not remove the fundamental objections to the mandatory death sentence which lay at the heart of the decisions in *Reyes*, *Hughes* and *Fox*. As Lord Bingham put it in *Reyes*, para 43, the core of the right which section 7 of the Constitution of Belize exists to protect is that no human being should be treated in a way that denies his basic humanity. To condemn a man to die without giving him the opportunity to persuade the court that this would in his case be disproportionate and inappropriate is to treat him in a way that no human being should be treated. There are no limits to the variety of circumstances which may lead a man to commit homicide. The crime of which he has been convicted may turn out to have been far more serious that he foresaw or contemplated: *R v Powell (Anthony)* [1999] 1 AC 1, 14, per Lord Steyn. Attempts to confine the mandatory death sentence to those categories of murder that are most reprehensible will always fail to meet these objections.

and

iii) because virtually all of the jurisdictions considered in the cases cited above have some equivalent form of mercy provision – those from the Caribbean operate in a materially identical way to that in Barbados – and yet it has been expressly held that consideration by an executive body, with no public hearing, reasons, or right to know fully, or challenge, the case against one, is no substitute for a judicial sentencing hearing [see, for example, *Reyes* at para. 47]. See further, paragraphs 67-75 above.

The grounds of the alleged victims' challenge to the mandatory death penalty

130. As set out above, the alleged victims maintain that the mandatory death penalty in Barbados is contrary to articles 4(1), 4(2), 5(1), 5(2) and 8, in conjunction with Article 1 of the Convention. Their reasons are as follows.

Violation of article 4(1)

131. The alleged victims submit that the imposition of the mandatory death penalty constitutes an arbitrary deprivation of life and respectfully invites this Honourable Court to endorse its reasoning in paragraph 103 of *Hilaire* to the effect that the mandatory death penalty:

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

132. The State Party seeks to argue that this analysis of the meaning of the term "arbitrary" / "arbitrarily" is "fundamentally misconceived" [written submissions on behalf of the State, 18 December 2006]. The alleged victims respectfully submit that such an argument is untenable: the Court's interpretation accords with the vast body of authority set out above. As the Supreme Court of India observed in *Mithu v State of Punjab* (cited above):

> "So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive" [Chinnappa Reddy J at p.713F]

133. It is submitted that this analysis of the indiscriminate effect of the mandatory death penalty falls squarely within the definition of "arbitrarily" endorsed by the State Party:

> "To act "arbitrarily" is to act "without any reasonable cause"; to act "capriciously" is to act "without any apparent reason" [State's written submissions para. 246]

134. Further, if, as the alleged victims submit, and as this Honourable Court held in *Hilaire*, the mandatory death penalty violates article 4(2) of the Convention (see below), then it is also arbitrary in the sense of being "not in accordance with the law", *viz* international law.

135. Even if, as the State Party seeks to argue [paragraph 244 of its written submissions, 18 December 2006], the word "arbitrarily" was added to article 4(1) of the Convention to authorise the use of capital punishment, there is no reference in the drafting records to any discussion or consideration of the mandatory imposition of the death penalty. But it is this that has been consistently held to be arbitrary, not the death penalty *per se*.

136. The State Party's third argument, that the due process rights afforded under the Barbadian system in any trial for murder prevent the mandatory death penalty from being arbitrary is misconceived: even following a paradigmatically fair trial, the automatic imposition of the death penalty will be arbitrary if it is out of all proportion to the culpability of the offender and the gravity of the offence.

137. Finally, the existence of the prerogative of mercy before the BPC cannot rectify the arbitrariness of the mandatory sentence for the reasons set out above:

i) it is not a judicial body;
ii) it meets in private;
iii) it is not obliged to give reasons for its decisions;
iv) there is no right for the condemned person to make oral submissions or to call or cross-examine witnesses;
v) there are no established legal guidelines governing the exercise of the BPC's functions and the merits of its decisions are not subject to review in a court of law.

Violation of article 4(2)

138. The alleged victims submit, for all of the reasons set out from the inquiry of the British Royal Commission on Capital Punishment in 1953 onwards [see paras. 9 above] that the offence of murder is so broad in its range of potential

culpability that it cannot properly be said that the mandatory death sentence for murder is truly restricted to only "the most serious offences".

139. The State Party simply does not address the issue of cases which remain murder, despite all of the statutory and common law defences and exceptions they identify, but which simply cannot be said to constitute "the most serious crimes".

Violation of articles 5(1) and (2)

140. In *Hilaire,* this Honourable Court, endorsing the view of the Supreme Court of the United States of America in *Woodson*, observed that:

> "to consider all persons responsible for murder as deserving of the death penalty, "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." [para. 105]

141. It is respectfully submitted that such treatment does not accord with the guarantee in article 5(1) of the right of everyone to have his physical, mental and moral integrity respected.

142. This accords with Saunders JA observations in *Hughes v R; Spence v R* in the Eastern Caribbean Court of Appeal (cited above):

> "The dignity of human life is reduced by a law that compels a court to impose death by hanging indiscriminately upon all convicted of murder, granting none an opportunity to have the individual circumstances of his case considered by the court that is to pronounce the sentence.
>
> ...
>
> "It is and always has been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide, then it must surely be excessive punishment for the offender convicted of murder, whose case is far removed from the worst case. It is my view that where punishment so excessive, so disproportionate, must be imposed upon such a person, courts of law are justified in concluding that the law requiring the imposition of the same is inhuman." [paras. 215-6]

See also the observations of Lord Bingham, giving judgment for the JCPC, sitting as the ultimate court of appeal for Belize in the case of *Reyes* (cited above).

143. Inhuman punishment and treatment is prohibited under article 5(2) of the American Convention.

144. The State Party seeks to argue that its mandatory death penalty does not constitute inhuman treatment, nor breach article 5(1), on the basis that "the Barbadian legal system does in fact treat each person as a uniquely individual human being and respects her or his right to "physical, mental and moral integrity." [written submissions, 18 December 2006 para.301]. In so arguing, the State seeks to rely once again on the range of due process rights, common law and statutory defences, and the role of the BPC.

145. The alleged victims submit that for all of the reasons already set out in relation to articles 4(1) and (2), these mechanisms are not sufficient to ensure the individualised, judicial sentencing required to determine whether or not the death penalty is in fact the appropriate and proportionate punishment in a particular case. Nor do the legal provisions and procedures in Barbados differ materially from those of the numerous other jurisdictions around the world in which courts have found the mandatory death penalty to be inhuman for want of individualised sentencing.

Violation of article 8

146. The alleged victims adopt the submissions of the Inter-American Commission at para. 92 of its application to this Honourable Court, namely:

> "mandatory sentencing for the death penalty precludes any opportunity on the part of an offender to make representations to the court imposing sentence as to whether the death penalty is a permissible or appropriate form of punishment, based upon the criteria prescribed in Article 4 of the Convention or otherwise, and prevents any effective review by a higher court as to the propriety of a sentence of death in the circumstances of a particular case. As a consequence, individuals subjected to this law cannot effectively exercise their right of defense and their right of appeal guaranteed by Article 8 of the Convention, interpreted together with the requirements of Article 4 of the Convention."

SECTION D: SAVINGS CLAUSES

Savings Clause in Barbados Constitution

147. The Constitution of Barbados is drafted so as to immunize from challenge on grounds of incompatibility with fundamental rights any law which is deemed to be 'an existing law' by section 26 of the Constitution. Since the *OAPA 1994* is such a law, the mandatory death penalty cannot be challenged domestically on grounds of incompatibility with fundamental human rights[37]. Therefore, this Court is the only forum in which the alleged victims can raise the complaints set out in these submissions.

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

> "111. Article 2 of the American Convention provides that:
>
> > [w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the State Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
>
> 112. Based on the above provision, the Court has consistently held that the American Convention establishes the general obligation of State Parties to bring their domestic law into compliance with the norms of the Convention, in order to guarantee the rights set out therein. The provisions of domestic law that are adopted must be effective (principle of effet utile). That is to say that the State has the obligation to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice.
>
> 113. If the States, pursuant to Article 2 of the American Convention, have a positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognised in the Convention, it follows, then, that they also must refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the

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

existing laws protecting them. These acts would likewise constitute a violation of Article 2 of the Convention."

Savings Clause breach Article 2 of American Convention on Human Rights

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

(i) it has failed to take any steps to bring section 2 of the *OAPA 1994* into conformity with its international obligations under the Convention and the American Declaration, notwithstanding the consistent jurisprudence of this Court and the Commission, as specifically drawn to its attention in the Commission's letter of 21st January 2003;

(ii) it has failed to take any step to repeal section 26 of the Constitution, despite the fact that the conflict between that section and the State's international obligations was made explicit in the decision of the majority of the JCPC in *Boyce and Joseph*[38];

(iii) even where the State has enjoyed a measure of discretion which would have enabled it to take steps to mitigate the violations of its international obligations, e.g. by refraining from reading death warrants and fixing dates for execution in respect of those subject to the mandatory death sentence, it has instead vigorously sought to carry out such sentences by appealing stays and commutations of sentence imposed by the domestic courts and arguing that its international obligations are of no effect in the face of domestic law.

150. The State Party seeks to argue that its savings clause does not violate article 2 of the Convention because the effect of section 26 of the Constitution only

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

bites if there has been violation of a fundamental right; since the State denies that there has been any such violation, it submits that "section 26 has no impact upon any of the rights of the four Alleged victims." [written submissions, 18 December 2006].

151. The alleged victims respectfully submit that this argument is disingenuous. Even in the case of *Boyce and Joseph* before the JCPC, where the majority upheld the constitutionality of the mandatory death sentence, Lord Hoffmann, delivering the judgment of the majority, expressly stated that the mandatory death penalty is not consistent with a current interpretation of either Barbados' international treaty obligations, nor the prohibition on inhuman treatment in section 15(1) of the Constitution [see para. 6 of the judgement of Lord Hoffmann [2005] 1 AC 400]. In short, it was only by operation of section 26 of the Constitution that the majority held the mandatory death sentence to be saved from being unconstitutional. It is submitted that, in these circumstances, it is beyond dispute that the continued existence in force of section 26 of the Constitution amounts to an ongoing violation of article 2 of the American Convention.

SECTION E: METHOD OF EXECUTION

Cruel and Inhuman Punishment

152. The Alleged victims submit that the execution of the death sentence by hanging as provided by Barbados law constitutes cruel and inhuman treatment or punishment in violation of Article 5(1) and 5(2) of the American Convention on Human Rights 1969.

153. The right not to be subjected to inhuman, cruel and unusual punishment is a fundamental right contained in some form in every human rights instrument, both regional and international, and in the Bill of Rights in constitutions around the world. It is contained in Article 5 of the American Convention on Human Rights and in Section 15(1) of the Constitution of Barbados. Despite the differences between the expressions used in the various instruments, for example "cruel and unusual treatment or punishment" or "inhuman and degrading treatment and punishment" the meaning is essentially the same. It is a right aimed at preventing man's inhumanity to man, it is to prevent the use of

punishments which are repugnant to humanity and to civilised society and which cause unnecessary and extreme suffering.

154. The jurisprudence interpreting what amounts to cruel and inhuman punishment has recognised the evolving standards of civilised society and the need to assess a particular punishment in light of what is recognised today as being an inhuman punishment. In *Newbe. S. v. Tshuma. S v. Ndhlore* [1988] (2) S.A. 702, it was said:

> "Punishments that are incompatible with the evolving standards of decency that mark the progress of a maturing state or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances."

155. Examples of punishments that have been found to be cruel and inhuman include flogging (*Pinder v. The Queen* [2002] 3 WLR 1443), corporal punishment (*Tyrer v. United Kingdom*) and whipping (see *The State v. Ncube and others* [1988] (2) SA 702 (ZSC)).

156. The alleged victims submit that the execution of the death sentence by hanging in Barbados is cruel and inhuman punishment as it exposes the condemned man to prolonged and unnecessary suffering, there is a risk of a long drawn out, extremely painful and possibly gruesome death due to the possibility of death by strangulation or full or partial decapitation.

Method of Execution not an Academic Issue

157. It has been argued by the State of Barbados that whether or not death by hanging in Barbados is a cruel and inhuman punishment is an academic issue as none of the alleged victims will now be executed. It is submitted that it is not an academic issue but is a real one for at least two reasons.

158. First the alleged victims' complaint is that at the times the death warrants were read to them their right not to be subjected to cruel and inhuman punishment was violated. It is submitted that when the death warrants were read the alleged victims were going to be executed within 7 days by hanging, and at

that time there was a violation of their Article 5 rights. They were exposed to a cruel and inhuman punishment and the alleged victims ask this Honourable Court to find that that exposure was a violation of their Article 5 rights.

159. Second, currently Mr Huggins' sentence of death has not been commuted and he still faces death by hanging. At any time the State of Barbados could read a death warrant to Mr Huggins at which point he would once again be exposed to a cruel and inhuman punishment.

The Need to Consider what Method would be Permissible?

160. In submitting that death by hanging in Barbados is a cruel and inhuman punishment the alleged victims make no comment about, nor need to make any comment about, other methods of execution carried out in other jurisdictions. It is irrelevant whether or not some other form of execution would or would not violate the prohibition on cruel and inhuman punishment. The only question that this Honourable Court is being asked to decide is whether the form and manner of execution to which the alleged victims were or may be exposed amounts to a violation of Article 5. In doing so there is no need for this court to consider whether some other form or method of execution would be permissible. It is not a pre-requisite that a permissible method of execution must first be identified before it is possible to find that death by hanging in Barbados is not permissible.

161. In the cases in which it has been argued that the death sentence cannot be carried out because the method of execution constitutes cruel and inhuman punishment the courts have always accepted that if they found the method concerned to constitute cruel and inhuman punishment then the sentence cannot be carried out. The issue therefore before the courts is always whether the particular method of execution in question is cruel and inhuman.

Case Law on Methods of Execution

162. In assessing whether a method of execution constitutes cruel and inhuman punishment one important consideration is whether it causes "the least possible physical and mental suffering". In respect of death by gas

asphyxiation in the case of *Ng v Canada* (469/1991) the UN Human Rights Committee stated at paragraph 16.2 that:

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

163. It is submitted that this case makes clear that a method of execution will violate the right not to be subjected to cruel and inhuman punishment if it does not cause "the least possible physical and mental suffering."

164. The Human Rights Committee in *Ng* went on to find that execution by gas asphyxiation constituted cruel and inhuman punishment because:

> "execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as quickly as possible, as asphyxiation by cyanide gas may take up to 10 minutes."(paras 16.4)

165. The Court of Appeals for the Ninth Circuit in America also found that death by lethal gas amounted to cruel and inhuman punishment and was therefore unconstitutional. In *Ferro v. Gomez* (1996) 77 F.3d 301 it was held that:

> "In short we hold that the district court's extensive factual findings concerning the level of pain suffered by an inmate during execution by lethal gas are not clearly erroneous. The district court's findings of extreme pain, the length of time this extreme pain lasts [15 seconds to one minute], and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual. Accordingly we conclude that execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the eighth and fourteenth amendments."
>
> [final paragraph of the judgment]

166. In *Republic v. Mbushu* (1994) 2 LRC 335 the High Court of Tanzania found that the death penalty was unconstitutional, partly because of the barbarity of

the method of execution, that of hanging. The judge asked rhetorically why this particular method of execution was still retained (at p.345c).

167. In the case of *Campbell v. Wood* (1994) 18 F. 3d 662 the Court of Appeals for the Ninth Circuit considered whether death by hanging as carried out in Washington was cruel and unusual punishment and so unconstitutional. The majority of the court (five out of nine judges) found that death by hanging in Washington did not involve the wanton and unnecessary infliction of pain and therefore was not unconstitutional. Crucial to their decision was that in Washington there was a detailed protocol which they found had eliminated virtually all risk of pain and decapitation. The minority of the court (judges Reinhardt, Browning, Tang and Nelson) in a powerful and fully reasoned dissent rejected the holding of the majority. One of the reasons for doing so was that they found that the expert testimony heard clearly demonstrated a significant risk of decapitation or strangulation. The dissenting judges felt that the State's evidence was highly suspect and felt that the expert evidence provided by Campbell was much stronger and more believable [694-5].

The Washington Protocol

168. In considering the constitutionality of death by hanging the court heard evidence and analysed Field Instruction WSP 410.500 ("the Washington Protocol") which is a detailed methodology for hanging derived from U.S army regulations. Under the Washington Protocol the rope used to hang a person must be between three quarters and one-and-one quarter inches in diameter. The rope must be boiled and then stretched to eliminate most of its elasticity. The rope is then coated in wax or oil so that it slides easily and the Protocol provides detailed instructions on how and where the knot should be tied. The Protocol employs a "long-drop" method of hanging whereby the condemned person is dropped a particular distance based on his weight. A chart is included in order to calculate the length of the drop.

169. The purpose of the Protocol is to reduce the risk that a person will be decapitated or die of asphyxiation. In relation to the length of drop, the majority found:

> "Although there is no way to predict with a high degree of accuracy which of the various mechanisms will contribute to unconsciousness and death in any given hanging, there are methods of increasing the likelihood that unconsciousness will be rapid and death comparatively painless. Chief among these is the length of the drop."
>
> "Appropriate drop distance is critical to conducting judicial hanging in the most humane way possible. If the drop is too short in relation to the weight of the prisoner, death is likely to result from the mechanism of airway occlusion; that is the condemned man will asphyxiate. If the drop is too long in relation to weight, death may result from decapitation."
> [684]

170. The majority went on to say that a second important factor in bringing about "a swift and painless death" is the selection and treatment of the rope. A very slender ligature is likely to break the skin, increasing the chances of partial or complete decapitation. Treating a rope in order to reduce elasticity is to ensure that the kinetic energy is quickly transferred to and borne by the neck structures rather than being absorbed by the rope. Waxing or oiling the rope is to ensure it slides easily around the neck as applying pressure all round the neck is an important factor in causing rapid unconsciousness. Finally the majority of the court noted the importance of the positioning of the knot as a factor bearing on whether unconsciousness and death are rapid and painless; the Protocol specifies that it should be below the left ear.

171. The above safeguards were crucial to the majority finding that death by hanging in Washington was not unconstitutional.

172. It is also important to note that in reaching their decision the majority only took into account evidence of one actual hanging. Campbell was refused permission to admit additional evidence of "bungled" hangings where those hangings had not been carried out according to the Washington Protocol. The majority upheld the decision of the district court that such evidence was inadmissible on the grounds that its role was to determine whether judicial hanging "only as it is performed in Washington" was cruel and unusual punishment [paragraph 41, p.686]. The decision of the majority in Campbell was therefore reached on very limited evidence, and evidence concerning actual numbers of hangings where death resulted from asphyxiation or decapitation was not admitted.

173. In the powerful dissent, the evidence adduced to show that the risk of decapitation and asphyxiation had been "virtually eliminated" by the use of the Washington protocol was robustly rejected. The dissenting judges found that:

> "Read in context ... the testimony as a whole clearly showed that although in the majority of hangings death is relatively painless, each time an individual is to be hanged, there is a significant risk of decapitation or of a slow, lingering and painful death". [emphasis added]

They went on to say:

> "[T]he Washington Protocol - on which the district court and the majority rely so heavily – consists solely of a 12-page typed set of prison regulations, less than three pages of which have anything to do with the mechanics of actual hanging. The crucial parts of this protocol were simply copied without any medical advice or consultation from a 1959 military execution manual that had *never* been used in an actual hanging, even though the Washington State officials had no idea how the procedure set forth in the manual had been developed. The expert evidence made clear that this protocol was in fact not very different from hanging procedures which had caused severe pain, lingering deaths and mutilation in the past, and that these results would likely continue to occur in a number of cases under the Washington procedures." [694]

174. It is submitted that the true ratio of the majority in *Campbell* was that, because of the Washington Protocol, which was accepted by the majority to have eliminated virtually all risk of pain and decapitation, death by hanging in Washington was not a cruel or unusual punishment. It follows that had the majority not found (as the minority did not) that the Washington protocol had virtually eliminated all risk of pain and decapitation, then death by hanging would have constituted a cruel and unusual punishment.

175. It is submitted that the reasoning contained in the minority is to be preferred, because:

(a) Firstly, the minority rightly summarised and considered the evidence that demonstrates the rejection of hanging by civilised society worldwide (see p697.)

(b) Secondly, the minority were correct in their analysis of the inconsistency of hanging with human dignity when they state:

"We are convinced that judicial hanging is an ugly vestige of earlier less civilised times when science had not yet developed medically-appropriate methods of bringing human life to an end. Hanging is a crude rough and wanton procedure, the purpose of which is to tear apart the spine. It is needlessly violent and intrusive, deliberately degrading and dehumanising. It causes grievous fear beyond that of death itself and the attendant consequences are often humiliating and disgusting." (see p. 701).

(c) Thirdly, the minority were correct to find that the trial judge had plainly been wrong to conclude that hanging produces a painless death, and they were correct to conclude that the evidence demonstrated that hanging inflicts wanton and unnecessary pain:

"Hanging involves a high risk of pain, far more than is necessary to kill a condemned inmate. If the drop is too short, the prisoner may strangle to death, a slow and painful process. However the hangman must also be concerned that the drop not be too long, for if it is, the prisoner may be decapitated." (see p. 708).

"There is absolutely no question that every hanging involves a risk that the prisoner will not die immediately, but will instead struggle or asphyxiate to death. This process, which may take several minutes, is extremely painful. Not only does the prisoner experience the pain felt by any strangulation victim, but he does so while dangling at the end of a rope, after a severe trauma has been inflicted on his neck and spine. Although such a slow and painful death will occur in only a comparatively small percentage of cases, every single hanging involves a significant risk it will occur ... This conclusion is not surprising, because every jurisdiction that had ever used hanging as a method of execution had understood that the risk of a painful and torturous death exists." (see pp. 712 – 713).

176. It is submitted by the alleged victims that the minority in *Campbell v. Wood* were correct to find that death by hanging, even with the Washington Protocol in place, constituted cruel and inhuman punishment.

177. The case of *Campbell v. Wood* was followed later the same year by the case of *Rupe v. Wood* (1994) 863 F. Supp. 1307, which again concerned the constitutionality of death by hanging in Washington. The district court in this case found that due to the particular characteristics of Mitchell Rupe (excessive weight, approximately 29 stone), there was a significant risk of decapitation and so held that to hang him would violate the Eighth amendment.

178. The evidence of Tana Wood, who was the Superintendent in charge of the hanging, was that she initially intended to use a drop of 5 feet, as dictated by the Washington Protocol. But Tana Wood also took advice from Dr Ravani, an engineering expert, as to the correct drop length and width of rope to be used. Following the advice she decided to reduce the drop length to 3 feet 6 inches and to fix the rope size at 7/8 inch diameter in order to reduce or eliminate the possibility of decapitation.

179. The State also provided the court with expert evidence concerning the likelihood of very rapid if not immediate unconsciousness, which the court accepted. However, the court did not accept that there was not a risk of decapitation. In order to reduce that risk however, the drop length would have to be reduced, with the result that Mr Rupe would be more likely to suffer strangulation.

180. The court found that although with the proposed drop length and following the Washington Protocol Mr Rupe would not be at risk of strangulation, they were of the view that he was at significant risk of decapitation. In the event that decapitation occurred the result would be mutilation of Mr Rupe's body. The court therefore held that:

> "Because the court concludes that there is a significant risk that Rupe's hanging would result in decapitation, such a hanging would also violate basic human dignity "which is the basic concept underlying the Eighth Amendment" *Gregg, 428 U.S. at 173 (*quoting *Trope, 356 U.S. at 100).* Supreme court cases discussing the eighth amendment make clear that decapitation and similar mutilation, even if accomplished after death and thus perhaps without "unnecessary and wanton infliction of pain", offend basic human dignity." [p.7 of the judgment]

181. The Court concluded that death by hanging in Mr Rupe's case, even following the Washington Protocol, was unconstitutional.

Expert Evidence

182. In submitting that death by hanging in Barbados amounts to cruel and inhuman punishment the alleged victims rely on the expert evidence of Dr Harold Hillman, Dr Hunt and Dr James.

183. The expert evidence of Dr Hillman is contained in his affidavit dated 5th April 2004, filed in support of a Constitutional Motion before the Constitutional Court of Uganda, and in his affidavit filed in these proceedings dated 30th March 2007 Dr Hillman's evidence can be summarised as follows:

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

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

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

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

(i) death by hanging constitutes inhuman and degrading treatment because it does not result in instantaneous death, and there is an impermissibly high risk that the victim will suffer an unnecessarily painful and torturous death by strangulation;

(ii) the pressure in the brain will increase and this is normally accompanied by severe headaches. The increased pressure can be seen as engorgement of the face, eyes and tongue;

(iii) the obstruction of the windpipe raises the carbon dioxide concentration in the blood which makes the person want to inspire, but he cannot do so, due to the obstruction of the windpipe itself. This causes great distress, as occurs during strangulation. However, the person cannot cry out nor can he react normally to distress and pain by moving his limbs violently as they are tied;

(iv) the skin beneath the rope in the neck is stretched by the fall and this will be painful; and

(v) the humiliating effects of hanging on the body clearly amount to degrading treatment and punishment.

187. The expert evidence of Dr Albert Hunt is contained in his affidavit dated 23rd March 2004, filed in support of a Constitutional Motion pending before the Constitutional Court of Uganda. Dr Hunt's evidence can be summarised as follows:

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

188. The doctors' empirical findings are supported by contemporary accounts of executions by those who witnessed them, on whose evidence the alleged victims rely. These accounts reveal a consistent pattern of failure to produce instantaneous death or unconsciousness with the result that the prisoner

suffered extreme pain prior to death. Significantly, these accounts all post date the introduction of the so-called "humane" long drop, which it had been thought would produce instantaneous death. The authors of the report documenting such empirical findings conclude:

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

189. The expert evidence of Dr. James is contained in his affidavit of 18 June 2007. The State of Barbados, in closing submissions at the oral hearing, questioned the expertise of Dr James on the basis that he himself has not carried out a post mortem on a body following judicial hanging. It is submitted that this criticism is completely misplaced and is to misunderstand the methodology of Dr. James' research and his considerable expertise in this area, including the firsthand study of skeletons of those who had been judicially executed.

190. Dr James clearly has unrivalled experience of research into various forms of hanging, and in particular has studied the skeletons of a group of individuals executed by the long drop method of judicial hanging practised in England and Wales before the death penalty was abolished, and in particular studied the cervical spines of these persons. In addition to first hand research, Dr. James has reviewed the established medical literature, scientific and historical papers and read the evidence submitted to the Committee appointed to inquire into executions in capital cases in 1886. He has published two scientific papers, one of which shows that fractures of the cervical spine (which should cause instant death) was, in fact, infrequent. The other addresses the potential for decapitation. He has appeared as an expert witness in all the leading cases in the United States of America.

191. In his affidavit Dr. James details the various attempts that have been made to devise a system for matching the length of the drop when an individual is executed with his body weight to minimise the risk of strangulation (if the drop is not enough) or decapitation (if it is too long). He concludes that no system

can be devised that will reliably ensure that death is instant and without decapitation. In paragraph 27 of his affidavit he states:

> "In any event, I do not think that it is possible to perfect judicial hanging such that instantaneous unconsciousness occurs reliably and reproducibly and certainly not from a system which utilises only the weight of the victim to determine drop length."

He goes on to say with regard to hanging in Barbados:

> "There is nothing in the affidavit of John Nurse or the other materials supplied by the State of Barbados to suggest that the method to be employed is so distinct from the means of judicial hanging used in other jurisdictions that comment from hangings outside Barbados are not relevant; there is nothing to suggest that it has been subject to such scientific validation as might give confidence in the outcome of its application."

192. As Dr James sets out there are numerous variables over and above a crude drop and weight calculation, including the strength of the individual's neck, the length and elasticity of the rope, the 'give' in the noose as it shortens and compresses the neck, the resistance of the slip knot and the position of the knot. The State of Barbados has provided no evidence to suggest any consideration is given to all or any of these important variables when preparing to carry out death by hanging.

Conclusion

193. The State of Barbados, up until the time of the oral hearing, produced no evidence to suggest there is in Barbados anything like the equivalent detailed procedures contained in the Washington Protocol designed to eliminate the risk of decapitation or asphyxiation. The Affidavit of John Nurse (tab 173 of annexures to the submissions of the State of Barbados, 18th December 2006) set out very basic equipment checks, and simply records that the inmate is measured and that measurement is applied to the noose, upon which a small amount of oil is placed. There was and, the alleged victims submit, is no written instructions, no protocol, and no-one trained to carry out executions. The gallows in Barbados are the old gallows at the near derelict Glendairy Prison and they have not been used since 1984: in short, it is submitted that not even the most basic safeguards were in place to ensure instant death.

194. At the oral hearing, for the very first time, John Nurse when giving oral evidence made reference to a new direction that he himself had written in June 2007. This has not been produced. Even if this is now in existence it clearly was not at the time the warrants were read to the alleged victims and so is not relevant to the complaint in these proceedings. The question for this Honourable Court is not whether the State of Barbados can now, or in the future, comply with safeguards equivalent to the Washington Protocol. The question is whether Barbados can show that at the time that the alleged victims were exposed to the death penalty, the method of hanging to be used did not amount to cruel and inhuman treatment. At the very least, if it is accepted that the majority in Campbell v Woods were correct (and it is submitted they were not), Barbados would have to show that safeguards equivalent to those contained in the Washington Protocol were in place. It is submitted that there is no such evidence. Whether the alleged victims would have died instantly, been decapitated or suffered lingering death by strangulation would have been largely a matter of chance.

195. The alleged victims submit that the execution of the alleged victims by hanging would not have met the test of "least possible physical and mental suffering". The process of being blindfolded and pinioned, hanged by the neck, made to defecate and urinate, and being exposed to the risk of a long drawn out extremely painful and possibly gruesome death amounts to cruel, inhuman and degrading treatment contrary to Article 5.

SECTION F: READING OF THE WARRANTS

The Reading of Execution Warrants to the Alleged Victims

196. Warrants of execution were read to all four alleged victims for the first time on 26 June 2002. This was after the State of Barbados had been given formal notification that all four were to Petition the JCPC. Warrants of execution were read to Boyce & Joseph for a second time on 15 September 2004; 12 days after all four alleged victims had lodged a complaint with the Inter-American Commission. The Motion was filed in the High Court and stay sought for a second time in the case of Boyce & Joseph. The High Court dismissed the Motions and Boyce & Joseph appealed to the Court of Appeal. While this appeal was pending warrants of execution were read to Atkins on 18 February

2005 and Huggins on 18 May 2005. Stays were applied for and granted in both cases pending the decision of the Court of Appeal in Boyce & Joseph. The Court of Appeal allowed the appeal on 31 May 2005, but the State appealed the decision to the Caribbean Court of Justice. That court upheld the Court of Appeal decision on 8 November 2006.

Reading of the Warrant to Boyce and Joseph in face of the notice of intention to appeal to the Privy Council

197. As the narrative set out in Section B demonstrates, there is no dispute that the first warrant was read to Boyce and Joseph before they had formally lodged their petition for special leave to appeal to the JCPC. The first warrant was read on 26th June 2002. The petition was lodged on 25th July 2002. But, equally, it cannot be disputed that long before the first warrant was read:

i) the BPC had been notified of Boyce and Joseph's intention to petition the JCPC;

ii) the BPC had been asked to postpone consideration of mercy until after the determination of the intended appeal to the JCPC; and

iii) that London Solicitors who customarily act on behalf of the State of Barbados in all of its appeals to the JCPC had given solicitors for Boyce and Joseph until 26th July 2002 to lodge the petition.

198. While the State of Barbados does not dispute the latter fact, they contend in oral argument before the Inter-American Court that their London Solicitors did not in this instance have the authority to act on their behalf. It is therefore appropriate to examine in greater detail exactly what the London Solicitors did.

199. By letter dated 2nd May 2002, Messrs Charles Russell wrote to Mr John Hume, London Solicitor acting for Boyce, informing him that

> "I anticipate receiving instructions from the Authorities in Barbados to the effect that the Petition should be filed no later than three months from the date in (sic) which you have given Notice. You are therefore expected to file the Petition no later than Friday 26th July 2002."

200. By letter dated 23rd May 2002, Messrs Simon Muirhead and Burton wrote to Messrs Charles Russell in the following terms:

> We write further to our telephone conversation (Lehrfreund/Almeida) of 16th May 2002.
>
> We are able to confirm that we have now received instructions to Petition the Judicial Committee for special leave to appeal as poor persons on behalf of Mr Boyce and Mr Joseph. We have received all relevant documentation in this matter which has been provided by John Hume and have instructed Counsel to settle the Petition.
>
> We understand that we are expected to file our client's Petition no later than Friday 26th July 2002.

201. The State of Barbados has not at any time produced any evidence that Messrs Charles Russell did not have authority to act on its behalf with respect to the granting of time to lodge the Petition for special leave. It can therefore be assumed that Messrs Charles Russell obtained the instructions they told Mr Hume they would seek and indeed had those instructions when the conversation between Mr Lehrfreund and Mr Almeida took place and in fact conveyed those instructions to Mr Lehrfreund. Hence the reason why Messrs Simons Muirheard Burton stated in the closing paragraph of their letter that "We understand that we are expected to file our client's petition no later than Friday 26th July 2002." If Messrs Charles Russell had been instructed by the "authorities in Barbados" to the contrary on such an important matter, one would expect that they would have said so. In the absence of any evidence that Charles Russell did not have the authority to commit to a date for the filing of the Petition, it can safely be assumed that such instructions had been received. At the very least, lawyers acting for Boyce and Joseph were justified in proceeding on the basis that they had until 26th July 2002 to file the Petition.

202. In its written case, the State of Barbados argues as follows:

i) that the warrant was read "prior to their having formally launched an appeal to the Judicial Committee of the Privy Council and were not read subsequent to that appeal" (para 339);

ii) that the State of Barbados is "under an obligation to carry out its constitutionally entrenched legal processes, included executions, in a

timely manner. If it were not to do so, it would violate the Petitioner's rights not to be subjected to cruel, inhuman and degrading treatment or punishment" (para 340); and

iii) that the mere possibility of the filing of an appeal is not a ground for delaying the reading of a death warrant. The serving of a notice of an intention to appeal does not amount to an appeal (para 341). The case of *Mejia v Attorney General of Belize* is cited in support.

203. As to the first point, it is not Boyce and Joseph's case that the warrant was read after they had lodged their appeal to the JCPC. What they contend is that the first warrant was read even though i) they had notified the authorities of their intention to appeal; ii) they had asked the Barbados JCPC to consider their cases only after the determination of the intended appeal; and moreover iii) the State of Barbados' London Solicitors had expressly allowed Boyce and Joseph until 26th July 2002 to lodge the petition. It is submitted that it was manifestly unfair in those circumstances to have read the warrants for the execution of Boyce and Joseph.

204. The State of Barbados' more recent argument that its London Solicitors were not authorised to fix a date by which the appeal should be lodged is of no moment. No evidence to this effect has ever been provided. In any event, the State of Barbados must take responsibility for the actions of those who normally act on its behalf and have ostensible authority so to act and moreover who expressly represented to lawyers for Boyce and Joseph that they had until 26th July to lodge the petition.

205. But even if the London Solicitors grant of time to lodge the appeal is put to one side, it is submitted that it is nevertheless manifestly unfair to read a warrant when Boyce and Joseph had signified their intention to appeal. No explanation has been given as to why the State of Barbados could not simply have warned Boyce and Joseph in the first instance that the BPC would take the next step if an appeal was not lodged by a certain specified date and thereafter to read the warrant if they had failed to do so.

206. As to the second argument, it is undoubtedly true that the State of Barbados was under an obligation to carry out executions in a timely manner. But if it

was thought that Boyce and Joseph were adopting delaying tactics in failing to lodge their appeal, this could have been easily cured by setting a cut off date for the filing of the appeal. Moreover, it is trite law that a condemned prisoner cannot rely on delay caused by his own actions. Accordingly, any unreasonable delay in the filing of the appeal would not in any event have been taken into account in assessing whether the *Pratt and Morgan* guidelines had been infringed.

207. As to the last argument, it is of course true that an intention to lodge an appeal is not the same thing as an actual appeal. However, it is important to note that when on 27th June 2002, Boyce and Joseph applied for a stay of execution, this was granted by the Barbados High Court even though an appeal had not yet been lodged and more importantly the State of Barbados did not object to the stay being granted. If the State was prepared to consent to a stay even though the appeal had not yet been lodged, the obvious question is why was the warrant read at all?

208. The State of Barbados relies on an extract from the decision of the High Court of Belize in *Mejia v The Attorney General of Belize* in which two points are made, namely that i) "It is not enough to send a notification of "Intention to Appeal." Concrete steps must be taken to file such petitions in a timely fashion"; and ii) that the Belize authorities ought not to be required to wait "ad infinitum for such petitions to be filed thus frustrating and delaying the judicial process and resulting in complaints that such delay in executions infringes constitutional rights."

209. There are a number of answers to the above. The first is that the Barbados Court of Appeal has determined quite definitively that the reading of the first warrant after Boyce and Joseph had intimated their intention to appeal to the JCPC was manifestly unfair and a denial of natural justice – (see para 70 of the judgment of the Court of Appeal and para 88 above).

210. Secondly, Rules made by the Governor General in 1967 and reported in Subsidiary Legislation Supplement No. 62, Supplement to Official Gazette No. 78 dated 28th September 1967 (referred to at para 46 of the judgment of the Barbados Court of Appeal) provide that:

"If intimation is received from or on behalf of a person condemned to death that it is intended to apply to the Judicial Committee of the JCPC for special leave to appeal, the execution will be postponed and a date, three weeks later, will be fixed ....." (see **Annex I**).

211. Even though the State of Barbados must be taken to be aware of these Rules[39], the execution was not postponed and moreover, Boyce and Joseph were given until 26th July 2006 to lodge their petition.

212. Thirdly, it is not suggested that the State of Barbados should have waited indefinitely while Boyce and Joseph took their time to lodge an appeal. Indeed, they had agreed to do so by 26th July 2002 and even so it was always within the State of Barbados' power to fix a date by which the appeal ought to have been lodged

213. In all of the circumstances, it is submitted that the State of Barbados intentionally, wantonly or recklessly inflicted mental injury on Boyce and Joseph by reading the first warrant since:

i) the State of Barbados knew that Boyce and Joseph intended to appeal;

ii) London Solicitors purporting to act for the State of Barbados had allowed Boyce and Joseph until 26th July 2002 to lodge an appeal;

iii) The 1967 Rules required the postponement of the execution once intimation of an intention to appeal was given;

iv) the State of Barbados readily consented to a stay of execution even though an appeal had not yet been lodged;

v) Nothing prevented the State of Barbados from fixing a date by which the Petition for special leave should have been lodged. It was not necessary, and indeed it was callous and cynical to read the warrant solely to compel Boyce and Joseph to lodge their appeal.

[39] See Bradshaw v A.G. of Barbados [1995] 1 WLR 936, at 942 where the Rules were relied on by the State of Barbados, albeit in a different context.

214. The reading of the first warrant to Frederick Atkins and Michael Huggins on 26 June 2002 was also mentally unfair and a denial of natural justice as they had intimated their intention to appeal to the JCPC.

Reading of the warrant while petitions to the IACHR were pending

215. It is not disputed by the State of Barbados that when the second warrant was read to the alleged victims, the authorities were aware that they had already petitioned the Inter-American Commission and that they had been asked to postpone the taking of any further action until after the determination of the petition. Rather the State of Barbados submits (see para 343 of its written case) that this did not amount to violation of the alleged victims' right to petition the Commission or subject them to cruel, inhuman or degrading treatment or punishment for three reasons:

i) There never has been, nor is there now, a legal right to petition the Commission in Barbados law;

ii) There is no binding right under the jurisprudence of the Inter-American system to complete a petition;

iii) The right to petition, which is denied, does not include a further right to extend the petition process for an unlimited or indefinite duration.

216. These points will be dealt with in turn. As to the first point, the State of Barbados contends that the only legal right which exists in Barbados law as established by the Caribbean Court of Justice in *Attorney General v Jeffrey Joseph and Lennox Boyce* is the right to not have one's legitimate expectation to complete a petition frustrated by the State but that this right was only declared to exist by the CCJ as from 8th November 2006 and it did not exist when the second warrant was read in 2004. Quite remarkably, the State of Barbados makes no mention in this part of its submission to the decision of the JCPC in *Lewis v A.G. of Jamaica*. In that case, it was held that the right to the protection of the law (a right guaranteed by the Barbados Constitution) entitled a condemned prisoner to complete a petition to an international human rights body and to obtain the reports of such a body for consideration by the Mercy Committee before determination of the application for mercy, and to a stay of

execution until that report had been received and considered. Nor does the State of Barbados refer to the fact that the Barbados Court of Appeal held that it was bound by the decision in *Lewis* or that the CCJ likewise ruled that Barbados courts were to consider themselves to be bound by decisions of the JCPC until overturned by the CCJ and that, specifically, they were bound by the decisions in *Lewis*.[40] In other words, both the CCJ and the Barbados Court of Appeal held that at the time the second warrant was read to the alleged victims the law in Barbados was as stated in *Lewis*, but the State of Barbados makes no mention of this.

217. Presumably, it will be said that it was only when the CCJ finally determined in November 2006 that Barbadian courts were bound by *Lewis* that the Barbadian authorities appreciated that they were bound by *Lewis*. Accordingly, it will probably be contended, there was no intentional breach of the alleged victims' right to a postponement of consideration of mercy until their petition was determined. However, any such contention is untenable for the following reasons. Firstly, it has always been accepted that Barbadian courts are bound by decisions of the JCPC on appeals from other jurisdictions in relation to similar legislative provisions or points of common law. In *Fatuma Binti Mohamed Bin Salim Bakhshuwen v Mohamed Bin Salim Bakhshuwen* [1952] AC 1, the JCPC, which was at all relevant time Barbados' highest court, decided that local courts were bound by all decisions of the JCPC, even those on appeal from a different jurisdiction. This position has been consistently followed in the Caribbean – see *Belize Bank Ltd v Atlantic Bank Ltd and Another* (1997) 55 WIR 96, at 102 (Belize Court of Appeal); *Grell-Taurel Ltd v Caribbean Home Insurance Co Ltd and Others* (1998) 55 WIR 374, at 383 (T&T High Court); *Presidential Insurance Co Ltd v Stafford* (1997) 52 WIR 449, at 453 (T&T Court of Appeal); *Jamaica Carpet Mills Ltd v First Valley Bank* (1986) 45 WIR 278, at 286 (Jamaica Court of Appeal); R v Minister Of National Security Ex Parte Grange (1976) 24 WIR 513, at 530 (Full Court of the Supreme Court of Jamaica). In *Jamaica Carpet Mills Ltd v First Valley Bank*, for example, the Jamaica Court of Appeal said (at p. 286):

[40] See *AG of Barbados v Joseph & Boyce* (CCJ Appeal No CV 2 of 2005) – paras 16-18 of Judgment of the President and Saunder J., para 1 of judement of Hayton J. and paras 23-24 of the judgment of Wit J.references to judgments; and *Joseph and Boyce v AG of Barbados* (Barbados Court of Appeal, CA 29 of 2004) at para 34.

> "It has been argued before us that the binding authority of the decisions of the JCPC on courts of Jamaica only applies to decisions in appeals from Jamaica and the authority for such a proposition is said to be *Baker v R* (above). I do not share that view. I was a member of the court in *R v Commissioner of Police, ex parte Cephas (No 2)* (1976) 24 WIR 500, in which Henry J in delivering the judgment of the Full Court referred to the decision of the JCPC, *Eshugbayi Eleko v Nigeria Government Officer Administering* [1928] AC 459, and said (at page 502): 'That judgment is binding on this court because although it was given in a case coming from another territory the issue of law in both cases is the same.'
>
> And the Court relied upon *Fatuma Binti Mohammed Bin Salim Bakhshuwen v Mohammed Bin Salim Bakhshuwen* [1952] AC 1. It was decided in that case that on the assumption that the rights of the parties were to be determined without reference to any Ordinance dealing specifically with wakfs, that the interpretation of Mohamedan law given by the Judicial Committee of the Privy Council in a series of cases was not confined to that law as applied or administered in India and that decisions of the Board given in appeals which came from India were binding on the Court of Appeal for Eastern Africa in appeals to that court from the Supreme Court of Kenya."

218. Moreover, in *Peter Bradshaw v AG of Barbados* CA 31&36 of 1992 (April 2nd 1993), the Barbados Court of Appeal held that it was bound to follow a previous decision of the JCPC in an appeal from Jamaica.

219. As such, the State of Barbados must have known that *Lewis* represented the law in Barbados at the time the reading of the second warrant was being considered. And even it if was not certain on this score, it could have applied to the High Court of Barbados to have the question determined without the need to inflict injury on Boyce and Joseph by reading a warrant to force them to approach the Court to enforce their rights.

220. Secondly, in 2002, the Barbadian Parliament enacted the Constitution (Amendment) Act 2002 which introduced the following provisions as sections 78(6) and 78(7) of the Constitution:

> (6) The Governor General, acting in accordance with the advice of the JCPC, may by instrument under the Public Seal direct that there shall be time-limits within which persons referred to in subsection (1) may appeal to, or consult, any person or body of persons (other than Her Majesty in Council) outside Barbados in relation to the offence in question; and, where a time-limit that applies in the case of a person by reason of such a direction has expired, the Governor General and the JCPC may exercise their respective functions under this section in relation to that person, notwithstanding that such an appeal or

consultation as aforesaid relating to that person has not been concluded.

(7) Nothing contained in subsection (6) shall be construed as being inconsistent with the right referred to in paragraph (c) of section 11.

Section 11(c) makes provision for the right to the protection of the law.

221. It is clear that these provisions are premised upon the existence of a right not to be considered for mercy until any pending petition before an international human rights body is determined. The grant in section 78(6) to the Governor General of a power to set time limits for the completion of a petition to an international body and, where such time limit has expired, to proceed to exercise the power under section 78(3) to decide whether to grant a condemned man mercy, notwithstanding that the condemned man's petition to the international body has not been determined, necessarily implies the prior existence of a right not to have any such petition curtailed by executive action. That the existence of the right is to be implied from the terms of section 78(6) is confirmed by section 78(7) which provides that the setting of time limits for the making of any such petition is not to be construed as being inconsistent with the right to the protection of the law. Simply put, if the right did not exist, there would be no need to prescribe any time limits for its exercise.

222. At the time the Amendment Act was passed in Parliament, the only source of the right to complete a petition before an international body before mercy was considered was the decision in *Lewis*. It must be presumed therefore that the members of the legislature, which included the Attorney General and all the other members of the Cabinet, were aware of the decision in *Lewis* and of its binding effect in the laws of Barbados. Indeed, the Hansard reports of the debates on the amendment show that *Lewis* was expressly referred to and that section 78(6) was introduced expressly to ensure that access to international bodies as result of *Lewis* would not prevent lawful sentences of death being carried out without undue delay.

223. It follows from all of the above that the State of Barbados at all times knew full well that the alleged vicitms were entitled under Barbadian law as a result of *Lewis* to have consideration of mercy in relation to them postponed until after the determination of their petitions to the Inter-American Commission. Nevertheless, even though fully aware that petitions had been filed and even

though specifically asked to postpone consideration of mercy, the State of Barbados deliberately and steadfastly proceeded to read warrants to the alleged victims and thereby inflict unnecessary mental anguish on them. Such wanton and callous conduct constitutes cruel and inhuman treatment and punishment.

224. As to the second point, while it is true that the State of Barbados has not violated any Provisional Measures Order relating to the alleged victims, this is not to the point. What is contended on behalf of the alleged victims is that they were subject to cruel, inhuman and degrading treatment or punishment when the State of Barbados deliberately and intentionally read warrants to them knowing that this would be in breach of Barbados law as then declared in *Lewis*.

225. As to the third point, the alleged victims do not contend for any further right to extend the petition process for an unlimited or indefinite duration. When the warrants were read to them, they had only very recently petitioned the Commission. It therefore could not be said by the State of Barbados that an unreasonable time had elapsed since the filing of the petition, justifying the reading of the warrant. Moreover, the Governor General had not yet set any time limits for the making of such petitions, as he was entitled to do under the Constitutional (Amendment) Act.

SECTION G: CONDITIONS OF DETENTION

The approach to be taken

226. International human rights law recognises the right of those detained to be treated with respect and dignity, and not to be subjected to inhuman or degrading treatment. The International Covenant on Civil and Political Rights 1966 explicitly states in Article 10 the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. The American Convention in Article 5(2) also explicitly states the right of those detained to be treated humanely, it states:

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

227. The alleged victims submit that the conditions of detention to which the alleged victims have been and are subjected fail to respect their physical, mental and moral integrity as required under Article 5(1) of the Convention and fail to treat them with respect for the inherent dignity of the human person and constitute inhuman and degrading treatment contrary to Article 5(2) of the Convention. The right not to be subjected to inhuman or degrading treatment is a non-derogable right and creates a minimum standard of treatment below which no-one, regardless of the economic or political circumstances of a country, can be subjected.

228. In addition to the provisions of the ICCPR and the American Convention there are internationally recognised guidelines concerning the treatment of prisoners, the most important being The UN Standard Minimum Rules for the Treatment of Prisoners ("SMR"). The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, adopted the SMR and the Economic and Social Council later approved them. There is also "The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment". The Body of Principles was adopted by the General Assembly in December 1988. Although these principles and guidelines are not strictly binding it is submitted that they are highly persuasive and have been accepted as the applicable standards throughout the world. As Baroness Vivien Stern states in her affidavit:

> "The adoption of these standards by the General Assembly and the Economic and Social Council, which are two principal organs of the United Nations, has given them the character of universality, that is, they are accepted by the international community as a whole as the minimum rules for conditions of detention. These non-treaty based instruments represent statements of values shared by the major legal systems and cultures of the world. Such statements are also found in the domestic law of the world's principal legal systems and have been drafted in an international process, with input from the full cross-section of United Nations Member States. Accordingly, their moral persuasiveness is beyond dispute.
>
> Additionally, the normative content of these standards and details on their implementation at the national level are to be found in the evolving jurisprudence of the United Nations Human Rights Committee, the treaty-monitoring body set up under the International Covenant on Civil and Political Rights."

229. Further, in *The Greek Case*[41] the European Commission on Human Rights in finding that the prison conditions in Greece violated Article 3 of the European Convention on Human Rights 1950 (the equivalent of Article 5 of the American Convention) relied heavily on the Standard Minimum Rules for the treatment of prisoners as providing guidance as to what treatment fell below that required by Article 3.

Relevant Case Law

230. The alleged victims rely on the decision of this Court in the *Suarez-Rosero Case*[42]. Apart from the fact that the victim in that case was held incommunicado, of which the present alleged victims do not complain (although at various times and to varying degrees the alleged victims have been prevented from communicating with family members and with their lawyers), similar conditions of detention to those in which the alleged victims have been and continue to be held were considered by the Court.

231. Further, the alleged victims submit that they are being detained in conditions of confinement which would also constitute a violation of their rights under Article 7 and Article 10(1) of the International Covenant on Civil and Political Rights and invite this Court to adopt a similar approach to that of the United Nations Human Rights Committee (UNHRC).

232. In its General Comment 7(16) on Article 7 the UNHRC said that:

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

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

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

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[41] 12 Yearbook of the European Convention on Human Rights – The Greek Case (1969), 468

[42] Judgment, 12th November 1997, Annual Report 1997.

Ultimate responsibility for the observance of this principle rests with the State as regards all institutions where persons are lawfully held against their will ... (see also *Mukong v Cameroon*[43])

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

235. In *Estrella v. Urugua*[44]*y* the HRC found that the systematic way in which detainees had been treated constituted a practice of inhuman treatment. The applicant had been detained in Libertad prison and been subject to conditions of detention which had been the subject of a number of complaints by other Applicants. The HRC stated:

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

236. A comparison of the prison conditions of the alleged victims with international standards for the treatment of prisoners also suggests that their treatment has failed to respect the minimum requirements of humane treatment. The alleged victims rely on the basic standards provided in respect of accommodation, hygiene, exercise, and medical treatment for prisoners set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners[45]. It is submitted that based upon the alleged victims' allegations, the State has failed to meet the minimum standards of proper treatment of prisoners.

237. It can be no answer that Barbados is a less affluent country than some in the region. It is submitted that the guarantees in the American Convention are expressed in absolute and unqualified terms and apply equally and with the same force to all those countries. Arguments justifying the conditions of detention

[43] Communication No. 458/1991
[44] Communication No. 74/1980 CCPR/C/OP/2 at 93 (1990).
[45] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the United Nations Economic and Social Council resolution 663 c (XXIV) of 31 July 1957; and amended by Economic Social Council Resolution 2076 (LXII) of 13 May 1977).

due to the economic situation in a country have been run and failed by Russia before the European Court of Human Rights. In the case of *Kalashnikov v. Russia* (Application no. 47095/99) although the European Court of Human Rights acknowledged the economic situation in Russia, it still found a violation of Article 3, the Court stated:

> "94. It was acknowledged that, for economic reasons, conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other member States of the Council of Europe. However, the Government were doing their best to improve conditions of detention in Russia. They had adopted a number of task programmes aimed at the construction of new pre-trial detention facilities, the re-construction of the existing ones and the elimination of tuberculosis and other infectious diseases in prisons. The implementation of these programmes would allow for a two-fold increase of space for prisoners and for the improvement of sanitary conditions in pre-trial detention facilities.

But went on to state:

> 95.The Court recalls that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV).
>
> [emphasis added]

238. In addition in *Mukong –v- Cameroon*[46], the UNHCR observed that the minimum standards governing the conditions of detention for prisoners reflected in the United Nations Standard Minimum Rules for the Treatment of Prisoners must be observed regardless of a state party's level of development.

239. The alleged victims also invite this Court to adopt the approach taken on Article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950 ("ECHR") which provides that: -

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

240. This Article is clearly designed to protect the same rights as Article 5 of the Inter American Convention on Human Rights. The European Commission of

[46] Communication No. 458/1991 CCPR/C/51/D/458/1991 (10 August 1994)

Human Rights and the European Court of Human Rights have found that prison conditions may amount to inhuman treatment. In the *Greek Case* the conditions in which many detainees were being kept were held to be inhuman treatment by reference to overcrowding and to inadequate toilets, sleeping arrangements, food, recreation and provision for contact with the outside world. These deficiencies were found in different combinations and were not all present in each of the several places of detention where breaches of Article 3 were found.

241. Importantly in *The Greek Case* the European Commission also found that Article 3 was violated:

> "in the extreme manner of separation of detainees from their families and in particular, the severe limitations, both practical and administrative, on family visits."

242. As is set out below one of the most worrying and striking concerns of Professor Andrew Coyle on his visit to Harrison Point Temporary Prison was the use of video link for family contact. The evidence of John Nurse was that each prisoner is allowed a 15-minute contact via the video link twice a month. Given there are only three video booths for 1,000 prisoners it is unlikely in reality the prisoners will even receive the allowed number of video contacts.

Detention of the Alleged Victims

243. The alleged victims complain that the conditions of their imprisonment at Glendairy prison and subsequently at Harrison's Point Temporary Prison were, and continue to be, cruel and inhuman. The alleged victims were held at Glendairy from the time of their remands – 1999 in the case of Boyce and Joseph, 1998 in the case of Atkins and 1999 / early 2000 in the case of Huggins - until 29 March 2005. All four alleged victims were then transferred to Harrison Point on 18 June 2005. The alleged victims Boyce, Joseph and Huggins remain at Harrison Point. Atkins remained there until he was transferred to hospital on 23 October 2005, where he died on 30 October 2005. Complaints about their conditions of detention therefore fall into two parts, first at Glendairy and second at Harrison's Point Temporary Prison.

244. The conditions at Glendairy Prison, prior to its destruction by fire, were widely condemned by national and international bodies, and were the subject of a detailed and critical report by leading expert, Baroness Vivien Stern[47], as being in violation of internationally recognised standards. The inadequate accommodation afforded to prisoners, their inadequate sanitation and health care, and their poor diet have led to the inevitable conclusion that Barbados is in breach of a number of international instruments that are intended to give those detained a minimum level of protection. It is submitted that this treatment violated the alleged victims' rights under Article 5 of the American Convention not to be subjected to inhuman or degrading treatment or punishment. The alleged victims rely on the Commission's findings of fact in relation to conditions of detention at Glendairy Prison, set out in paragraphs 70-72 of the Commission's application to this Court.

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

i) Baroness Vivien Stern - Report of Glendairy Prison (1994) (See CB Appendix C.3).
ii) Local Media Sources (See CB Appendix C.1 and C.2)
iii) U.S. State Department Country Reports on Human Rights Practices: Barbados 2001 (see CB Appendix C.4), and 2005 (see CB Appendix E.2)
iv) United Nations Committee on the Rights of the Child, concluding observations of the Rights of the Child: Barbados. 24/08/99, CRC/C/Add.103(concluding observations and comments) 24 August 1999
v) Report of the National Commission on Law and Order (appointed by decision made by the Cabinet of Ministers of Barbados on September 19, 2002).
vi) International Centre for Prison Studies, King's College London, Guidance Note 4, Dealing with prison overcrowding, singling out Glendairy Prison in Barbados as one of the most overcrowded prisons in the world with 302% occupancy level[48].

[47] See CB Appendix C.3, Report of Baroness Vivien Stern 1994 visit to Glendairy Prison.
[48] For (iv) (v) and (vi) see Commission Application to this Court p.18 and p.19, note 76

246. In respect of the period during which the alleged victims were held at Glendairy, they rely on the report of Baroness Vivien Stern, an internationally recognised expert on prison conditions, and the oral evidence of Professor Andrew Coyle who concurred with her observations and conclusions.

247. Baroness Stern visited Glendairy prison in September 1994. She found the cells in which death row prisoners were held to be dank and dark with no natural light. Prisoners had no bedding save a mattress on the floor and exercise was limited to 30 minutes daily in a small caged area. She concluded that the part of the prison where those on death row were held was, in her words, "completely unacceptable" and that "the[..] conditions breach all acceptable standards."

248. Between 1994 and 2005, Baroness Stern and Professor Andrew Coyle continued to monitor conditions at Glendairy, by way of media, NGO and official reports and statistics. When Baroness Stern visited Glendairy in 1994 the prison housed 702 men and 22 women. By March 2005, as the State's own witness, John Nurse, acknowledged, the number had risen to 994 prisoners comprising 942 men and 52 women. That figure amounted to three times the institution capacity. These figures, together with the other information to which Baroness Stern and Professor Coyle have had access, lead them to the inescapable conclusion that conditions did not improve at Glendairy between 1994 and 2005. This is borne out by the evidence of the alleged victims themselves.

i) The alleged victims submit that the following conditions of detention to which they were all subjected at Glendairy Prison constituted violations of their rights under Articles 5(1) and 5(2) of the Convention;
ii) They were detained in the maximum security section of the prison (the condemned cells). This was a section which was at the end of a corridor of other cells. The cells which were not part of the maximum security section were separated from the cells in maximum security by an iron gate. They were confined in small cells with no windows. They were constantly lit by a bare light bulb. Their only ventilation was through the door of the cell which opened onto a corridor. They were locked in their cells for at least 23 hours a day;
iii) They were allowed out of their cells for approximately one hour per day. During this time, the alleged victims were expected to bathe and take exercise. On occasions, the alleged victims received less than one hour to exercise;

iv) The alleged victim, Jeffrey Joseph, on some occasions received only 15 minutes per day of exercise. The alleged victim, Michael Huggins, experienced occasions when he received no exercise time at all;
v) The alleged victims were deprived of adequate sanitation and had to use a slop bucket as a toilet. They were allowed to empty the slop pail twice per day, once in the morning and once in the evening. If the slop bucket was used during any other time of the day, it could not be emptied until the end of the day;
vi) The alleged victims' cells had inadequate ventilation and were therefore extremely hot and uncomfortable;
vii) After the reading of the warrants of execution, the alleged victims received less water than previously and in particular, the alleged victims, Jeffrey Joseph and Frederick Atkins, had their personal belongings removed.

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

Harrison's Point Temporary Prison

249. Since March 2005, the alleged victims, together with approximately 900 other inmates, have been held in temporary accommodation at Harrison's Point. In May 2005, the press reported complaints by prisoners and their families about inadequate conditions at the temporary prison, including unsanitary cells, inedible food, and unclean drinking water. Family members of inmates complained that they were denied the opportunity to visit their relatives in prison and that prison authorities had failed to inform them in a timely manner when prisoners had serious health problems that resulted in their being taken to the hospital. Attorneys also complained that they were denied the ability to see their clients held at Harrison's Point and other facilities. The superintendent of prisons responded that the emergency situation necessitated temporary restrictions on visits but that attorneys were allowed to visit prisoners.

250. A report by the US State Department on 8 March 2006[49], recounted the following complaints by inmates held at Harrison Point:

> "Keith Fields, held at the temporary prison while awaiting trial, told a judge that conditions at the prison were dangerous. Fields said he had to be hospitalized after being beaten and stabbed by other prisoners. On April 30, Deryck Smith, a prisoner held at the temporary prison, died after reportedly suffering an asthmatic attack. On May 24,

[49] Report available at http://www.state.gov/g/drl/rls/hrrpt/2005/61715.htm (see CB E.2)

prisoner Darcy Bradshaw fell into a coma and died in the hospital after having become ill at Harrison Point." [See CB Appendix E.2]

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251. In respect of conditions at Harrison Point Temporary Prison, the alleged victims rely on the expert testimony of Professor Andrew Coyle following his visit to Harrison Point on 6 July 2007, as well as their own affidavits. (Professor Coyle's written report and opinion is at **Annex II** of this document).

252. Professor Coyle found, in summary:

i) that the alleged victims were held in grilled cages for 24 hours each day;
ii) that they were allowed out of their cages only once a day, usually to go to the bathroom and once a week, at most, to exercise, and twice a month, at most, for video conferences;
iii) sanitary arrangements comprise a room with five shower heads and five toilets for 40 prisoners. Access to these facilities is limited to one short period each morning. At all other times, prisoners must use a slop bucket within their cage, with no privacy from other prisoners or prison staff;
iv) the block in which the cages are located has limited natural light and is illuminated 24 hours a day by fluorescent tubes. Professor Coyle found that even at 1pm on a sunny July afternoon the block was dark and depressing and it was difficult to see. The use of fluorescent lighting throughout the night interferes with the prisoners' ability to sleep;
v) the flow of air is restricted;
vi) prisoners' access to drinking water is dependent on distribution by prison staff;
vii) contact with relatives, or anyone outside the prison, is limited to a video-conferencing session twice per month;
viii) medical care is not as it should be, with extended delays in seeing the doctor

253. At the oral hearing, John Nurse gave oral evidence about the conditions at Harrison's Point. It is submitted that in respect of two of the most concerning aspects of the alleged victim's conditions of detention he did not disagree with Professor Coyle. He agreed that the alleged victims are being kept in cages (albeit that he referred to them as cells which had the "appearance of cages"),

and that they only had contact with the outside world via a video link. This means that the alleged victims have not had physical contact with any family and friends since at least March 2005.

254. In respect of the evidence concerning day-to-day life in J block where the alleged victims are detained, it is submitted that the evidence of Professor Coyle, where it differs from that of John Nurse, should be preferred. Professor Coyle explained that he discussed openly with the prisoners aspects of their daily lives, including the time they spend out of the cages, the amount of exercise they get, the use of the slop buckets, and access to clean water. When the prisoners, for example, explained that in reality they only get exercise about 2 to 3 times a week, and that they only get to use the shower and toilets once a day, the officers accompanying Professor Coyle did not disagree either at the time or later when Professor Coyle was with them on his own. In Professor Coyle's considerable experience of conducting prison visits he said that if the prisoners were lying the officers would either point it out immediately, or at the very least do so later. That did not happen in this case. In addition in his oral evidence Professor Coyle explained that arithmetically the prisoners had to be telling the truth due to the number of staff on duty at any one time and the fact that the prisoners were always only taken out of their cages one at a time. In his evidence John Nurse said that he "tries to visit J block once a month". It is submitted that the detailed information provided by Professor Coyle following discussions with prisoners and staff is more reliable.

255. With regard to what Professor Coyle observed first hand it is submitted his evidence was compelling and accurate. He described the lack of light and ventilation and the oppressive nature of the prison buildings. He also described the complete lack of privacy for the prisoners due to the cages they are kept in; at all times they can be seen by both other prisoners and officers, this is evidence that clearly cannot be disputed, given the nature of the cages (which John Nurse described in similar terms).

256. The Honourable Court is also asked, when considering the relevance to actual conditions, to take into account that John Nurse's evidence, both written and oral, frequently referred to what the prison rules allowed for, rather than what happens in practice. For example he said in oral evidence that exercise is "allowed" once a day, he did not say that the prisoners received exercise once

a day. He also said they were permitted "an hour" of exercise once a day, not that they had an hour of exercise.

257. For all of these reasons it is submitted that the detailed evidence of Professor Coyle concerning the prison conditions at Harrison's Point Temporary prison be preferred to that of John Nurse.

258. The State of Barbados has sought to justify the conditions at Harrison's Point on the grounds that it is a temporary measure, and on the grounds of Barbados' economic and developmental status. In response the alleged victims submit first, that as set out above the right not to be subjected to inhuman and degrading conditions must be protected regardless of a country's economic or state of development, it provides a minimum standard that all must adhere to. Second, Harrison's Point has now been in operation for over two years and can no longer be viewed as "temporary". Third, as Professor Coyle noted, many of the conditions that fall foul of the minimum standard found at Harrison's Point are not dependent on finance or building structure restrictions, but on the regime and attitude of those who run the prison. For example, if the prisoners were properly assessed for risk it would be likely that more than one prisoner at a time (as happened at Glendairy with death row prisoners) could be allowed out of the cages at one time. This would allow for prisoners to use the toilets more frequently, so avoiding having to use their slop buckets in their cages, and would allow more opportunity for exercise. As Professor Coyle said, the number of toilets and showerheads that exist in J block should be sufficient, but as with many of the facilities it is the lack of access not the lack of availability that is the problem. That, it is submitted, is a problem of regime and attitude and not of money.

Conclusion

259. Professor Coyles's direct observation of the conditions at Harrison point lead him to conclude that they constitute a violation of Article 5(2) ACHR. In all the circumstances, it is submitted that the conditions in which the alleged victims have been and continue to be detained, in particular in relation to the lack of privacy, being kept in cages, the lack of contact with the outside world, use of the slop buckets, and the lack of natural light and exercise, constitute inhuman and

degrading treatment and fail to respect the human dignity of the person and so are contrary to Article 5 of the ACHR.

SECTION H: EXHAUSTION OF DOMESTIC REMEDIES

The Argument of the State of Barbados

260. The State of Barbados has raised in its preliminary objections to the admissibility of the application of the Commission of 18th August 2006 and the related Petition of 3rd September 2004, the grounds that domestic remedies have not been exhausted. It is submitted by the State of Barbados that (i) there is a right under Article 37 of the Rules of Procedure of the Inter-American Court of Human Rights ("Rules of the Court") to raise preliminary objections before the Court, and (ii) that the Commission acted in violation of the procedural norms in not determining the application inadmissible for failure to exhaust domestic remedies.

261. Barbados has objected to the admissibility "of any claim regarding the alleged violation of Article 5 or any other article of the American Convention"[50] claiming that the victims have not exhausted domestic remedies in relation to, *inter alia*, the alleged conditions of their detention, the alleged cruelty of hanging as a form of execution, and the alleged cruelty involved in reading warrants of execution.

262. In relation to the alleged conditions of the victims detention, the alleged cruelty of hanging as a form of execution and the alleged cruelty involved in reading warrants of execution, Barbados argues that adequate remedies exist for those violations under at least two distinct processes under the laws of Barbados: (1) under the Prison Rules, 1974 and the Prisons Act; (2) under Section 15 and 24 of the Constitution of Barbados. The State claims there is no evidence that the alleged victims have had recourse to these processes or filed any complaints in this regard.[51]

263. As a result, the State submits that the application of the Commission "should be struck out in its entirety as inadmissible and not in satisfaction of the

[50] Answer to the Application p. 7
[51] Answer to the Application pp. 7 – 8.

requirement of the American Convention". In the alternative, Barbados submits that "all claims regarding the alleged conditions of their detention, the alleged cruelty of hanging as a form of execution, and the alleged cruelty involved in reading warrants of execution, must be severed from the application".[52]

264. The alleged victims submit that for the following reasons the preliminary objections raised by the State of Barbados must be rejected:

i) **Estoppel**: this 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[53];

ii) **Burden of proof**: the State claiming non-exhaustion of domestic remedies bears the burden of proving (i) that there are domestic remedies that remain to be exhausted; and (ii) that they are effective. It cannot therefore be argued, as the respondent State now seeks to do[54], that "the Commission was required to declare the petition inadmissible on grounds of non exhaustion" when it had itself failed to identify any effective domestic remedy in its submissions to the Commission;

Alternatively:

iii) There are **no effective domestic remedies** which remain to be exhausted.

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[52] Answer to the Application pp. 8.
[53] Herrera-Ulloa, Judgment of July 2, 2004, C Series No.117, para.83; The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53; Castillo Petruzzi et al. Case. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 56; Loayza Tamayo Case. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, paras. 40-44
[54] Para 2 of the submissions of the State of Barbados, 18 December 2006 at para. 2.

265. Article 37 does not allow a State to raise objections based on non-exhaustion of domestic remedies where those objections had not previously been raised before the Commission.

266. Article 46 of the American Convention sets out the admissibility criteria for petitions or communications. The criterion of exhaustion of domestic remedies is contained in Article 46(1)(a), which states:

> **"Article 46**
>
> 1. Admission by the Commission of a petition or communication lodged in accordance with Article 44 or 45 shall be subject to the following requirements:
>
> (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
>
> (b) ..."

267. Article 47 states that the Commission shall consider inadmissible any petition or communication submitted if, *inter alia*, the requirements indicated in Article 46 have not been met.

268. The purpose behind the requirement to exhaust domestic remedies before petitioning the Inter American Commission is designed for the benefit of the State. It ensures that the State has an opportunity to provide redress for an alleged violation of the Convention prior to it being considered by an international body. As it is a requirement for the benefit of the State it has been found to be a requirement that can be waived, either expressly or impliedly, by the State[55] and once waived is irrevocable.

269. *In the Matter of Viviana Gallardo et al.* Series A No. G 101/81, the Inter American Court stated that:

> "26. ... [U]nder the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges

[55] It is clear that the State of Barbados accepts that right to raise preliminary objections can be waived as in paragraph 7 of its Submissions it is stated that the filing of its answer to the application should not be deemed to constitute a waiver of the objection raised in paragraphs 1 to 7.

before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly. A waiver, once effected, is irrevocable. (Eur. Court H. R., De Wilde, Ooms and Versyp Cases ("Vagrancy" Cases), judgment of 18th June 1971)."

270. The subsequent case law[56] has clearly established that in a case brought under Article 44 of the Convention, the State will be presumed to have waived any objection based on non-exhaustion of domestic remedies that it has not submitted at the appropriate times in the proceedings before the Commission.

271. In *In the case of Herrera-Ulloa*, Judgment of July 2, 2004, C Series No. 117, the Court stated:

> "80. Article 46(1)(a) of the Convention provides that for the Commission to admit a petition or communication lodged in accordance with Articles 44 or 45, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.
>
> 81. The Court has established criteria that have to be taken into account in the instant case. Firstly, the Respondent State may expressly or tacitly waive invocation of the rule requiring exhaustion of domestic remedies. Secondly, in order to be timely, the objection that domestic remedies have not been exhausted should be raised during

[56] Inter-Am. Ct. H.R., Velásquez Rodríguez Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 88; Inter-Am. Ct. H.R., Fairén Garbi and Solís Corrales Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 2, para. 87; Inter-Am. Ct. H.R., Godínez Cruz Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, para. 90; Inter-Am. Ct. H.R., Gangaram Panday Case. Preliminary Objections. Judgment of December 4, 1991. Series C No. 12, paras. 38-40; Inter-Am. Ct. H.R., Neira Alegría et al. Case. Preliminary Objections. Judgment of December 11, 1991. Series C No. 13, para. 30; Inter-Am. Ct. H.R., Caballero Delgado and Santana Case. Preliminary Objections. Judgment of January 21, 1994. Series C No. 17, para. 63; Inter-Am. Ct. H.R., Castillo Páez Case. Preliminary Objections. Judgment of January 30, 1996. Series C No. 24, para. 40; Inter-Am. Ct. H.R., Loayza Tamayo Case. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, para. 40; Inter-Am. Ct. H.R., Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31; Inter-Am. Ct. H.R., Castillo Petruzzi et al. Case. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 56; Inter-Am. Ct. H.R., Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; Inter-Am. Ct. H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53; Inter-Am. Ct. H.R., Constitutional Court Case. Judgment of January 31, 2001. Series C No. 71, paras. 89, 90 and 93; Inter-Am. Ct. H.R., Las Palmeras Case. Judgment of December 6, 2001. Series C No. 90, para. 58; Inter-Am. Ct. H.R., "Five Pensioners" Case. Judgment of February 28, 2003. Series C No. 98, para. 126 and Inter-Am. Ct. H.R., "Juan Humberto Sánchez" Case. Judgment of 7 June, 2003. Series C No. 99, para. 69.

> the first stages of the proceedings or, to the contrary, it will be presumed that the interested State has waived its use tacitly. Thirdly, in previous cases the Court has held that non-exhaustion of domestic remedies is purely an admissibility issue and that the state that alleges non-exhaustion of domestic remedies must indicate which domestic remedies should have been exhausted and provide evidence of their effectiveness"

272. In that case the respondent State belatedly sought to raise a preliminary objection before the Court that the domestic remedies of Constitutional review and habeas corpus had not been exhausted, the Court expressly found:

> "in as much as the State did not allege a failure to exhaust the remedies of review and habeas corpus during the proceedings before the Inter-American Commission, it implicitly waived one means of defense that the American Convention creates in its favor, and tacitly admitted that such remedies either do not exist or were exhausted in a timely manner. Therefore, the principle of estoppel prevents the State from raising this argument, for the first time, in its brief answering the application and its observations on the written brief of pleadings, motions and evidence."

273. In the present case, the State of Barbados did not raise any objections or make any observations on the exhaustion of domestic remedies in the cases of Messrs Boyce and Joseph until it filed its answer to the Application of the Commission (December 18 2006). In the case of Messrs Huggins and Atkins, the sole objection based on non-exhaustion raised by the State of Barbados before the Commission was that "Messrs Huggins and Atkins had not yet exhausted domestic remedies because no order had been transmitted from the JCPC relating to their domestic appeals". The Commission noted that "The State did not elaborate, nor has it done so since, on what other domestic appeals were pending, and what other legal remedies could have been exhausted."[57] Thus the Commission concluded:

> "68. Given the absence of any observations from the State regarding precisely which domestic remedies have not been exhausted by Messrs Huggins and Atkins, and considering the fact that the State has provided no observations regarding the exhaustion of domestic remedies in the case of Messrs Boyce and Joseph, the Commission finds that the State implicitly or tacitly waived any challenge with regard to the exhaustion of remedies by the alleged victims in domestic proceedings."

[57] Report No. 03/06, adopted on February 28,2006.

274. It is respectfully submitted that the Commission's conclusion is wholly consistent with the findings of this Court in the cases cited above. The Commission were therefore correct to declare the Application admissible.

Burden of proof

275. Further or alternatively, the respondent State is wrong to argue that the Commission was required to declare the petition inadmissible on grounds of non-exhaustion of domestic remedies by virtue of Article 48(1)(c), notwithstanding the State's own failure to raise its present objections. Such a contention overlooks the consistent case law of this Court in respect of the burden of proving the existence of effective domestic remedies:

> "in previous cases the Court has held that non-exhaustion of domestic remedies is purely an admissibility issue and that the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness."[58]

276. The respondent State wholly failed to discharge this burden before the Commission. As set out above, the respondent State made no complaint in respect of non-exhaustion of domestic remedies in respect of the alleged victims, Boyce and Joseph, and in respect of Huggins and Atkins, complained only that "no order had been transmitted from the JCPC relating to their domestic appeals". The Commission considered this complaint and rejected it. There were therefore no grounds on which the Commission could properly have concluded that effective domestic remedies remained to be exhausted. It ill behoves the respondent State to argue that the Commission erred in failing to reach such a conclusion, when it provided neither evidence nor argument to support it.

[58] In the case of Herrera-Ulloa, op. cit. para 81; The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53; Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.

Domestic remedies have been exhausted

277. Alternatively, it is submitted that all domestic remedies have been exhausted in respect of death by hanging, the reading of warrants of execution, and prison conditions, or that such remedies would be wholly ineffective.

Death By Hanging

278. The respondent State now seeks to argue that in so far as the alleged victims claim that the method of execution by hanging constitutes cruel and inhuman treatment, a Constitutional challenge under sections 15 and 24 of the Constitution of Barbados constitutes a "suitable and effective remedy" which has not been exhausted[59].

279. The alleged victims strongly dispute, for the reasons given below, that such a challenge constitutes an effective remedy and note that, in accordance with the case law set out above, the burden of proving the existence and efficacy of an alternative remedy lies with the State seeking to rely upon its non-exhaustion as a bar to admissibility.

280. First, the alleged victims note that in the *Case of Herrera-Ulloa*, this Court held itself "compelled to point out that":

> "the action challenging constitutionality is an extraordinary course whose purpose is to question the constitutionality of a law, not to have a court ruling reviewed. Hence, the action challenging constitutionality cannot be counted amongst the domestic remedies that a petitioner is necessarily required to pursue and exhaust." [60]

281. Second, it is for the respondent State to prove that a Constitutional challenge under sections 15 and 24 of the Constitution of Barbados would be an effective remedy. But that is impossible because any challenge would be barred by the "savings clause" contained in section 15(2) of the Constitution of Barbados, which provides:

> "(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section

[59] Submissions of the State of Barbados 16 December 2006 para. 4b.
[60] Op. Cit para. 85.

to the extent that the law in question authorises the infliction of any punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966."

282. Since hanging was the method of execution practiced under the law prior to 30th November 1966, section 15(2) prevents the alleged victims challenging the Constitutionality of death by hanging with under section 15(1) of the Constitution. It is notable that while section 26(1) of the Constitution saves only "written law", section 15(2) of the Constitution is wider, saving any law, indeed anything done under the authority of any law.

283. The JCPC similarly held in a case concerning Trinidad and Tobago that hanging, as a method of execution, could not be challenged because of the savings law clause - see *Boodram v Baptiste* [1999] 1 WLR 1709. Following that ruling it is unrealistic to suggest that the alleged victims in this case would have any remedy under the Constitution on the question of death by hanging because the Constitutional provisions in Trinidad and Tobago and in Barbados are to all intents and purposes the same.

284. If this is not the case, and the respondent State seeks to persist in its contention that a Constitutional challenge would provide an effective domestic remedy, it is required to demonstrate how this would be the case notwithstanding the existence of the savings clause.

285. Third, legal aid for a Constitutional challenge is only available for applications to the High Court and appeals to the Court of Appeal. No Legal Aid is available for any appeal from the Court of Appeal to the Caribbean Court of Justice or the JCPC when the alleged victims' appeals were extant.

Reading of Warrants of Execution

286. In so far as the alleged victims complained about the reading to them of warrants for their execution, the essence of their complaint is that the circumstances in which the warrants were read to them and any future reading of such warrants constituted inhuman treatment. While it is true that the alleged victims could raise this by further constitutional motion in Barbados, they could only do so if and when a further warrant for their execution is read

to them. Inevitably that means that they cannot raise this issue until four to five days before their execution.

287. It is submitted that the ability to raise the question of the reading of the warrants to the alleged victims for their execution in the last few frantic days before they are due to be executed, requiring, as it would, last minute stays of execution during a period of acute anxiety and anguish on the part of the alleged victims cannot be considered to be an effective remedy.

288. In addition, in relation to Messrs Boyce and Joseph, complaints were made to the Barbados constitutional court that the reading of the warrants to them infringed their constitutional rights. As demonstrated above (see paras 86-88), while the Barbados Court of Appeal found that the reading of the warrants to them was manifestly unfair and breached the principles of natural justice, no relief was granted in relation to these breaches.

Prison conditions

289. In its submissions the respondent State has alleged that the alleged victims had adequate and effective remedies available to challenge the conditions in which they are held, namely (i) under the *Prison Rules 1974* and the *Prisons Act* and (ii) by way of Constitutional challenge.

290. Under the *Prison Rules* the respondent State makes reference to a Visiting Committee. This committee is said by the respondent State to be required to "visit and inspect prison facilities and allegations of abuses, unsatisfactory conditions and other complaints"[61]. Under the *Prison Act* the respondent State refers to an Advisory Board that advises both Ministers and the Superintendent of Prisons and "reviews prison conditions". It is alleged that these provide the alleged victims with an adequate and effective remedy.

291. It is submitted that neither can be considered an effective or adequate remedy. The Committee reports directly to the Governor-General and provides only advice and suggestions. The only power that the Visiting Committee has is to make reports and recommendations to the Governor-General; it has no power

[61] See para 4 of the respondent States submission of 18 December 2006

to determine individual complaints or provide redress. Moreover, there is no provision in the Prison Act or the Rules empowering the Governor-General to act as a result of anything contained in the Visiting Committee's report. The Advisory Board can only review conditions and advise Ministers and the Prison Superintendent.

292. In respect of what constitutes an effective remedy the Inter American Court has established that:

> "It is not enough for remedies to exist formally, they must give results or responses to violations of human rights if these rights are to be considered effective. In other words, everyone must have access to a simple and rapid remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights. This guarantee "is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society, in the sense set forth in the Convention." "[62]

293. Furthermore, the Court has also stated that remedies that, due to the general situation of the country or even the particular circumstances of any given case, prove illusory cannot be considered effective. In *Las Palmeras Case*, Judgment of December 6, 2001. Series C No. 90, para. 58 the Court stated:

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[62] Inter-Am. Ct. H.R., "Juan Humberto Sánchez" Case. Judgment of 7 June, 2003. Series C No. 99, para. 121; Inter-Am. Ct. H.R., "Five Pensioners" Case. Judgment of February 28, 2003. Series C No. 98, para. 126 and Inter-Am. Ct. H.R., Las Palmeras Case. Judgment of December 6, 2001. Series C No. 90, para. 58. See also: Inter-Am. Ct. H.R., Velásquez Rodríguez Case. Preliminary Objections. Judgment of 26 June, 1987. Series C No. 1; Inter-Am. Ct. H.R., Fairén Garbi and Solís Corrales Case. Preliminary Objections. Judgment of 26 June, 1987. Series C No. 2; Inter-Am. Ct. H.R., Godínez Cruz Case. Preliminary Objections. Judgment of 26 June, 1987. Series C No. 3; Inter-Am. Ct. H.R., Gangaram Panday Case. Preliminary Objections. Judgment of December 4, 1991. Series C No. 12; Inter-Am. Ct. H.R., Neira Alegría et al. Case. Preliminary Objections. Judgment of December 11, 1991. Series C No. 13; Inter-Am. Ct. H.R., Caballero Delgado and Santana Case. Preliminary Objections. Judgment of January 21, 1994. Series C No. 17; Inter-Am. Ct. H.R., Castillo Páez Case. Preliminary Objections. Judgment of January 30, 1996. Series C No. 24; Inter-Am. Ct. H.R., Loayza Tamayo Case. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25; Inter-Am. Ct. H.R., Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40; Inter-Am. Ct. H.R., Castillo Petruzzi et al. Case. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41; Inter-Am. Ct. H.R., Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50; Inter-Am. Ct. H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66 and Inter-Am. Ct. H.R., Constitutional Court Case. Judgment of January 31, 2001. Series C No. 71.

> "58. It is the *jurisprudence constante* of this court that it is not enough that such recourses exist formally, they must be effective; that is they must give results or responses to the violations of rights established in the Convention. This Court has also held that remedies that, due to the general situation in the country or even the particular circumstances of any given case, prove illusory cannot be considered effective. **This may happen when, for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions**; or any other situation in which justice is being denied, such as cases in which there had been an unwarranted delay in rendering a judgement." [emphasis added]

294. It is submitted that it clearly follows from the above that the Visiting Committee, which reports to the Governor-General and so lacks independence, which lacks any power to order or require any act or to provide any redress to an individual, or which cannot reach a binding decision, cannot satisfy the requirements of an effective remedy to an alleged violation of the American Convention. Similarly the Advisory Board is a reviewing body only, and has no power to reach binding decisions or order any redress or remedy.

295. Any possible constitutional motion is ineffective due to the lack of legal aid for the instruction of expert witness. Without expert evidence it is almost impossible for the alleged victims to succeed in bringing a challenge to their conditions of confinement. They are not experts, they do not have the skills to contrast and compare their conditions with others around the world. Furthermore, on any factual issue, it is almost impossible for those in the position of the alleged victims to succeed unless their evidence is corroborated by an expert. In other words it is wholly unrealistic to suggest that the alleged victims have an effective remedy, when they cannot even obtain the basic requirements of a prison conditions challenge, namely an expert report based on a visit to the prison contextualising the conditions. The vital role played by Professor Coyle in the proceedings before this Honourable Court clearly demonstrate that.

Conclusion

296. For all the above reasons it is submitted that the preliminary objections raised by the State of Barbados must be rejected.

297. In conclusion, the submissions of the State that the alleged victims have failed to exhaust their domestic remedies cannot be sustained because:

i) the State of Barbados did not raise any challenge with regard to exhaustion of remedies before the Commission, it therefore implicitly waived any such challenge and is estopped from raising it before this Honourable Court;

ii) in any event, the domestic remedies on which the State of Barbados purports to rely do not constitute effective sources of redress. In relation to prison conditions there is no evidence that the Prison Board of Management has ever met, that it has ever made any report or recommendation, and, in any event, it has no power to secure binding redress. The theoretical possibility of bringing a constitutional motion is ineffective in practice, because there is no legal aid with which to obtain expert evidence. Any challenge is therefore confined to the evidence of the prisoner against that of the prison staff. Such a challenge was in fact raised on behalf of the alleged victims Boyce and Joseph in the course of their constitutional challenge to the reading of warrants of execution, but in the absence of expert evidence on their behalf, their complaints were peremptorily dismissed. In such circumstances, it cannot properly be said that there was available any effective domestic remedy that was not pursued.

SECTION I: REPARATIONS AND COSTS

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

Declaration of violations

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

Commutation of sentence 0001021

300. A direction that the State of Barbados commute the death sentence of the fourth alleged victim, Michael Huggins and substitute therefore a sentence of life imprisonment with appropriate opportunity to apply for parole.

Adoption of necessary legislative measures

301. A direction that the State of Barbados adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed in a manner inconsistent with the rights and freedoms guaranteed under the Convention, and in particular, that it is not imposed through mandatory sentencing and that it is not given effect by hanging.

302. A direction that the State of Barbados adopt such legislative or other measures as may be necessary to ensure that the conditions of detention in which the victims are held comply with the requirements of the American Convention, including the right to humane treatment under Article 5 of the Convention.

303. A direction that the State of Barbados adopt such legislative or other measures as may be necessary to ensure that the domestic courts have full jurisdiction to uphold fundamental Constitutional rights. In particular, that such steps are taken as are necessary to remove the immunizing effect of section 26 of the Constitution of Barbados in respect of "existing laws".

Compensation

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

Costs 0061022

305. In relation to costs, the alleged victims wish to emphasise that the lawyers involved in the submission of their case to the Inter-American Court do not seek any legal fees in relation to this application. The alleged victims' legal advisors conduct the case on a pro bono basis. In relation to expenses, the alleged victims would submit that the expenses incurred in respect of the hearing before the Inter-American Court should be recovered from the State insofar as these are not covered by the Inter-American Commission. These should include travel and per diem allowance, accommodation for the legal representatives and the expert witnesses attending the hearing and an additional amount representing the costs of preparation of the appeal to cover courier, photocopying and travel expenses incurred in visiting prisons as well as affidavit fees.

Saul Lehrfreund MBE
Parvais Jabbar
Keir Starmer QC
Alair Shepherd QC
Douglas Mendes SC
Ruth Brander
Alison Gerry

13th August 2007
Legal Representatives of the alleged victims