APPLICATION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF

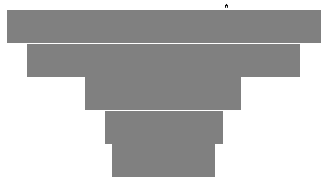
LENNOX BOYCE, JEFFREY JOSEPH, FREDERICK BENJAMIN ATKINS AND MICHAEL HUGGINS
V.
BARBADOS

CASE NO 12.480

SUBMISSIONS OF THE STATE OF BARBADOS

AGENT:
JENNIFER EDWARDS,
SOLICITOR GENERAL OF BARBADOS

DEPUTY AGENT:
DR. DAVID S. BERRY
LECTURER IN LAWS, UNIVERSITY OF THE WEST INDIES



18 December 2006

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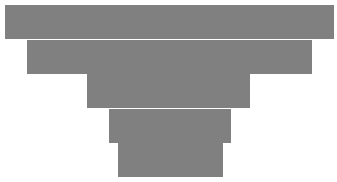

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I. INADMISSIBILITY OF THE APPLICATION

1. Barbados takes this opportunity to present to this Honourable Court its firm objection to the admissibility of the Application of the Commission of August 18, 2006, and the related petition of September 3, 2004, as expressly provided for in Article 37 of the *Rules of Procedure of the Inter-American Court of Human Rights*.[1] Barbados objects on the basis that domestic remedies have not been exhausted and therefore the case is rendered inadmissible.

2. Exhaustion of domestic remedies is required for the admissibility of a petition under Articles 46(1)(a) and 47(a) of the *American Convention on Human Rights*,[2] and Articles 27 and 31 of the *Rules of Procedure of the Inter-American Commission on Human Rights*.[3] The State submits in this regard that the Commission was required to declare the petition inadmissible on grounds of non-exhaustion as provided for under Article 48(1)(c) of the *American Convention*, and by not doing so has violated the procedural norms of the *Convention*. As a result Barbados requests that this Honourable Court reject the application for not satisfying the conditions imposed by Article 61(2) of the *American Convention*, as affirmed by Article 2(1) of the *Statute of the Inter-American Court of Human Rights*.[4]

3. As articulated by this Honourable Court in the *Case of Cayara vs. Peru, Preliminary Objections*, at paragraph 63 and as further supported in the operative paragraph, violations of procedural norms by the Commission cannot be permitted and should result in the dismissal of the case:

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1 *Rules of Procedure of the Inter-American Court of Human Rights*, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (updated to May 2004), OEA/Ser L./V/I 4 rev 10 (31 May 2004) [**Annex, Tab 9**].

2 *American Convention on Human Rights* (1969), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, P.A.U.T.S. 36, 9 I.L.M. 673, 65 A.J.I.L. 679, 3 H.R.J. 151, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (updated to May 2004), OEA/Ser L./V/I 4 rev 10 (31 May 2004) [**Annex, Tab 1**]

3 *Rules of Procedure of the Inter-American Commission on Human Rights*, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (updated to May 2004), OEA/Ser L./V/I 4 rev 10 (31 May 2004) [**Annex, Tab 8**]

4 *Statute of the Inter-American Court of Human Rights*, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (updated to May 2004), OEA/Ser L./V/I 4 rev 10 (31 May 2004) [**Annex, Tab 11**]

> 63. The Court must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism. In the instant case, to continue with a proceeding aimed at ensuring the protection of the interests of the alleged victims in the face of manifest violations of the procedural norms established by the Convention itself would result in a loss of the authority and credibility that are indispensable to organs charged with administering the system for the protection of human rights.[5]

4. In this regard, the State formally objects to the admissibility of any claim regarding the alleged violation of Article 5 or any other article of the *American Convention* because the Petitioners have not exhausted their domestic remedies in relation to, *inter alia*, the alleged conditions of their detention, the alleged cruelty of hanging as form of execution, and the alleged cruelty involved in reading warrants of execution. Adequate remedies exist under at least two distinct processes under the laws of Barbados.[6]

   a. Firstly, adequate and effective domestic remedies are available under the *Prison Rules, 1974*[7] and the *Prisons Act*.[8] Under Part V of the *Prisons Rules, 1974*, a Visiting Committee, consisting of a Magistrate and other qualified persons, is required to visit the prisons frequently and to inspect the prison facilities and to investigate allegations of abuses, unsatisfactory conditions, and other complaints. Members of the Visiting Committee are provided with free access to all parts of the prisons and to all prisoners, either in their cells or in a room out of sight and hearing of prison officers, if desired. The Visiting Committee reports directly to the Governor-General, to whom it provides advice and suggestions. There is no evidence that the Petitioners have made a complaint to, let alone exhausted their remedies through, this Committee. Further, in Barbados the conditions of prisons, the welfare of the prisoners and the conduct and standards of discipline of prison officers are subject to scrutiny by the

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5 *Case of Cayara vs. Peru, Preliminary Objections*, I-A Ct H R., Judgement of February 3, 1993, Series C, No. 14 **[Annex, Tab 43]**, para. 63. See also the following operative paragraph, or *dispositif*, in which the Court orders that the case be dismissed.

6 The State notes that Section 15(3)(c) of the *Constitution of Barbados* **[Annex, Tab 17]** as amended by the *Constitution (Amendment) Act 2002-14* **[Annex, Tab 18]** is inapplicable to the four Petitioners, thus allowing them to challenge any prison conditions not dictated by law (as exempted in Section 15(2)). As a result the Petitioners may bring suits before the courts of Barbados for any alleged violations of their Section 15 rights.

7 *Prison Rules, 1974* **[Annex, Tab 26]**.

8 *Prisons Act*, Cap. 168 **[Annex, Tab 25]**.

Advisory Board described in Sections 8-8A of the *Prisons Act*. The Board advises both the Minister and the Superintendent of Prisons, and must include a magistrate in its membership. This magistrate is *ex officio* the Visiting Justice of Prisons: *Prisons Act*, Section 9. The Advisory Board provides a neutral third party to review prison conditions and constitutes a suitable and effective domestic remedy. There is no evidence that the Petitioners have had recourse to this process.

b. Secondly, claims regarding cruel and inhuman treatment can be filed before Barbados' courts of law under Sections 15 and 24 of the *Constitution of Barbados*.[9] Barbados' courts constitute both a suitable and effective remedy. There is no evidence that the Petitioners have filed any claims regarding the alleged conditions of their detention, the alleged cruelty of hanging as form of execution, and the alleged cruelty involved in reading warrants of execution.

In sum, two distinct remedies exist which the Petitioners have not exhausted: (1) those available under the *Prison Rules, 1974* and *Prisons Act*, and (2) that available under normal constitutional procedures for the protection of human rights through the courts of Barbados

5. Further, none of the exceptions to the rule regarding exhaustion of domestic remedies, including those found in Article 46(2) of the *American Convention,* are applicable.

6. As a result, the State submits that the Application of the Commission of August 18, 2006, should be struck out in its entirety as inadmissible and not in satisfaction of the requirements of the *American Convention on Human Rights*. In the alternative, all claims regarding the alleged conditions of their detention, the alleged cruelty of hanging as form of execution, and the alleged cruelty involved in reading warrants of execution, must be severed from the present Application.

* * *

7. Nevertheless, because Barbados must file its complete answer to the Application of the Commission within the stipulated time period, the State provides Submissions on all aspects of the case in the following pages. Nevertheless subsequent argument on any issue cannot be deemed to constitute a waiver, or any other form of retraction of, the above objection to the jurisdiction of this Honourable Court.

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[9] *Constitution of Barbados* **[Annex, Tab 17]**.

II. OVERVIEW OF SUBMISSIONS

8. By means of the following Submissions the State of Barbados hereby avails itself of the opportunity to answer in full the Application of the Commission of August 18, 2006. The State also here expressly indicates that, as intimated by Rule 38(2) of the *Rules of Procedure of the Inter-American Court of Human Rights*,[10] by the following Submissions Barbados contradicts the facts and claims of the Commission and the Petitioners, unless such facts or claims are hereafter expressly accepted.

A. Denial of Human Rights Violations

9. Barbados denies all of the Petitioners' allegations of human rights violations on the following bases.

Under the International Legal Rules of Treaty Interpretation Barbados' Capital Punishment is Lawful

10. Firstly, Barbados does not accept that its form of capital punishment is contrary to any of its obligations under the Inter-American system of human rights.

11. Barbados fully accepts that it has subscribed to international legal obligations under both the *Charter of the Organization of American States*,[11] and the *American Convention on Human Rights*.[12] However, Barbados only has accepted the obligations expressly set out in these treaties, subject to its reservations to the *American Convention*.

12. Applying the accepted international legal methods of treaty interpretation, both under the 1969 *Vienna Convention on the Law of Treaties*[13] and under customary international law, Barbados cannot accept that its constitutionally protected form of capital punishment is contrary to its Inter-American human rights obligations.

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[10] *Rules of Procedure of the Inter-American Court of Human Rights* [**Annex, Tab 9**]

[11] *Charter of the Organization of American States* (1948), 119 U.N.T.S. 4 (amended 721 U.N.T.S. 324), P.A.U.T.S. 1, 2 U.S.T. 2394, T.I.A.S. 2361, 46 A.J.I.L. Supp. 43, as amended by the four *Protocols of Amendment to the Charter of the Organization of American States* (the "Protocol of Buenos Aires" of February 27, 1967, the "Protocol of Cartagena de Indias" of December 5, 1985, the "Protocol of Washington" of December 14, 1992, and the "Protocol of Managua" of June 10, 1993) [**Annex, Tab 2**]

[12] *American Convention on Human Rights* [**Annex, Tab 1**].

[13] 1969 *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF.39/27, U.K.T.S. 58 (1980), Cmnd. 7964, 8 I.L.M. 679, 63 A.J.I.L. 875 (1969) [**Annex, Tab 12**]

In understanding its obligations under the *OAS Charter* and *American Convention* Barbados has employed the primary method of treaty interpretation, namely, the textual method. It is submitted that the ordinary meanings of the texts of both the *OAS Charter* (as interpreted by the American Declaration of the Rights and Duties of Man,[14] and the *American Convention* fully support the legality of capital punishment in the Inter-American system and do not prohibit use of mandatory capital punishment. Further, Barbados' reservations to the *American Convention on Human Rights*, which were accepted without objection, fully contemplate its continued use of its present system of capital punishment. Barbados also submits that an application of either of the other, subsidiary forms of treaty interpretation – the subjective and teleological forms of interpretation – yields the same result, namely, that neither capital punishment nor mandatory capital punishment is prohibited.

13. In addition, the State submits that the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, themselves both being treaty-created and treaty-regulated organs, must interpret and apply Inter-American treaties in accordance with the accepted international legal rules of treaty interpretation. This interpretive requirement has been recognised in numerous cases by both the Court and Commission. As a consequence, to the extent that either this Honourable Court or the Commission has interpreted a treaty in a manner not compatible with the 1969 *Vienna Convention on the Law of Treaties* or the customary rules regarding treaty interpretation, that interpretation must be invalid and incapable of creating binding obligations.

14. Barbados respectfully submits that the application of textual, subjective and teleological forms of interpretation to the *OAS Charter* (as interpreted by the American Declaration of the Rights and Duties of Man), and *American Convention* all support its position that the application of the death penalty is restricted, but not prohibited, and that the application of mandatory capital punishment is neither expressly nor implicitly prohibited.

15. Further, the State submits that there is no evidence of a customary rule of general international law, or even of a regional or local customary rule, that purports to prohibit mandatory capital punishment. Barbados respectfully submits that neither this Honourable Court, nor the Commission, nor any party in the Inter-American system of human rights, has demonstrated satisfaction of the burden of proof for the existence of such a rule, either in the present case or earlier cases. Nor, the State submits, could such a burden be fulfilled.

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[14] American Declaration of the Rights and Duties of Man (1948), O A S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (updated to May 2004), OEA/Ser L./V/I 4 rev. 10 (31 May 2004) [**Annex, Tab 126**].

16. In the alternative, even if such a rule could be proved, Barbados would not be bound by it because of its persistent objector status. The position of the persistent objector is well recognised in international law and has been accepted by the Commission itself. The persistent objector rule is so fundamental that it may be used to exempt a state from the application of any customary rule of international law, even a customary rule that later achieves the status of being a *jus cogens* rule.

Barbados' System of Laws Does Not Violate its Inter-American Human Rights Obligations

17. Further, the State submits that its present system of laws does not violate any of the rules of the Inter-American system, including the rules established by the *OAS Charter* and *American Convention*.

Capital Punishment

18. Regarding its system of capital punishment, under the laws of Barbados convictions that will be subject to the death penalty are limited to crimes of an exceptionally serious nature – namely, the crimes of high treason and murder. For each of these crimes a wide array of legal defences and other mechanisms are available from the time an accused is charged, during the course of a trial, pre-conviction and post-conviction, that can prevent the application of the death penalty. Following conviction an individual has the right to appeal for mercy to the Privy Council of Barbados (the mercy committee). When determining this latter petition, the Privy Council is able to consider all of the mitigating circumstances in relation to the individual, including the character and record of the offender, the subjective factors that might have influenced the offender's conduct, and the possibility of reform and social re-adaptation of the offender. As a result, under the laws of Barbados each person has the right to have his or her situation fully assessed, as an individual.

19. In particular, Barbados denies that it has violated any of Articles 1, 2, 4, 5 and 8 of the *American Convention* or the similar articles of the American Declaration, as suggested the Application of the Commission of August 18, 2006 and the Petition of September 3, 2004. Many of these alleged violations are based upon the mistaken assumption that Article 4 of the *Convention* prohibits mandatory capital punishment. Once this assumption is shown to be incorrect, no consequential violations of the other rights can arise (e.g., Articles 1, 2, 5 and 8).

20. Further, the State formally rejects the Petitioners' submission that the form of capital punishment chosen by the State, namely, hanging, can *in and of itself* constitute cruel, inhuman, or degrading punishment or treatment under Article 5 of the *American Convention*. In this regard the State submits that a sentence of death *per se* cannot give rise to a claim of cruel, inhuman or degrading punishment or treatment under Article 5 of the *Convention*; nor can execution of

that sentence by hanging. Rather, hanging is a globally accepted method of execution, one that does not create materially greater suffering than other forms of execution. Further, under the laws and practices of Barbados execution by hanging is administered in a manner so as to ensure that the individual is treated with respect and humanity, and to provide a speedy execution process.

21. With respect to the allegations that the State read warrants of execution to any of the Petitioners after an appeal had been filed to the Judicial Committee of the Privy Council, these allegations are manifestly groundless. No warrants were read after the formal commencement of the Judicial Committee of the Privy Council Appeal processes with respect to any of the four Petitioners. Regarding the reading of warrants of execution *prior to* the commencement of an appeal, the State is required by law to carry out its legal processes, including penalties, in a timely manner. In addition, an *intention* to appeal does not constitute an appeal. As a result no rights could have been violated in relation to the reading of warrants of execution, either under the laws of Barbados or the rules of Inter-American system of human rights.

22. With respect to the State's reading of the warrants of execution while the Petitioners Communication was being considered by the Commission, Barbados submits that there is no legal requirement under either its domestic law or Inter-American human rights law that the State must await the conclusion of Commission procedures and thus no injury can have arisen. The State makes three main submissions in this regard:

    a. Firstly, there has never has been, nor is there now, a legal right to petition the Commission in Barbadian law since, strictly speaking, the process is entirely an international legal one. Contrary to the submissions of the Petitioners, the decisions of the Judicial Committee of the Privy Council in the cases of *Thomas v. Baptiste*[15] and *Lewis v. The Attorney General of Jamaica*[16] are not, and never were, binding upon Barbados. Further, neither the *American Convention* nor any other instrument of the Inter-American system of human rights has been made part of the law of Barbados by incorporation by act of Parliament. As a result none of the instruments of the Inter-American system of human rights have binding force under the laws of Barbados, nor can they be relied upon before courts of Barbados. Rather, the only legal right, arising at the time of the decision of the Caribbean Court of Justice (the CCJ) in the case of

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[15] *Thomas and Another v Baptiste and Others* [2000] 2 A C 1 **[Annex, Tab 86]**

[16] *Lewis v The Attorney General of Jamaica* [2001] 2 AC 50 **[Annex, Tab 65]**

Attorney General et al. v Jeffrey Joseph and Lennox Ricardo Boyce,[17] is the right to not have one's legitimate expectations frustrated by the state. Only from November 8, 2006 (the date of the final binding decision of the Caribbean Court of Justice), could the legitimate expectation of an individual in Barbados to be able to complete international human rights petition processes give rise to an enforceable right under Barbadian law.[18] Thus the legitimate expectation did not exist at any of the times that warrants of execution were read to the Petitioners. In the alternative, even if the legitimate expectation could have been said to have arisen earlier, on the date of the decision of the Court of Appeal in the same matter, namely, May 31, 2005 – a point which the state expressly denies – this date also fell after the reading of any of the warrants of execution with relation to the Petitioners. Thus there existed no binding right under the laws of Barbados to complete the petition processes of the Inter-American Commission on Human Rights or any other international body at the time of the reading of any of the warrants of execution to the Petitioners. As a result no rights in relation to these processes can have been violated under the laws of Barbados;

b Secondly, even under the jurisprudence of the Inter-American system of human rights the Petitioners have no binding right, *per se*, to complete their petitions with respect to the Inter-American Commission on Human Rights. The Commission cannot issue binding decisions and all of its processes, including reports, decisions, precautionary measures, *et cetera*, only constitute recommendations. This is why the Commission has been given the power to request Provisional Measures from this Honourable Court. Provisional Measures Orders can give rise to binding obligations under international law and the State has consistently respected each of the Orders of this Honourable Court: the State has not read any warrants of execution with respect to any Petitioner covered by a Provisional Measures Order. As a result, Barbados has not violated any of their rights to a fair trial, to equal protection, or to judicial protection in reading warrants of execution; and

c. Thirdly, in the alternative, even if the reading of warrants of execution could constitute a violation of their rights, a point expressly denied by the

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[17] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]**

[18] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce, ibid*, Joint Judgement of President the Rt Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders, paras 107 and 125.

State, the right to petition the Commission does not include the further right to extend the petition process for an unlimited or indefinite duration. As a result even if the reading of the warrants could constitute a breach of the *Convention*, the State submits that the Commission is estopped from arguing for reparations in light of its consistent practice of delay in relation to death penalty cases.

23. In sum, the State's reading of warrants of execution could not, and did not, violate any domestic or Inter-American human rights of the four Petitioners.

Conditions of Imprisonment

24. Barbados submits that the conditions of imprisonment of the Petitioners do not violate Article 5 of the *American Convention*. As the State fully elaborates below, Barbados' prison conditions do not violate either the rules of general international law or the norms of the Inter-American system. The State's prison system fully respects the rights of those imprisoned to live in conditions of detention compatible with their personal dignity, in conformity with the State's obligations under the Inter-American system of human rights, and to the to the maximum extent permitted by its level of economic development.

Barbados' Legal System, Including the Death Penalty, is the Democratic Choice of the People

25. Finally, Barbados wishes to remind this Honourable Court that its system of capital punishment is based upon the freely expressed democratic wishes of its population. Democracy is a fundamental plank of the Inter-American system as a whole, and a people's ability to democratically choose the legal norms under which their society functions is fully in accordance with, and in fact mandated by, the right of self-determination under international law.

B. Request for Relief

26. In consideration of the above, and the Submissions as set out below, Barbados respectfully requests that this Honourable Court expressly deny all of the claims and requests of the Petitioners in their Petition of September 3, 2004, and of the Commission in its Application of August 18, 2006, and further requests that this Honourable Court expressly declare that Barbados' laws and practices are compatible with its obligations under the Inter-American system of human rights. The State sets out in summary form its Prayer for Relief in the next section, and expresses it in full at the end of its Submissions, starting at p. 213.

III. PURPOSE OF THE STATE'S SUBMISSIONS

27. The State avails itself of the opportunity to answer in full the Commission's Application of August 18, 2006, because of the fundamental importance of the issues raised in this case. The Application of the Commission involves amongst other things a challenge to the foundations of the State's criminal justice system. The Commission's application challenges the most serious penalty provided for under the laws of Barbados, a penalty that has been in existence and that has been applied to the most heinous crimes from the time of Barbados' settlement in the early 17th Century, namely, the death penalty. The death penalty in Barbados, *in its present form*, is overwhelmingly approved by the public and has been upheld by all of Barbados' highest courts of law, including its Court of Appeal, the Judicial Committee of the Privy Council and the Caribbean Court of Justice.

28. The Inter-American Commission on Human Rights and this Honourable Court have both examined the rules related to mandatory capital punishment under the Inter-American system of human rights, most notably in the recent case of *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* [19] However in this case, and in others before it, the State respectfully submits that neither the Commission nor the Court has had the benefit of full argument on the question of mandatory capital punishment. In *Hilaire*, for example, this Honourable Court noted in paragraph 16 of the judgement that the State of Trinidad and Tobago both refused to accept the Court's jurisdiction over the matter and *did not attend the public hearings*; as a result the Court was required to proceed by means of default proceedings.[20]

29. To correct this gross imbalance in legal argument on this most fundamental issue, Barbados offers the following detailed Submissions to this Honourable Court. The State will demonstrate that the existing jurisprudence of both the Commission and Court unfortunately does *not* conform to either the international legal rules regarding treaty interpretation or the rules related to the ascertainment and application of customary international law. As a result, the State submits that the decisions of both this Honourable Court and the Commission regarding mandatory capital punishment are unsustainable as a matter of law and cannot be followed.

30. Consequently, the State solemnly urges both the Court and the Commission to rectify this situation by looking at the issues related to mandatory capital

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[19] *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, I-A Ct H.R., Judgement of June 21, 2002, Series C, No. 94 **[Annex, Tab 57]**

[20] *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago, ibid*, para. 53.

punishment anew, in light of the binding rules regarding the interpretation and application of treaties and the strict rules regarding proof of customary international law. The state will demonstrate in full that not one of the authorised methods of treaty interpretation permits an interpretation of the *OAS Charter* (as interpreted by the American Declaration), or the *American Convention* in such a way as to limit, let alone prohibit, the application of mandatory capital punishment. The State also will demonstrate in full that there are no binding rules of customary international law, global, regional or otherwise, which restrict or prohibit the application of mandatory capital punishment.

31. As a result the State respectfully requests that this Honourable Court expressly deny the claims and requests of the Petitioners in their Petition of September 3, 2004, and the claims and requests of the Commission in its Application of August 18, 2006. In doing so the State requests this Honourable Court, *inter alia*, to:

a affirm that the proper interpretations of the human rights provisions of the *Charter of the Organization of American States* (as interpreted by the American Declaration on Rights and Duties of Man) and of the *American Convention on Human Rights* cannot and do not prohibit the form of capital punishment traditionally employed by Barbados,

b affirm that Barbados' application of the death penalty in the context of its entire system of laws and human rights protections does not violate either the *OAS Charter* (as interpreted by the American Declaration) or *American Convention on Human Rights*, including Articles 1, 2, 4, 5 and 8 of the *American Convention* and the similar articles of the American Declaration, and in particular to:

- affirm that the mandatory nature of Barbados' capital punishment, when considered in the context of its entire criminal justice system, does not violate Articles 4(1), 4(2), 5(1), 5(2), 8(1) or any other articles of the *American Convention* or similar provisions of the American Declaration,

- affirm that the conditions of detention experienced by the Petitioners and the reading of warrants of execution to them have not violated their rights under Articles 5(1), 5(2) or any other articles of the *American Convention* or similar provisions of the American Declaration,

- affirm that the reading of warrants of execution to the Petitioners while their complaints were pending before the Inter-American Commission on Human Rights did not in any manner violate their rights under Article 1(1) or any other articles of the

American Convention or similar provisions of the American Declaration, and

- affirm that the laws of Barbados, including the *Offences Against the Person Act 1994* and the *Constitution* are in full compliance with the *American Convention* and therefore do not in any way violate the rights and freedoms protected under the *American Convention*, including under Article 2 of that *Convention* or similar provisions of the American Declaration, and

c. deny all of the demands of both the Petitioners and the Commission, including those set out in paragraph 161 of the Application of the Commission of August 18, 2006, in relation to

- the requests for remedies, including reparation, compensation and costs as set out in paragraphs 145-159 of the Application of the Commission of August 18, 2006, for any of the four Petitioners and their relatives,

- the request for commutation of the death sentence of Mr Huggins, and

- the requests contained in subparagraphs (4)-(6) of the same paragraph of the Application for adoption of legislative and other measures to, *inter alia*, change the nature of Barbados' form of capital punishment, its laws related to capital punishment, its rules related to existing laws, or its prison standards.

IV. REPRESENTATION

32. According to Articles 21 and 33 of the *Rules of Procedure of the Inter-American Court of Human Rights* the State has designated Ms. Jennifer Edwards, Solicitor General of Barbados, as its Agent, and Dr. David S. Berry as its Deputy Agent.

V. JURISDICTION OF THE COURT

33. Barbados ratified the *American Convention on Human Rights* on November 27, 1982, and accepted the contentious jurisdiction of this Honourable Court on June 4, 2000. The State accepts the jurisdiction of the Inter-American Court of Human Rights over the Commission's Application of August 18, 2006, as provided for under Article 62(3) of the *American Convention*. ***The State,***

however, does not accept the admissibility of the present Petition and Application for the reasons set out in Section I, above.[21]

VI. PROCESSING BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

34. Unless the State otherwise disputes a matter of fact or law in these Submissions, any attached documents, documents submitted subsequently to this Honourable Court, or in its oral pleadings or evidence, in answering the Application of the Commission of August 18, 2006 the State accepts the procedural summary of the Commission's processing of the Petition in paragraphs 11-29 of that Application. The State expressly denies, however, any allegations or implied allegations that Barbados has in any manner breached its obligations under the *OAS Charter* (including as interpreted by the American Declaration), the *American Convention on Human Rights*, or any other rule of customary or conventional international law.

VII. FACTUAL MATTERS

A. General

35. To the extent that the State does not otherwise dispute or reject the factual assertions of the Petitioners in their Petition of September 3, 2004 and the Commission in its Application of August 18, 2006, or provide conflicting facts in its Submissions or any attached documents or subsequent oral pleadings or evidence, for the purposes of the present Submissions the State accepts the summary of considerations of fact by the Commission in paragraphs 30-73 of its Application.

36. The State expressly denies, however, any suggestions or any implied suggestions of fact contained in that summary or elsewhere in materials filed with this Honourable Court that would entail Barbados being in any manner in breach of its obligations under Barbadian laws, the *OAS Charter* (including as interpreted by the American Declaration), the *American Convention on Human Rights*, or any other rule of customary or conventional international law.

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[21] See Section I Inadmissibility of the Application, starting at p 6, above

B. Specific Inaccuracies

37. There are a number of inaccuracies, however, which the State feels compelled to draw to the attention of this Honourable Court in the original Petition of Jeffrey Joseph, Lennox Boyce, Frederick Atkins and Michael Huggins of September 3, 2004, and subsequent communications, orders and requests by the Petitioners, the Commission and the Court, including the Application of the Commission of August 18, 2006.

38. In paragraph 2 of the Petition of Jeffrey Joseph, Lennox Boyce, Frederick Atkins and Michael Huggins of September 3, 2004, the Petitioners purport to make their submissions "in respect of violations of the American Convention on Human Rights by the Government of *Jamaica*." The State understands the Petition to be directed to the Government of Barbados.

39. Likewise, in paragraph 1 of the Application of the Commission of August 18, 2006, Barbados is referred to as "the Republic of Barbados." This is incorrect. As indicated later in paragraph 38 of the same Application Her Majesty the Queen is the Head of State of Barbados.

40. Correspondence from the Petitioners, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights incorrectly identifies Barbados' form of capital punishment as being "arbitrary." As fully demonstrated below, this assertion is manifestly unfounded, both as a matter of fact and at law. Barbados' criminal justice system, taken as a whole, provides full consideration of all of the relevant circumstances of the individual.

41. Regarding the procedural histories of the Petitioners, contrary to their submissions in paragraph 5 of the Petition of September 3, 2004, and the submissions of the Commission in paragraph 46 of the Application of August 18, 2006, Rodney Murray (not "Murrey"), Romaine Bend (not "Ramaine Ben"), Jeffrey Joseph and Lennox Boyce were first arraigned for the murder of Marquelle Hippolyte on Wednesday, *January 10, 2001*. The acts related to the *murder*, not arraignment, took place on April 10, 1999. On January 10, 2001, Rodney Murray alone pleaded guilty to manslaughter and the matter was adjourned. On Wednesday, January 24, 2001, Romaine Bend, Jeffrey Joseph and Lennox Boyce were again arraigned and Romaine Bend pleaded guilty to manslaughter. The trial thereafter commenced with Lennox Boyce and Jeffrey Joseph. Lennox Boyce and Jeffrey Joseph were sentenced to death by Justice Payne on February 2, 2001.

42. Warrants of execution were read to Lennox Boyce, Jeffrey Joseph, Frederick Atkins and Michael Huggins on June 26, 2002, not June 27, as stated in the Application of the Commission of August 18, 2006. The stays of execution were granted on June 28, 2006.

43. Regarding Frederick Atkins, the Petition of September 3, 2004, in paragraph 15, incorrectly dates his conviction and sentence as taking place on July 21, 1999, before Judge "Norre." The identical date is also given in paragraph 3 of the Application of the Commission to this Honourable Court of August 18, 2006. In fact Frederick Atkins was convicted and sentenced to death one year later, on July 21, 2000, by Judge Moore. Likewise the reference to a conviction date of "21st July, 2001" in the Affidavit of Frederick Atkins of August 17, 2004 (contained in Appendix 13 of the Petition of September 3, 2004), is incorrect.

44. Regarding Michael Huggins, the Petition of September 3, 2004, in paragraph 21, incorrectly dates the dismissal of his appeal against conviction as occurring on March 27, 2003. The Barbados Court of Appeal in fact dismissed his appeal on March 27, 2002.

45. Regarding the death of Frederick Atkins, as mentioned in paragraphs 3 and 54 of the Application of the Commission of August 18, 2006, the State indicated in the Letter from the Acting Minister of Foreign Affairs to the Inter-American Court of Human Rights on "Inter-American Commission of Human Rights Report No. 3/06, Merits, Case 12.480, Lennox Boyce, Jeffrey Joseph, Michael Huggins and Frederick Atkins v. Barbados," of May 19, 2006, that "Petitioner Frederick Atkins passed away as a result of a terminal illness after a period of hospitalization."[22] He was admitted to the Queen Elizabeth Hospital on October 23, 2005 and passed away on October 30, 2005.[23] As indicated in his official Registration of Death, as certified by Dr. Michael, Mr. Atkins' cause of death was pneumocystic carinii, acute asthma, and varicella zoster.[24]

46. In addition, correspondence and other documents from the Petitioners, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights suggests that warrants of execution were read to the petitioners Jeffrey Joseph and Lennox Ricardo (Joseph and Boyce) "while appeals were still pending before the Judicial Committee." This is incorrect. As is noted in the

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[22] Letter from the Acting Minister of Foreign Affairs to the Inter-American Court of Human Rights on "Inter-American Commission of Human Rights Report No. 3/06, Merits, Case 12.480, Lennox Boyce, Jeffrey Joseph, Michael Huggins and Frederick Atkins v. Barbados," of May 19, 2006 [**Annex, Tab 175**]

[23] Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006 [**Annex, Tab 172**], para. 11. See also the Registration of Death of Frederick Atkins, Certified by Dr. Michael, Registration No. 001653A, of November 4, 2005 [**Annex, Tab 176**]

[24] Registration of Death of Frederick Atkins, Certified by Dr. Michael, Registration No. 001653A, of November 4, 2005 [**Annex, Tab 176**] Please also see the official Death Certificate in relation to Frederick Atkins, which is appended to this Registration, along with a brief Memo from the Superintendent of Prisons to the Attorney General's Office of December 6, 2006, noting that Mr. Atkins experienced acute asthmatic attacks and had required hospital treatment in previous instances

2005 decision of the Barbados Court of Appeal in the case of *Boyce and Joseph v The Attorney General et al*,[25] at paragraph 2, when their death warrants were first read on June 26, 2002, Joseph and Boyce *had not filed an appeal*; their appeals were filed nearly one month later, on July 25, 2002. In fact, as stated clearly in paragraph 25 of the Petition of September 3, 2004, their Solicitors had merely indicated to Charles Russell, Solicitors, that they were "*instructed* to Petition the Judicial Committee of the Privy Council."[26] As the State will fully elaborate below, as a matter of law the mere *possibility* of the Petitioners filing an appeal is not a ground for delaying the reading of the warrants of execution. The serving of a notice of an *intention* to appeal does not amount to an appeal. Thus no warrants were read to the Petitioners subsequent to the appeal of their cases to the Judicial Committee of the Privy Council, or while any such appeal was pending.

47. In addition, the Petitioners and their counsel did not avail themselves of vital opportunities to request the commutation of their death sentences, despite several express reminders by the State.[27] From as early as April 6, 2002, and April 16, 2002, Jeffrey Joseph and Lennox Boyce, respectively, were given written notice from the Clerk of the Barbados Privy Council that the latter body would be advising the Governor General on the exercise of the prerogative of mercy. By these letters both Petitioners also were invited to provide written submissions to the Barbados Privy Council. On April 16, 2002, Jeffrey Joseph and Lennox Boyce were each provided with a copy of his respective: Report of the Trial Judge, Court of Appeal Decision, Record of Criminal Appeals, Report of the Superintendent of Prisons, Report of the Medical Officer of the Prison, Report of the Chaplain of the Prison, and antecedent history from the Commissioner of Police.[28] Despite a second invitation by the Clerk requesting written submissions on June 3 and 4, 2002, from Lennox Boyce and Jeffrey Joseph, respectively, neither petitioner nor his counsel made any written representations to the Barbados Privy Council by the time it met on June 24, 2002.[29] On that date the Privy Council advised the Governor General against commuting the death

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[25] *Boyce and Joseph v The Attorney General et al* (Unreported) Barbados Court of Appeal, Civil Suit No. 29 of 2004 (May 31, 2005), as available through http://www.lawcourts.gov.bb/LawLibrary/CasesYears.asp?Years=2005&Court=COA (accessed 30 November 2006) **[Annex, Tab 35]**

[26] Emphasis added.

[27] See, e.g., the summary of notices and invitations to make submissions provided to the Petitioners in paras. 6-7 of the decision in *Boyce and Joseph v The Attorney General et al* (Unreported) Barbados Court of Appeal, Civil Suit No. 29 of 2004 (May 31, 2005) **[Annex, Tab 35]**

[28] See *Boyce and Joseph v The Attorney General et al, ibid.*

[29] See *Boyce and Joseph v The Attorney General et al, ibid.*

sentences of Jeffrey Joseph and Lennox Boyce. Thus, despite several opportunities the Petitioners did not avail themselves of mechanisms by which their death sentences could have been commuted.

48. In addition, as this Honourable Court may be aware, a fire on March 29, 2005, at Her Majesty's Prison at Glendairy, Barbados, required the relocation of all prisoners to temporary prison facilities at Six Roads and St. Ann's Fort. At present all prisoners are held at Harrison's Point Temporary Prison.[30] A new, permanent prison facility is being constructed at Dodds Plantation, in St. Philip. As a result of these substantial changes, and due to the large number of inaccuracies in the description of the prison conditions in Barbados, the State will examine and deny the incorrect factual assertions, and accurately describe the actual prison conditions, in Section X D of these Submissions, starting at page 149, below.

49. Finally, to update the statement of the Commission in paragraph 53 of its Application of August 18, 2006, the State notes that on November 8, 2006, the Caribbean Court of Justice issued its judgement in the case of *Attorney General et al. v. Joseph and Boyce*,[31] which dismissed the appeal and, *inter alia*, upheld the commutation of the sentences of both Jeffrey Joseph and Lennox Ricardo Boyce.

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[30] See the Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006, para 10 **[Annex, Tab 172]**

[31] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32].**

VIII. MANDATORY CAPITAL PUNISHMENT IS PERMISSIBLE UNDER THE INTER-AMERICAN TREATY OBLIGATIONS ACCEPTED BY BARBADOS IN ACCORDANCE WITH THE INTERNATIONAL LEGAL RULES OF TREATY INTERPRETATION

A. Barbados Has Accepted the Rights and Obligations Contained in the Text of the OAS Charter and American Convention, Subject to Its Reservations

50 When Barbados ratified both the *Charter of the Organization of American States* and the *American Convention on Human Rights* it understood its obligations as being those expressed in the texts of the two treaties. In particular, it understood its obligations under Articles 1, 2, 4, 5 and 8 of the *American Convention* as being clearly established in the text of those articles, as modified by the reservations that Barbados itself attached when ratifying the *Convention*. As this Honourable Court will be aware, Barbados included reservations specifically related to the death penalty. These reservations provide:

> The instrument of ratification was received at the General Secretariat of the OAS on November 5, 1981, with reservations. Notification of the reservations submitted was given in conformity with the Vienna Convention on the Law of Treaties, signed on May 23, 1969. The twelve-month period from the notification of said reservations expired on November 26, 1982, without any objection being raised to the reservations.
>
> The text of the reservations with respect to Articles 4(4), 4(5) and 8(2) (e), is the following:
>
> > In respect of 4(4) the criminal code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point inasmuch as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4).
> >
> > In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court

> of Appeal,[32] might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over or over 70 years of age may be executed under Barbadian law.
>
> In respect of 8(2)(e) Barbadian law does not provide as a minimum guarantee in criminal proceeding any inalienable right to be assisted by counsel provided by the state. Legal aid is provided for certain scheduled offences such as homicide, and rape.[33]

51. It should be noted that these Barbadian reservations make specific reference to Barbados' system of laws, which provides for death by hanging as a penalty for the acts of murder and treason. No objections were made to any of these reservations.

52. Further, as established in *Restrictions to the Death Penalty* advisory opinion, in paragraph 45, a state's reservations become part of the treaty itself with respect to that state:

> 45. The fact that this legal dispute bears on the scope of a reservation made by a State Party in no way detracts from the preceding conclusions. Under the Vienna Convention on the Law of Treaties (hereinafter cited as Vienna Convention), incorporated by reference into the Convention by its Article 75, a reservation is defined as any "unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." [Art. 2(d).] The effect of a reservation, according to the Vienna Convention, is to modify with regard to the State making it the provisions of the treaty to which the reservation refers to the extent of the reservation. [Art. 21(1)(a).] Although the provisions concerning reciprocity with respect to reservations are not fully applicable to a human rights treaty such as the Convention, it is clear that reservations become a part of the treaty itself. It is consequently impossible to interpret the treaty correctly, with respect to the reserving State, without interpreting the reservation itself. The Court concludes, therefore,

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[32] The reference in Barbados' reservation to the "Privy Council, the highest Court of Appeal," is to the Privy Council established under the *Constitution* of Barbados which exercises the prerogative of mercy, *not* the Judicial Committee of the Privy Council which sits in the United Kingdom.

[33] "American Convention on Human Rights, 'Pact of San José, Costa Rica' (Signatures and Current Status of Ratifications)," as reproduced in *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 2004)*, OEA, Ser. L/V/I 4 rev. 10 (31 May 2004) **[Annex, Tab 13]**, at pp. 59-60

> that the power granted it under Article 64 of the Convention to render advisory opinions interpreting the Convention or other treaties concerning the protection of human rights in the American states of necessity also encompasses jurisdiction to interpret the reservations attached to those instruments.[34]

53. In sum, Barbados' obligations under the *American Convention* must be interpreted as modified by its reservations.

B. Overview of the Authorised Methods of Treaty Interpretation

54. In order to understand the obligations that Barbados has assumed under the *OAS Charter* and the *American Convention*, the texts of these two treaties must be interpreted. In the case of the Inter-American system, these treaties are subject to interpretation by the States Parties themselves, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

55. There are three established methods of treaty interpretation: (1) the textual method, (2) the subjective method and (3) the teleological, or purposive, method.

(1) Textual Method: Primary

56. The primary form of treaty interpretation is textual in nature. This is codified in Article 31(1) of the 1969 *Vienna Convention on the Law of Treaties*.[35] Article 31 also reflects a rule of customary international law.[36]

57. As established by the Inter-American Court of Human Rights in *Restrictions to the Death Penalty* advisory opinion,[37] in paragraph 45, the *Vienna Convention on the Law of Treaties* has been incorporated by reference into the *American Convention* by means of Article 75 of the latter *Convention*. In the same advisory opinion, and in a number of subsequent decisions, the Court has applied

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[34] *Restrictions to the Death Penalty (Arts 4(2) and 4(4) American Convention on Human Rights)*, I-A Ct H.R., Advisory Opinion OC-3/83 of September 8, 1983, Series A, No. 3 (emphasis added) **[Annex, Tab 80]**.

[35] 1969 *Vienna Convention on the Law of Treaties* **[Annex, Tab 12]**.

[36] *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994, p. 6 **[Annex, Tab 83]**, at pp. 21-22 (para. 41); *LaGrand* (Germany v. United States of America), I.C.J. Reports 2001, p. 466 **[Annex, Tab 62]**, at p. 501 (para. 99).

[37] *Restrictions to the Death Penalty (Arts 4(2) and 4(4) American Convention on Human Rights)*, I-A Ct H.R., Advisory Opinion OC-3/83 of September 8, 1983, Series A, No. 3 **[Annex, Tab 80]**.

the rules of the *Vienna Convention on the Law of Treaties* in interpreting Inter-American human rights treaties.[38]

58. The Court has specifically applied Article 31 of the *Vienna Convention* in several cases.[39]

59. Moreover in the advisory opinion on *The Right to Information on Consular Assistance*,[40] in paragraph 112, the Court expressly stated that the "*OAS Charter*, which [is a treaty] in the meaning given to the term in the *Vienna Convention on the Law of Treaties*, must be interpreted in accordance with the latter's Article 31."

60. Articles 31-33 of the *Vienna Convention on the Law of Treaties*, setting out the rules for interpretation of treaties, provide:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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[38] E.g., *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, I-A Ct H.R., Advisory Opinion OC-2/82 of September 24, 1982, Ser. A, No. 2 **[Annex, Tab 84]**; *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, I-A Ct H.R., Advisory Opinion OC-10/89 of July 14, 1989, Ser. A, No. 10 **[Annex, Tab 59]**

[39] These include: *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, I-A Ct H.R., Advisory Opinion OC-1/82 of September 24, 1982, Ser. A, No. 1 **[Annex, Tab 75]**, paras. 33 and 37; *Case of Godinez-Cruz vs. Honduras, Preliminary Objections*, I-A Ct H.R., Judgement of June 26, 1987, Series C, No. 3 **[Annex, Tab 45]**, para. 33; *Case of the "Panel Blanca" vs. Guatemala (Paniagua-Morales et al.), Preliminary Objections*, I-A Ct H.R., Judgement of January 25, 1996, Series C, No. 23 **[Annex, Tab 50]**, para. 29; *Villagrán-Morales et al. v. Guatemala (Case of the "Street Children")*, Judgement of November 19, 1999, Series C, No. 63 **[Annex, Tab 88]**, para. 192; *Case of Benjamin et al. vs. Trinidad and Tobago. Preliminary Objections*, I-A Ct H.R., Judgement of September 1, 2001, Series C, No. 81 **[Annex, Tab 41]**, paras. 75 and 80; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, I-A Ct H.R., Judgement of June 21, 2002, Series C, No. 94 **[Annex, Tab 57]**, para. 19.

[40] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, I-A Ct H.R., Advisory Opinion OC-16/99 of October 1, 1999, Ser. A, No. 16 **[Annex, Tab 85]**.

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an

> authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[41]

61. Article 31(1) of the *Vienna Convention on the Law of Treaties* sets out the general rule. It establishes the centrality and supremacy of textual interpretation, a position that is well supported by the writings of international legal scholars and the decisions of international tribunals, including those of the Inter-American Court of Human Rights.

62. The International Law Commission's "Final Draft Articles and Commentary to the Vienna Convention on the Law of Treaties" makes clear that the original draft of Article 31 (then numbered "Article 27") consciously established the primacy of textual interpretation.[42] The International Law Commission, at page 687, explains its position clearly:

> (11) The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this – the textual – approach to treaty interpretation. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find expression in the proceedings of the Institute. The textual approach, on the other hand, commends itself by the fact that, as one authority [128] has put it, "*le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties*."[43] Moreover, the

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41 *Vienna Convention on the Law of Treaties* **[Annex, Tab 12]**

42 International Law Commission's "Final Draft Articles and Commentary to the Vienna Convention on the Law of Treaties," *Yearbook of the International Law Commission* (18th Session, 1966), Vol II, p. 177, as reproduced in Sir Arthur Watts, *The International Law Commission, 1949-1998*, Volume Two: The Treaties, Part II (1999), p. 619 *ff.* **[Annex, Tab 119]**

43 For the convenience of this Honourable Court, this phrase may be translated as: "the text is, with rare exceptions, the sole and most recent expression of the common will of the parties."

> jurisprudence of the international Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain.[129] [44]

63. The Inter-American Court of Human Rights set out several of the basic principles of treaty interpretation in its advisory opinion *Restrictions to the Death Penalty*,[45] and applied these to the *American Convention on Human Rights*. In that opinion, in paragraphs 48-50, the Court established (1) that it is necessary to apply the *Vienna Convention on the Law of Treaties* to the *American Convention*, that in doing so (2) supplementary means of interpretation must be greatly restricted, and that (3) the primary form of interpretation must be the objective, or textual one:

> 48. The manner in which the request for the advisory opinion has been framed reveals the need to ascertain the meaning and scope of Article 4 of the Convention, especially paragraphs 2 and 4, and to determine whether these provisions might be interrelated. To this end, the Court will apply the rules of interpretation set out in the Vienna Convention, which may be deemed to state the relevant international law principles applicable to this subject.
>
> 49. These rules specify that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [Vienna Convention, Art. 31(1).] Supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of the foregoing provisions, or when it leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. (Ibid., Art. 32.)
>
> 50. This method of interpretation [in the Vienna Convention on the Law of Treaties] respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation. In the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves

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[44] Emphasis added. The Commission cites, respectively: [128] *Annuaire de l'Institut de droit international*, vol. 44, tome 1 (1952), p. 199; [129] E.g., in the *United States Nationals in Morocco* case, *I.C.J. Reports 1952*, pp. 196 and 199.

[45] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, I-A Ct.H.R., Advisory Opinion OC-3/83 of September 8, 1983, Series A, No. 3 **[Annex, Tab 80]**

> are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, "are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;" rather "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States." (The Effect of Reservations, supra 42, para. 29.)[46]

64. Further, in the *"Other Treaties"* advisory opinion,[47] in paragraph 37, the Court applied a strict textual approach to interpreting Article 64 of the *American Convention*:

> 37. The text of Article 64 of the Convention does not compel the conclusion that it is to be restrictively interpreted. In paragraphs 14 through 17, the Court has explained the broad scope of its advisory jurisdiction. The ordinary meaning of the text of Article 64 therefore does not permit the Court to rule that certain international treaties were meant to be excluded from its scope simply because non-American States are or may become Parties to them. In fact, the only restriction to the Court's jurisdiction to be found in Article 64 is that it speaks of international agreements concerning the protection of human rights in the American States. The provisions of Article 64 do not require that the agreements be treaties between American States, nor that they be regional in character, nor that they have been adopted within the framework of the inter-American system. Since a restrictive purpose was not expressly articulated, it cannot be presumed to exist.[48]

65. This strict textual approach – going no further than the ordinary meaning of the text of the treaty – is the correct one for interpreting any treaty, including a human rights treaty in the Inter-American system.

66 Further, even though the International Law Commission, in its "Final Draft Articles and Commentary to the Vienna Convention on the Law of Treaties," at page 685, suggested that the "process of interpretation is a unity and that the provisions of the article [now Article 31] form a single, closely integrated rule,"

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[46] Emphasis added

[47] *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art 64 of the American Convention on Human Rights)*, I-A Ct H R , Advisory Opinion OC-1/82 of September 24, 1982, Ser A, No 1 **[Annex, Tab 75]**

[48] Emphasis added

nevertheless, as outlined above and further illustrated below, the article itself indicates a clear, logical interpretive order in which textual interpretation is primary.[49]

67. In this regard, it is submitted that when the Inter-American Court of Human Rights stated in *Case of the "Panel Blanca," Preliminary Objections*,[50] in paragraph 40, that the elements of Article 31 are interconnected, this statement must be understood as meaning that they are interconnected within a particular, logically ordered structure, where textual interpretation is given priority.

(2) Other Forms of Interpretation as Supplementary

a) Subsequent Practice Reflecting Agreement of States Parties

68. The dominance of the textual form of interpretation is also evidenced by other provisions of the *Vienna Convention of the Law of Treaties*. The remaining rules laid out in Article 31 of the *Vienna Convention*, as well as in Articles 32 and 33, are clearly intended to be supplemental in nature – to be used to assist in the interpretation when the textual method is insufficient.

69. Subsections (3)(a)-(b) of Article 31, for example, provide that the subsequent developments relevant to treaty interpretation are those based upon agreement between the parties – either through an actual agreement or "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Subsequent developments must therefore satisfy two requirements in order to be used as an aid in interpretation. They must reflect (1) an agreement that (2) is between the States Parties to the treaty.

70. As a consequence, subsequent developments about which there is *no agreement* are irrelevant. This is clearly summarised by Anthony Aust, in *Modern Treaty Law and Practice*, at page 195, as follows:

> It is not necessary to show that each party has engaged in a practice, only that all have accepted it, albeit tacitly. But, if a clear difference of opinion between the parties exists, the practice

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[49] International Law Commission, "Final Draft Articles and Commentary to the Vienna Convention on the Law of Treaties," *Yearbook of the International Law Commission* (18th Session, 1966), Vol II, p. 177, as reproduced in Sir Arthur Watts, *The International Law Commission, 1949-1998*, Volume Two: The Treaties, Part II (1999), p 619 *ff* **[Annex, Tab 119]**

[50] *Case of the "Panel Blanca" vs Guatemala (Paniagua-Morales et al), Preliminary Objections*, I-A Ct H R , Judgement of January 25, 1996, Series C, No. 23 **[Annex, Tab 50]**

> may not be relied upon as a supplementary means of interpretation.[51]

71. The International Law Commission's "Final Draft Articles and Commentary to the Vienna Convention on the Law of Treaties" makes clear at page 689 that the relevant practice must be that of *all of the parties*:

> The text provisionally adopted in 1964 spoke of a practice which "establishes the understanding of all the parties". By omitting the word "all" the Commission did not intend to change the rule. It considered that the phrase "the understanding of the parties" necessarily means "the parties as a whole". It omitted the word "all" merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice [52]

72. Furthermore, the subsequent agreements or practices of *non-parties* to the treaty are irrelevant.

73. It should be noted in this regard that the parties to the *Charter of the Organization of American States* and the *American Convention on Human Rights* are the States Parties, *not* the Commission or the Court. Only the subsequent agreements or practice *of the States Parties* is relevant, and even then, only as a supplemental aid to treaty interpretation.

74. This point is fundamental to an understanding of how treaties, especially human rights treaties, can develop and change without formal amendment. Such development is only possible if supported by strong evidence of subsequent practice that establishes the agreement of the States Parties regarding the new interpretation to be placed upon the meaning of the treaty. It is submitted that only in such a manner can the references by the Inter-American Court of Human Rights in cases such as *The Right to Information on Consular Assistance*,[53] in paragraphs 114-115, to the "evolutive interpretation" of international human rights protection and the "dynamic evolution" of human rights law properly be understood.

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[51] Anthony Aust, *Modern Treaty Law and Practice* (2000) **[Annex, Tab 91]**

[52] International Law Commission, "Final Draft Articles and Commentary to the Vienna Convention on the Law of Treaties," *Yearbook of the International Law Commission* (18th Session, 1966), Vol. II, p 177, as reproduced in Sir Arthur Watts, *The International Law Commission, 1949-1998*, Volume Two: The Treaties, Part II (1999), p 619 *ff* (emphasis added) **[Annex, Tab 119]**

[53] *The Right to Information on Consular Assistance in the Framework of the Guarantee of the Due Process of Law*, I-A Ct H R., Advisory Opinion OC-16/99 of October 1, 1999, Ser. A, No 16 **[Annex, Tab 85]**

75. In sum, the textual method of interpretation is given clear priority under the law of treaties. Subsequent agreements and practice can be used as supplemental aids to treaty interpretation, but only where the agreements and practice are those of all of the States Parties. In consequence, human rights treaties may be 'living instruments' only to the extent that their growth and development stem from the *agreed practice of their States Parties*.

(3) Subjective and Teleological Methods: Secondary

76. The two other methods of treaty interpretation, the subjective and teleological ones, are secondary in nature.

77 The subjective method looks to the intention of drafters of the treaty. It is supported by Article 32 of the *Vienna Convention on the Law of Treaties*. However, as made clear in Article 32 itself, the subjective method is a *supplementary* means of treaty interpretation. Importantly, it is to be employed to either confirm or determine the meaning of *the text itself*, and only where the textual method of interpretation either (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable.

78. It is submitted that the subjective method of interpretation – looking at the intention of the drafters of the particular instrument – supports Barbados' interpretation of its human rights obligations under the Inter-American system of human rights. This will be elaborated at length in Sections VIII.D and VIII.E, below.

79. The teleological method, sometimes called the "purposive approach," interprets the treaty so as best to fulfil its overall object and purpose. It finds some support in Articles 31(1) and 33(4) of the *Vienna Convention*. However in each of these provisions we see that it is a 'last-resort' form of interpretation: it is either to be used to confirm the textual interpretation, or used only when both the textual and subjective forms of interpretation fail, as in Article 33(4). Importantly, the wording of Articles 31(1) and 33(4) show that the object and purpose of the treaty can only be used as a guide to the interpretation of, not as a replacement for, the text itself. The interpreter is to examine the text of the treaty "in the light of" or "having regard to" its object and purpose (rather than, for example, "in accordance with" its object and purpose).

80. In fact, when the International Law Commission drafted the 1969 *Vienna Convention on the Law of the Treaties* it specifically linked the object and purpose to the textual context (rather than placing it in a separate article), *precisely to avoid the excesses of the teleological method*. According to T.O. Elias, in *The Modern Law of Treaties*, at page 83,

> The Commission has deliberately referred to the object and purpose of the treaty as the most important part of the context,

> not as an independent element, since the latter course may lead to distorted interpretations, and open the door to the teleological method that might result in a subjective and self-interested approach.[54]

81. In sum, the textual form of treaty interpretation was chosen as the dominant one by the International Law Commission when drafting the *Vienna Convention on the Law of Treaties*. It is expressed as such in the *Vienna Convention* itself, and also is established as such at customary international law.[55] Other methods of treaty interpretation, including the subjective and teleological ones, are secondary and can be used only in limited circumstances.

82. Further, where the text of a treaty is clear, the meaning of this text must be applied, and further subjective and teleological interpretation is not necessary. As established by the International Court of Justice in the *Competence of the General Assembly* advisory opinion, at page 8:

> [T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter.[56]

83. Later on the same page, the Court establishes that the ordinary meaning of the text must be used unless such an interpretation would lead to something unreasonable or absurd. As a result the International Court of Justice held that it was "not permissible, in this case, to resort to the *travaux préparatoires*." The Inter-American Court of Human Rights endorsed the same approach in its advisory opinion *Restrictions to the Death Penalty*, in paragraph 49 (reproduced above). Similarly, in the case concerning the *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), at page 22 (paragraph 41), the International Court of Justice expressly stated that "Interpretation must be based above all upon the text of the treaty."[57]

84. It is respectfully submitted that only in this manner can several passages of judgments of the Inter-American Court of Human Rights and reports of the Inter-

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[54] T.O Elias, *The Modern Law of Treaties* (1974) (emphasis added; citing: U.N Conference on the Law of Treaties, First Session, Official Records, p 170) **[Annex, Tab 95]**

[55] T.O Elias, *The Modern Law of Treaties* (1974), pp. 72-73 **[Annex, Tab 95]**

[56] *Competence of the General Assembly Regarding Admission to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 4 **[Annex, Tab 53]**

[57] *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994, p. 6 **[Annex, Tab 83]**

American Commission on Human Rights properly be understood. Any other meaning would be impermissible under the law of treaties.

85. Thus, it is submitted that the references by the Inter-American Commission and Court to the judgment of the Permanent Court of International Justice in the *Case of the Free Zones of Upper Savoy and the District of Gex* that suggest that clauses of a treaty must be given "appropriate effects" must be read as allowing this to occur only in cases where this interpretation does not conflict with the clear meaning of the treaty text. For example, in paragraph 33 of the *Case of Godínez-Cruz*, Preliminary Objections,[58] the Court states:

> 33. The interpretation of the Convention regarding the proceedings before the Commission necessary "for the Court to hear a case" (Art. 61(2)) must ensure the international protection of human rights which is the very purpose of the Convention and requires, when necessary, the power to decide questions concerning its own jurisdiction. Treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art. 31(1) of the Vienna Convention on the Law of Treaties). The object and purpose of the American Convention is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its "appropriate effects." Applicable here is the statement of the Hague Court:
>
> > Whereas, in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects (**Free Zones of Upper Savoy and the District of Gex**, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13).[59]

86. This passage itself makes clear that 'appropriate effects' can only be provided where this is *permitted by the text itself*.

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[58] *Case of Godinez-Cruz vs. Honduras, Preliminary Objections*, I-A Ct H.R., Judgement of June 26, 1987, Series C, No. 3 **[Annex, Tab 45]**

[59] Underlining added

87. Further, it is submitted that careful scrutiny of the *Case of the Free Zones of Upper Savoy and the District of Gex*[60] reveals that the Permanent Court's use of the phrase "appropriate effects" was very limited, and *cannot* yield the broad meaning seemingly placed upon it by the Commission and Court in Inter-American jurisprudence.

88. The *Case of the Free Zones of Upper Savoy and the District of Gex* involved the joint submission by means of a *Special Agreement* between Switzerland and France of a number of questions to the Court regarding the effect of Article 435 of the *Treaty of Versailles* on earlier treaties between the two states. These earlier treaties had established a customs and economic regime for the free zones of Upper Savoy and the Pays de Gex. The *Special Agreement* provided for the Court to decide whether Article 435 of the *Treaty of Versailles* (1) abrogated the earlier treaties (the French position), or (2) simply allowed the two states to abrogate them by mutual consent (the Swiss position). The *Special Agreement* also required the Court, after concluding its deliberations but prior to judgement, to set a time limit for the parties to settle between themselves the new regime. Upon the expiry of this time limit, if the parties had failed to establish a regime, the Court was empowered to do so.

89. A difficulty with the *Special Agreement* procedure became apparent to the parties, however, as a result of the fact that France and Switzerland could not reach a decision on the question of abrogation. This impasse made it fruitless for the parties to attempt to negotiate a new regime. As a result the two states agreed in their pleadings and correspondence that the Court should indicate "unofficially" its position on the question of abrogation when making the order establishing the time limit for the parties to settle the new regime: *ibid.*, pages 8 and 12. The Court, however, concluded on the latter page that under the provisions of its own *Statute* it was unable to make any such "unofficial" pronouncement. To sum up, the parties could not agree on the issue of abrogation, which issue needed resolution prior to their negotiations. But the Court had not been empowered, under its own *Statute* or the *Special Agreement*, to unofficially indicate its position on this question at the appropriate point – the time of its order establishing a time limit for settlement.

90. The Court found a way around this impasse by indicating the results of its deliberations on the question of abrogation in its order establishing the time limit. This was not an "unofficial" communication as requested by the parties, but neither did it have binding force or final effect in deciding the dispute. Thus, the Court was able *to comply with the strict text of its own Statute and the Special Agreement, and yet at the same time to provide the parties with the information they sought*. It is in this precise context that the passage quoted in the Inter-

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[60] *Case of the Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., Series A, No. 22 (Order of August 19, 1929) **[Annex, Tab 51]**

American *Case of Godínez-Cruz vs. Honduras* arises, and thus it may be helpful to this Honourable Court to quote the entire portion of the order, as set out at page 13 of the *Free Zones* case:

> Whereas the Court must, in any event, fix by order, in accordance with Article 48 of the Statute, the time contemplated by Article 1, paragraph 2, of the Special Agreement; and whereas, in contradistinction to the judgments contemplated by Article 58 of the Statute, to which reference is made in Article 2, paragraph 1, of the Special Agreement, orders made by the Court, although as a general rule read in open Court, due notice having been given to the Agents, have no "binding" force (Article 59 of the Statute) or "final" effect (Article 60 of the Statute) in deciding the dispute brought by the Parties before the Court;
>
> Whereas, in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects;
>
> Whereas it is possible, without infringing the provisions of the Statute, to give effect in all essential respects to the common will of the Parties as expressed in the Special Agreement, by indicating, in the grounds of the order according to the Parties the time referred to in Article 1, paragraph 2, of the Special Agreement, the result of the Court's deliberations upon the question formulated in Article 1, paragraph 1, of that instrument;

91. In sum, as clearly indicated in this passage, the Permanent Court of International Justice upheld the clear wording of the text of its *Statute* by not making an "unofficial" communication. But it also allowed the clauses of the *Special Agreement* to have "appropriate effects" by answering the question posed in the text of its non-binding order. As a result, this case stands for the proposition that *a tribunal may allow treaty provisions to have 'appropriate effects' where such effects can be rendered in a manner fully compatible with the text of the treaty*

92. Barbados submits that this is the correct reading of the *Case of the Free Zones of Upper Savoy and the District of Gex*, and that as a result any Inter-American cases that seek to rely upon it must be interpreted in the same manner.[61]

93. In this regard statements about prioritisation of the object and purpose of a treaty *above* the clear wording of the text are misconceived. For example, the Inter-American Court of Human Rights in the case of *Case of Cayara vs. Peru,*

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[61] See, e.g., paragraph 30 of the *Case of Velásquez-Rodriguez vs Honduras, Preliminary Objections*, I-A Ct H.R., Judgement of June 26, 1987, Series C, No 1 **[Annex, Tab 52]**

Preliminary Objections,[62] in paragraph 37, incorrectly attributes a prioritisation of effectiveness to a passage from the above *Case of Velásquez-Rodríguez vs Honduras*:

> 37. The Court has on other occasions analyzed certain aspects of Article 51 of the Convention (*Velásquez Rodríguez Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 1, para. 62 et seq.; *Neira Alegría et al. Case, Preliminary Objections*, Judgment of December 11, 1991. Series C No. 13, para. 32), but not the characteristics or conditions of the time limit contemplated in paragraph 1 of that article. In order to arrive at a satisfactory resolution of the objections interposed by the Government, it is necessary to refer to it. In doing so, moreover, the Court must ratify its often stated opinion that the object and purpose of the treaty is the effective protection of human rights and that the interpretation of all its provisions must be subordinated to that object and purpose, as provided in Article 31 of the Vienna Convention on the Law of Treaties (*Velásquez Rodríguez Case, Preliminary Objections, op. cit.*, para. 30)

94. The latter, underlined passage clearly misapplies Article 31 of the *Vienna Convention on the Law of Treaties*. It also clearly misapplies paragraph 30 of the *Velásquez Rodríguez Case*, which reproduces the same passage from the *Free Zones* case set out above.

95. It is submitted that the reverse is true: the textual method takes priority over the teleological method of interpretation. In fact, in some cases the textual method of interpretation may take precedence to such an extent as to require a provision to be applied strictly, even where this strict application renders the treaty *ineffective*.

96. An example of this latter position is found in the case regarding the *Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania (Second Phase)*.[63] In this case three *Peace Treaties* between the Principal and Allied Powers and Bulgaria, Hungary and Romania included provisions related to the observance of human rights and fundamental freedoms. Disputes arose as to whether Bulgaria, Hungary and Romania were in compliance with these provisions. These disputes were supposed to go before specially-established Commissions, as explained by the Court at page 226:

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[62] *Case of Cayara vs Peru. Preliminary Objections*, I-A Ct H.R., Judgement of February 3, 1993, Series C, No 14 **[Annex, Tab 43]**

[63] *Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania (Second Phase)*, I.C.J. Reports 1950, p 221 **[Annex, Tab 58]**

Articles 36, 40 and 38, respectively, of the Peace Treaties with Bulgaria, Hungary and Romania, after providing that disputes concerning the interpretation or execution of the Treaties which had not been settled by direct negotiation should be referred to the Three Heads of Mission, continue:

> "Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment."

97. However, none of these Commissions could be established because of the refusal of Bulgaria, Hungary and Romania to appoint their members. As a result, the question arose as to whether the Secretary-General could appoint the omitted national Commissioner(s) in such a case. The Court, at page 227, answered this question in the negative:

> The Court considers that the text of the Treaties does not admit of this interpretation. While the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners it is nevertheless true that according to the natural and ordinary meaning of the terms it was intended that the appointment of both the national Commissioners should precede that of the third member. This clearly results from the sequence of the events contemplated by the article: appointment of a national Commissioner by each party; selection of a third member by mutual agreement of the parties; failing such agreement within a month, his appointment by the Secretary-General. Moreover, this is the normal order followed in the practice of arbitration, and in the absence of any express provision to the contrary there is no reason to suppose that the parties wished to depart from it.
>
> The Secretary-General's power to appoint a third member is derived solely from the agreement of the parties as expressed in the disputes clause of the Treaties; by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein. The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General

> to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists.[64]

98. Even though this conclusion rendered the provisions of the *Treaties* ineffective, and even though the impasse was itself caused by breaches of the *Treaties*, the International Court of Justice upheld the plain meaning of the text. The Court stated, at pages 228-29:

> As the Court has declared in its Opinion of March 30th, 1950, the Governments of Bulgaria, Hungary and Romania are under an obligation to appoint their representatives to the Treaty Commissions, and it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment. These conditions are not present in this case, and their absence is not made good by the fact that it is due to the breach of a treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.
>
> The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.[65]

99. As a result the Court held that the plain meaning of the text must be upheld even where this would frustrate effectiveness of the treaty.

100. It must be noted in this regard that Barbados is not asking this Honourable Court to frustrate the effectiveness of the *American Convention on Human Rights*. Rather, the State's submissions are compatible with the proper interpretation of the *American Convention* and will increase its effectiveness overall, by resolving inaccuracies and areas of ambiguity that exist in the Inter-American jurisprudence.

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[64] Emphasis added

[65] Emphasis added

101. In sum, the textual method of treaty interpretation is afforded primacy in the 1969 *Vienna Convention on the Law of Treaties* and in customary international law. Subsequent practice reflecting the agreement of States Parties may be used in a supplementary manner to assist in establishing the meaning of the text. Subjective and teleological methods of interpretation are likewise secondary and supplementary, and will not displace the clear meaning of the text, even where that clear meaning makes the treaty ineffective.

C. The Rules of Treaty Interpretation Place Clear Limitations Upon the Inter-American Commission and Court

(1) Inter-American Organs as Treaty-Created, Empowered and Circumscribed

102. The rules regarding treaty interpretation are of fundamental importance to both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, since these two bodies were themselves created by international legal agreements. As treaty-created organs they are bound both by the terms of the treaties which established them and by the general rules of international law, including those related to the law of treaties. In the context of the Inter-American Commission on Human Rights this is expressly recognised in the final paragraph of Article 106 of the *Charter of the Organization of American States*[66] and the first paragraph of Article 19 of the *Statute of the Inter-American Commission on Human Rights*.[67] These provide, respectively:

> **Article 106**
>
> There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.
>
> An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

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[66] *Charter of the Organization of American States* **[Annex, Tab 2]**

[67] *Statute of the Inter-American Commission on Human Rights*, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (updated to May 2004), OEA/Ser L./V/I 4 rev. 10 (31 May 2004) **[Annex, Tab 10]**

Article 19

> With respect to the States Parties to the American Convention on Human Rights, the Commission shall discharge its duties in conformity with the powers granted under the Convention and in the present Statute ...[68]

103. In the case of this Honourable Court, this is expressly recognised in Article 1 of the *Statute of the Inter-American Court of Human Rights*,[69] which provides:

Article 1. Nature and Legal Organization

> The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.[70]

104. Further, the Organization of American States as a whole is limited by Article 1 of the *OAS Charter*, which provides:

Article 1

> The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency.
>
> The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States.[71]

105. The second paragraph of Article 1 specifically limits the powers of the Organization to those conferred by its constituent treaty.

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[68] Emphasis added.

[69] *Statute of the Inter-American Court of Human Rights* **[Annex, Tab 11]**

[70] Emphasis added

[71] Emphasis added.

106. The Court and Commission have been empowered under their respective constituent documents to interpret and apply Inter-American human rights provisions, and in doing so may they may clarify the meaning of these documents. However both bodies are strictly limited by their constituent instruments and by the international legal rules of treaty interpretation that have been outlined above. Both bodies are required to apply the textual method of treaty interpretation and are greatly restricted in their abilities to use either the subjective or teleological methods. And of course neither body is empowered to substitute its own views in place of the clear wording of the text of the *American Convention*.

(2) Organs May Interpret, Not Fundamentally Transform, Treaty Obligations

107. More pointedly, it is respectfully submitted that neither the Inter-American Court of Human Rights nor the Inter-American Commission on Human Rights is empowered to fundamentally transform the nature and extent of the treaty obligations imposed upon States Parties by means of interpretive processes, without the consent of the latter. Neither the Commission nor the Court has the capacity to fundamentally change the nature of the obligations that Barbados has accepted under the *Charter of the Organization of American States* or the *American Convention*, including those obligations related to the right to life, the right to humane treatment, the right to a fair trial and the right to judicial protection, without its consent.

108. Barbados submits, and will fully establish below, that according to the internationally recognised rules of treaty interpretation the mandatory death penalty remains legally permissible under the *Charter of the Organization of American States* (as interpreted by the American Declaration of the Rights and Duties of Man), and the *American Convention on Human Rights*. To the extent that this Honourable Court and the Inter-American Commission on Human Rights have suggested otherwise in their jurisprudence in the past, Barbados respectfully submits that these decisions are incorrect as a matter of law.

109. Further, it is submitted that if it were to be concluded that either the Court or Commission had applied improper standards in the past when interpreting the *OAS Charter* and *American Convention*, such interpretations would fall outside of the competence of each organ (as being *ultra vires*). It also would logically follow that any juridical decisions which were based upon improper standards, whether questioning the legality of the imposition of mandatory capital punishment or any other matter, would be incapable of imposing binding obligations upon the Member States of the Organization of American States

110. It is further submitted that it must be the duty of each Member State subject to the Inter-American system to respectfully draw such questions regarding *ultra vires* actions to the attention of both this Honourable Court and the Inter-

American Commission and, if necessary, to the other organs of the Organization of American States.

D. Obligations Imposed by Article I of the American Declaration of the Rights and Duties of Man Do Not Restrict Barbados' Ability to Impose its Form of Capital Punishment

111. Further, the State submits, and will now go on to prove, that when properly interpreted the provisions of the American Declaration of Rights and Duties of Man cannot bar the imposition of capital punishment or mandatory capital punishment

(1) Status of the American Declaration: Interpretive Tool Only

112. As a preliminary matter, the State reminds this Honourable court that the American Declaration of the Rights and Duties of Man[72] in and of itself was originally intended to be, and remains, a non-binding document. Nevertheless, although legally non-binding, the Declaration is now recognised as fulfilling the important role of being an authoritative guide to the interpretation of the meaning of the phrase "fundamental rights of the individual" that is found in Articles 3(l) and 17 of the *Charter of the Organization of American States*.

113. The interpretive status of the Declaration was established in the *Interpretation of the American Declaration* advisory opinion,[73] in which the Inter-American Court of Human Rights, in paragraphs 33-4 and 39-40, respectively, explained that although the American Declaration is not a treaty, the *OAS Charter* is, and the latter protects, *inter alia*, human rights. According to the Court, as summarised in paragraphs 41-47 of the same case, the Inter-American Commission was established under the *OAS Charter* to protect human rights and these "rights are none other than those enunciated and defined in the American Declaration," as recognised in the Commission's *Statute* and by the General Assembly of the Organization. As a result, the Court explained in paragraph 45, "[f]or the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter."

114. In sum, the State takes this opportunity to remind this Honourable Court that although the American Declaration has an important interpretive role, it is not

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[72] American Declaration of the Rights and Duties of Man **[Annex, Tab 126]**

[73] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, I-A Ct H.R., Advisory Opinion OC-10/89 of July 14, 1989, Ser. A, No. 10 **[Annex, Tab 59]**.

binding *per se*. Only the treaty that it aids in interpreting, namely, the *Charter of the Organization of American States*, is binding.

115. This is an important distinction, one often overlooked in the jurisprudence of the Inter-American system of human rights, with a clear consequence for the legal obligations of OAS Member States. This is simply that Member States remain bound by the *Charter*, which must be interpreted in accordance with the ordinary rules of treaty interpretation. Use of the American Declaration is therefore supplementary in nature. Further, *interpretation* of the American Declaration (being twice removed from the *Charter*), is properly classified as a tertiary process.

(2) The American Declaration's Treatment of the Right to Life in Relation to the Death Penalty

a) Textual Interpretation. No Absolute Right to Life May be Read Into the OAS Charter or the Declaration

116. Article I of the American Declaration, considered as an interpretive guide to the binding human rights obligations imposed in the *OAS Charter*, does not expressly mention the death penalty. In the words of the Inter-American Commission on Human Rights in the case of *Roach and Pinkerton v. United States*,[74] in paragraph 44, the "American Declaration is silent on the issue of capital punishment."

117. Article I simply provides:

Article I.

> Every human being has the right to life, liberty and the security of his person.

118. On a purely textual interpretation, Article I would seem to create an absolute and unlimited right to life. Such an absolute interpretation would be unreasonable. It would, for example, mean that the state is required to protect the right to life of all of its citizens at all times, and would bar the imposition of any state-authorised use of force that could deprive an individual of her or his right to life. As a result, a death at the hands of a police officer, for example, who acted entirely in self defence would entail a breach of the *OAS Charter*.

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[74] *Roach and Pinkerton v. United States* (Case 9647), Resolution No. 3/87, I-A C.H.R., *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, OEA/Ser.L/V/II.71, Doc. 9, Rev. 1, 22 September 1987 **[Annex, Tab 81]**

119. Such an unlimited interpretation of the right to life, as has been recognised by both this Honourable Court and the Commission, is manifestly unreasonable. All legal systems must recognise the lawful ability of states to terminate the lives of individuals in some circumstances, such as through military action during a time of war or as a result of lawful police operations.

120. Rather, it is submitted that the text of the Declaration represents a compromise formulation, one that expresses the right to life at an abstract level in order to avoid specific reference to controversial issues such as abortion and the death penalty. This is made clear through an analysis of the drafting records related to the American Declaration.

b) Drafting Records Reflect Fundamental Disagreement Resulting in Compromise Formulation

121. In the draft of the American Declaration produced by the Inter-American Juridical Committee in Rio de Janeiro, on December 8, 1947,[75] the text of Article I expressly included a reference to the death penalty:

> Article I
>
> RIGHT TO LIFE
>
> Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbecils [*sic*] and the insane.
>
> Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity.[76]

122. In the "Report to Accompany the Definitive Draft Declaration of the International Rights and Duties of Man,"[77] at page 5, the Inter-American Juridical Committee provided three specific reasons for the inclusion of the

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[75] **Annex, Tab 95**

[76] "Declaration of the International Rights and Duties of Man," Definitive Project presented by the Inter-American Juridical Committee for Consideration by the 9th International Conference of American States at Bogotá, as reproduced in Inter-American Juridical Committee, *Project of Declaration of the International Rights and Duties of Man* (Washington, D.C.: Pan American Union, 1948), at p. 2 (emphasis added) [**Annex, Tab 114**]

[77] "Report to Accompany the Definitive Draft Declaration of the International Rights and Duties of Man," reproduced in *Project of Declaration of the International Rights and Duties of Man* (Washington, D.C.: Pan American Union, 1948) [**Annex, Tab 125**]

second paragraph of Article I. The new draft allowed the Committee (1) to reflect the diversity of legislation regarding the death penalty, (2) to remain neutral in the matter, and (3) to recognise the sovereign competence of each state to decide such questions. The Committee stated, *ibid.*:

> 10. The last part of this article also is changed in order to emphasize that the Committee is not taking sides in favour of the death penalty but rather admitting the fact that there is a diversity of legislation in this respect, recognizes the authority of each state to regulate this question.[78]

123. The Committee then indicated its own opposition to the death penalty, but was only able to list five Latin American states as supporting this position: Colombia, Panama, Uruguay, Brazil and Venezuela. *Ibid*, pages 5-6. As seen in the *Final Act of the Ninth International Conference of American States*,[79] at page 1, this number represented the views of a small minority, less than one quarter of the twenty-one delegations to the conference.

124. The fact that references to abortion and the death penalty were too contentious to be included in the text also has been expressly recognised by the Commission in its "Baby Boy" Case.[80] In this case, in paragraph 19, in the context of a discussion of abortion, the Commission clearly establishes that Article I represents a compromise between competing views:

> 19. A brief legislative history of the Declaration does not support the petitioner's argument, as may be concluded from the following information and documents:
>
> a) Pursuant to Resolution XL of the Inter-American Conference on Problems of War and Peace (Mexico, 1945), the Inter-American Juridical Committee of Río de Janeiro, formulated a preliminary draft of an International Declaration of the Rights and Duties of Man to be considered by the Ninth International Conference of American States (Bogotá, 1948). This preliminary draft was used by the Conference as a basis of discussion in conjunction with the draft of a similar Declaration prepared by the United Nations in December, 1947.

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[78] Emphasis added

[79] *Final Act of the Ninth International Conference of American States*, Bogotá, Colombia, March 30 - May 2, 1948 (Washington, D C : Pan American Union, 1948) **[Annex, Tab 118]**.

[80] *"Baby Boy" Case, Case 2141 (United States)*, March 6, 1981, Resolution 23/81, I-A C H R, *Annual Report of the Inter-American Commission on Human Rights 1980-1981*, OEA/Ser L/V/II 54, Doc 9, Rev 1, 16 October 1981 **[Annex, Tab 33]**

b) Article 1 - Right to Life - of the draft submitted by the Juridical Committee reads: "Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity." (Novena Conferencia International Americana - Actas y Documentos Vol. V Pág. 449).

c) A Working Group was organized to consider the observations and amendments introduced by the Delegates and to prepare an acceptable document. As a result of its work, the Group submitted to the Sixth Committee a new draft entitled American Declaration of the Fundamental Rights and Duties of Man, article I of which reads: "Every human being has the right to life, liberty, security and integrity of this person "

d) This completely new article I and some substantial changes introduced by the Working Group in other articles has been explained, in its Report of the Working Group to the Committee, as a compromise to resolve the problems raised by the Delegations of Argentina, Brazil, Cuba, United States of America, Mexico, Peru, Uruguay and Venezuela, mainly as consequence of the conflict existing between the laws of those States and the draft of the Juridical Committee. (Actas y Documentos Vol. 5 pages 474-484, 495-504, 513-51S.

e) In connection with the right to life, the definition given in the Juridical Committee's draft was incompatible with the laws governing the death penalty and abortion in the majority of the American States. In effect, the acceptance of this absolute concept--the right to life from the moment of conception--would imply the obligation to derogate the articles of the Penal Codes in force in 1948 in many countries because such articles excluded the penal sanction for the crime of abortion if performed in one or more of the following cases: A-when necessary to save the life of the mother; B-to interrupt the pregnancy of the victim of a rape; C-to protect the honor of an honest woman; D-to prevent the transmission to the fetus of a hereditary on contagious disease; E-for economic reasons (angustia económica).

f) In 1948, the American States that permitted abortion in one of such cases and, consequently, would be affected by the adoption of article I of the Juridical Committee, were; Argentina - article 86 n.1, 2 (cases A and B); Brasil - article n. I, II (A and B); Costa Rica - article 199 (A); Cuba - article 443 (A, B and D); Ecuador - article 423 n. I, 2 (A and B); Mexico (Distrito y Territorios Federales) - articles 333e 334 (A and B); Nicaragua - article 399 (frustrated attempt) (C); Paraguay - article 352 (A); Peru - article 163 (A-to save the life or health of the mother); Uruguay - article

328 n. 1-5 (A, B, C. and F - the abortion must be performed in the three first months from conception); Venezuela - article 435 (A); United States of America - see the State laws and precedents; Puerto Rico S S 266, 267 (A) (Códigos Penales Iberoamericanos - Luis Jiménez de Asua - Editorial Andrés Bello - Caracas, 1946 - volúmenes I y II).

g) On April 22, 1948, the new article I of the Declaration prepared by the Working Group was approved by the Sixth Committee with a slight change in the wording of the Spanish text (there was no official English text at that stage) (Actas y Documentos) vol. V pages 510-516 and 578). Finally, the definitive text of the Declaration in Spanish, English, Portuguese and French was approved by the 7th plenary Session of the Conference on April 30, 1948, and the Final Act was signed May 2nd. The only difference in the final text is the elimination of the word "integrity" (Actas y Documentos vol. VI pages 297-298; vol. I pages 231, 234, 236, 260, 261).

h) Consequently, the defendant is correct in challenging the petitioners' assumption that article 1 of the Declaration has incorporated the notion that the right of life exists from the moment of conception. Indeed, the conference faced this question but chose not to adopt language which would clearly have stated that principle.[81]

125. Commissioner Dr. Marco Gerardo Monroy Cabra, in his Dissenting Opinion in *Roach and Pinkerton v. United States*,[82] makes this point even more directly when he states in sections 1 and 6 of his opinion, respectively:

> Article I of the American Declaration of the Rights and Duties of Man approved by the IX International Conference of American States held in Bogotá from March 30 through May 2, 1948, and included in the Final Act of the Conference states: "Every human being has the right to life, liberty and the security of his person." This article makes no reference, either explicitly or implicitly, to prohibition of the death penalty with respect to minors. The draft of the Inter-American Juridical Committee included the following as Article I: "Every person has the right to life. This right extends to the right to life of incurables, imbeciles and the insane. Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity."

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[81] Emphasis added, citations omitted

[82] *Roach and Pinkerton v. United States* (Case 9647), Resolution No. 3/87, I-A C.H.R., *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, OEA/Ser.L/V/II.71, Doc. 9, Rev. 1, 22 September 1987 **[Annex, Tab 81]**

> After discussion, the IX Conference decided to omit any reference to the death penalty and to change the wording proposed by the Inter-American Juridical Committee Article 1, therefore, was drafted in its present form, making no reference to the death penalty. A close look at the preparatory work leads to the unmistakable conclusion that the States participating in the IX International Conference of American States in Bogotá in 1948 did not wish to preclude the death penalty since, otherwise, they would have agreed on its prohibition and, consequently, approved the text by the Inter-American Juridical Committee, which confined its application to crimes of exceptional gravity. An interpretation of Article 1 in the light of its current meaning, while taking into account the preparatory work recorded in the Proceedings of the Conference, the specific deletion of the provision concerning the death penalty would allow one to conclude that the American Declaration of the Rights and Duties of Man did not regulate the matter of the death penalty, and of course, far less did it include any provision on the general or specific proscription of its application in the case of juveniles. One might therefore conclude, with regard to this first aspect, that if the American Declaration of the Rights and Duties of Man remained silent on the death penalty and did not approve the draft that included it, the United States can establish the death penalty without violating Article I or any other standard in the aforecited American Declaration of the Rights and Duties of Man.
>
> [...]
>
> [I]n interpreting the Declaration, the [majority of the] Commission did not attribute any value to the preparatory work leading up to the American Declaration of the Rights and Duties of Man contained in the Proceedings of the IX International Conference of American States held in Bogotá in 1948. If this background had been taken into account, it would have concluded that there was a consensus to delete any reference to the death penalty from Article 1 in view of the differences that existed among the States on this matter.[83]

126. Further, as seen in the more recent case of *Juan Raúl Garza v. United States*,[84] at 1255, in paragraph 90, the Commission has confirmed its understanding that Article I does not prohibit the death penalty:

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[83] Emphasis added

[84] *Juan Raúl Garza v. United States*, Case 12.243 (2000), Report No. 52/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20, Rev. **[Annex, Tab 60]**

> 90. Against this backdrop of interpretative principles, the Commission observes in relation to the Petitioner's alleged violations of Article I of the Declaration that this provision is silent on the issue of capital punishment. In past decisions, however, the Commission has declined to interpret Article I of the Declaration as either prohibiting use of the death penalty per se, or conversely as exempting capital punishment from the Declaration's standards and protections altogether. Rather, in part by reference to Article 4 of the American Convention on Human Rights, the Commission has found that Article I of the Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life.[85]

127. In sum, the drafting records of the American Declaration and the decisions of the Commission demonstrate that Article I was not meant to restrict the imposition of the death penalty or mandatory death penalty (which, as the State will fully establish below, need not be and under the laws of Barbados is not, arbitrary).

c) No Limit on Mandatory Capital Punishment Can be Read Into the Declaration

128. In the alternative, even if some limitations can be read into Article I, such limitations do not restrict the imposition of mandatory capital punishment. Some scholars, such as William Schabas, have suggested that because some of the texts that were submitted to the Council of Jurists during the drafting of the American Declaration sought to impose limitations on a state's ability to use the death penalty, similar limitations should be read into the final text.[86] Barbados submits that such arguments are highly questionable, for the reasons established in the advisory opinion regarding *Access to, or Anchorage in, the Port of Danzig of Polish War Vessels*.[87] In this case the Permanent Court of International Justice held, at page 144, that an interpreter of a treaty is not to pay regard to intentions expressed by states during the drafting phase which are not incorporated into the text of the treaty:

> The Court is not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the

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[85] Emphasis added

[86] William Schabas, *The Abolition of the Death Penalty in International Law* (2002) **[Annex, Tab 105]**, at pp. 313-14.

[87] *Access to, or Anchorage in, the Port of Danzig of Polish War Vessels*, Advisory Opinion, 1931 P.C.I.J., Ser. A/B 43, p. 128 **[Annex, Tab 29]**

> authors of the Treaty, but for which no provision is made in the text itself.

129. Further, it is submitted that even if some of the limitations contemplated in the drafting process could be read so as to implicitly modify the final text, the only limitations upon capital punishment that were suggested during the drafting process were (1) that it be imposed only for crimes of exceptional gravity, (2) that it be prescribed by pre-existing laws, and according to Haiti, (3) that it be limited in cases of political offences.[88] No reference was made to a limitation or restriction upon a state's ability to impose mandatory capital punishment. Complete abolition of the death penalty, it must be remembered, was suggested but ultimately not accepted.

130 The Inter-American Commission on Human Rights has subsequently suggested several further limitations upon a state's right to impose the death penalty under Article I of the American Declaration. For example, the Commission suggested in the case of *Juan Raúl Garza v. United States*,[89] at page 1255 (paragraph 91), that Article I requires states to: (1) limit the death penalty to crimes of exceptional gravity as prescribed by pre-existing law, (2) provide an accused with the strict and rigorous judicial guarantees of a fair trial, and (3) prevent inconsistent application of the death penalty. Nevertheless, the Commission has consistently recognised that the Declaration does not prohibit the application of the death penalty. In the same case of *Juan Raúl Garza v. United States*, for example, the Commission held in paragraph 92 that regardless of any suggested international trend towards abolition of the death penalty, such a trend has not changed the nature of Article I:

> 92. Having carefully reviewed the information and evidence submitted by the parties in Mr. Garza's case, the Commission cannot conclude that pertinent international law has developed to the present time, so as to alter the Commission's standing interpretation of Article I of the Declaration. Rather, the Commission remains of the view that the American Declaration, while not proscribing capital punishment altogether, does prohibit its application in a manner that would render a deprivation of life arbitrary.

131 In sum, it is submitted that Article I does not prevent the lawful imposition of either capital punishment or, by extension, mandatory capital punishment.

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[88] See, e.g., Schabas, *The Abolition of the Death Penalty in International Law* (2002) **[Annex, Tab 105]**, pp. 312-14.

[89] *Juan Raúl Garza v. United States*, Case 12.243 (2000), Report No. 52/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20, Rev. **[Annex, Tab 60]**

132. Further, the form of capital punishment that exists under the laws of Barbados, which the Commission has described as 'mandatory,' is neither arbitrary nor is it in violation of any *OAS Charter* rights. Barbados will fully set out its arguments related to the meaning of "arbitrary" later in its submissions, starting at paragraph 243.

E. Obligations Imposed by Article 4 of the American Convention on Human Rights Do Not Restrict Barbados' Ability to Impose its Form of Capital Punishment

133. In contrast to the broad wording of Article I of the American Declaration, the wording of Article 4 of the *American Convention* is both specific and clearly and expressly contemplates the lawful imposition of the death penalty by States Parties. Article 4 provides:

> **Article 4. Right to Life**
>
> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
>
> 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
>
> 3. The death penalty shall not be re-established in states that have abolished it.
>
> 4. In no case shall capital punishment be inflicted for political offences or related common crimes.
>
> 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
>
> 6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

134. Again in contrast to Article I of the American Declaration, Article 4 of the *American Convention* imposes specific limitations upon states that wish to use

capital punishment. Not one of these limitations, however, excludes the application of the death penalty, or mandatory death penalty, to serious crimes.

135. In this regard the Court should be aware that Barbados' present form of capital punishment has been in existence, and established by law, for hundreds of years. As a result upon ratifying the *American Convention* Barbados made express reservations in order to allow it to continue to impose the death penalty in its traditional form. One of those reservations provides:

> In respect of 4(4) the Criminal Code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point in as much as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4).[90]

136. No objections were registered to any of Barbados' reservations, including this one. As a result, Barbados became a party to the *American Convention* on the understanding that its *existent* form of capital punishment (including death by hanging) was, and would remain, permissible in the absence of an express amendment to the *Convention*.

(1) Drafting Records Do Not Support Any Restriction Upon the Use of Mandatory Capital Punishment

137. This understanding is supported by the drafting records of the *American Convention*. The *travaux préparatoires* cannot be read so as to support either an intention to abolish the death penalty or to restrict the use of mandatory capital punishment. On the contrary, the drafting records and debates surrounding what eventually became Article 4 make clear that there was strong disagreement about whether capital punishment and abortion should be permitted. Latin American states that prohibited these practices in their domestic laws attempted to have their views reflected in the *American Convention*. As with the American Declaration, these attempts were unsuccessful. In fact, as consistently demonstrated by both the drafting records and records of the debates, specific wording was added *to allow for* the possibility of abortion, and all attempts to abolish capital punishment were defeated. Further, nowhere in these records is there evidence of an attempt to limit, let alone prohibit, mandatory capital punishment. In fact, the possibility that mandatory capital punishment might be

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[90] "American Convention on Human Rights, 'Pact of San José, Costa Rica' (Signatures and Current Status of Ratifications)," as reproduced in *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 2004)*, OEA, Ser L/V/I 4 rev 10 (31 May 2004) **[Annex, Tab 13]**, at pp 59-60.

impermissible does not even appear to have arisen during the entire decade of debates and meetings.

138. In addition, it is important to remember that, as established as early as the advisory opinion regarding *Access to, or Anchorage in, the Port of Danzig of Polish War Vessels*,[91] statements made during the preparation of a treaty which do not become part of the treaty may not be used for its later interpretation.

139. To assist this Honourable Court it will be helpful to examine in some detail the *travaux préparatoires* related to the *American Convention on Human Rights*. These drafting records show that no consensus existed regarding the prohibition of either capital punishment or mandatory capital punishment.

140. Starting with one of the earliest versions of Article 4, that produced by the Inter-American Council of Jurists in 1959, there is no evidence of any limit or restriction placed upon mandatory capital punishment. Article 2 of the Draft Convention on Human Rights Prepared by the Inter-American Council of Jurists, provides at page 2:

> Article 2
>
> 1. The right to life is inherent in the human person. This right shall be protected by law starting with the moment of conception. No one shall be arbitrarily deprived of his life.
>
> 2. In countries where capital punishment has not been abolished, sentence of death may be imposed only as a penalty for the most serious crimes and pursuant to the final judgment of a competent court, and in accordance with a law establishing such punishment, enacted before the commission of the crime.
>
> 3. In no case shall capital punishment be applied for political offenses.
>
> 4. Capital punishment shall not be imposed on persons who, at the time of the commission of the crime, were under 18 years of age; nor shall it be applied to pregnant women.[92]

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[91] *Access to, or Anchorage in, the Port of Danzig of Polish War Vessels*, Advisory Opinion, 1931 P.C.I.J., Ser. A/B 43, p. 128 **[Annex, Tab 29]** (reproduced in para. 128, above)

[92] Draft Convention on Human Rights Prepared by the Inter-American Council of Jurists, in its Fourth Meeting in Santiago, Chile, from August-September 1959, OAS Doc., Doc. 128 (English) Rev., 8 September 1959 (Original: Spanish), as reproduced in Thomas Buergenthal and Robert E. Norris, eds, *Human Rights. The Inter-American System*, Part 2: The Legislative History of the American Convention on Human Rights, Appendix, Part 16.1 (emphasis added) **[Annex, Tab 115]**.

141. The highlighted portion of this article implicitly restricts abortion. So too did a subsequent draft proposed by the State of Uruguay – the Draft Convention on Human Rights Presented to the Second Special Inter-American Conference by the Government of Uruguay, of 18 November 1965.[93] In fact the Uruguayan draft sought to go much further – attempting to prohibit capital punishment:

> Article 2
>
> 1. Every human being has the right to have his life respected. This right shall be protected by law from the moment of conception. No one shall be arbitrarily deprived of his life.
>
> 2. The States Parties to this Convention shall abolish capital punishment. Reservations to this provision shall be admitted solely on condition that sentence of death may be imposed only as a penalty for the most serious crimes and pursuant to the final judgment of an independent and impartial regular court, which will satisfy due process at law, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.
>
> 3. In no case shall capital punishment be inflicted for political offenses.
>
> 4. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age; nor shall it be applied to pregnant women.
>
> 5. Amnesty, pardon, or commutation of sentence of death may be granted in all cases.[94]

142 Nevertheless, neither the Uruguayan draft nor the draft of the Inter-American Council of Jurists was accepted. The portions of both drafts that might be construed to prohibit abortion were revised in reaction to the concerns of those states in which the practice was lawful. Subsequent drafts in fact included wording for the specific purpose of *permitting* abortion. Further, the Uruguayan attempt to prohibit capital punishment, as illustrated below, never received support of the majority of Member States of the OAS.

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[93] Draft Convention on Human Rights Presented to the Second Special Inter-American Conference by the Government of Uruguay, Doc 49 (English) of 18 November 1965 (Original: Spanish), as reproduced in Thomas Buergenthal and Robert E Norris, eds, *Human Rights. The Inter-American System*, Part 2: The Legislative History of the American Convention on Human Rights, Appendix, Part 16 1 **[Annex, Tab 116]**, at p 63

[94] Emphasis in original

143. Regarding abortion, the draft of Article 4 set out in the Draft Inter-American Convention on Protection of Human Rights, at page 2, contained new wording to allow abortion in those states in which it was lawful:

> **Article 3**
>
> 1. Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.
>
> 3. In no case shall capital punishment be inflicted for political offenses.
>
> 4. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
>
> 5. Every person condemned to death shall have the right to apply for pardon or commutation of sentence. Amnesty, pardon, or commutation of capital punishment may be granted in all cases. Capital punishment shall not be imposed while a decision is pending on the first application for commutation, presented to the competent authority.[95]

144. It should be noted that this provision does not prohibit capital punishment, nor does it prohibit or in any way limit mandatory capital punishment.

145. In response to this draft Uruguay reiterated its objection to the death penalty. But *Uruguay formally accepted that no consensus existed supporting its position*. In the document entitled Observations of the Governments of the Member States Regarding the Draft Inter-American Convention on Protection of Human Rights: Uruguay, at page 2, Uruguay stated:

> 3. The provision that most deviates from Uruguayan convictions and traditions is Article 3, since it permits the continuation of the death

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[95] Draft Inter-American Convention on Protection of Human Rights, adopted by the Council of the Organization of American States on October 2, 1968, as reproduced in Organization of American States, *Inter-American Specialized Conference on Human Rights*, San José, Costa Rica, November 1969, OEA/Ser K/XVI/1 1 (English), Doc. 5, 22 September 1969 (emphasis added) **[Annex, Tab 117]**.

> penalty, even though it restricts is application to the conditions already set forth at the symposium that was held in Montevideo to study the draft prepared in Santiago, Chile
>
> Regarding the aforementioned Article 3 of the preliminary draft, it is to be noted that Article 26 of the Constitution of Uruguay establishes that "*the death penalty shall not be applied to anyone.*"
>
> Therefore, it is difficult for Uruguay to accept a text that openly contradicts one of its most cherished principles of domestic law.
>
> It must be taken into account, however, that the preliminary draft is the result of unavoidable compromises within the committee that prepared it, and that Article 3 took the form that it did after lengthy discussions during which opposing, irreducible concepts were debated.
>
> This being the case, and since there does not seem to be a climate of opinion favoring the elimination of the death penalty, Uruguay believes that the most workable solution would be to try to refine Article 3. To this end, it suggests that the following paragraph be added between numbers 1 and 2: "*The death penalty shall not be established in states that have abolished it, nor shall its application be extended to crimes with respect to which it does not presently apply.*"[96]

146. This express recognition of the lack of acceptance of its attempt to abolish the death penalty by OAS Member States did not prevent Uruguay from again raising the issue during subsequent debates. Nevertheless as clearly acknowledged in the above statement *by the most persistent proponent of abolition of the death penalty*, an abolitionist position was untenable at the time.

147. The minutes of the drafting committee during the Conference of San José a year later reveal that the same disagreements reoccurred. For example, in the Minutes of the Second Session of Committee I (Summary Version), held on November 10, 1969, at page 31, the Brazilian delegate suggested that the phrase "and in general, from the moment of conception" be deleted so as to permit states which allow abortion to accede to the *Convention*.[97] The US supported this position:

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[96] Observations of the Governments of the Member States Regarding the Draft Inter-American Convention on Protection of Human Rights: Uruguay, Organization of American States, *Inter-American Specialized Conference on Human Rights*, San José, Costa Rica, November 1969, OEA/Ser K/XVI/1 1 (English), Doc 6, 26 September 1969 (emphasis in original, underlining added) **[Annex, Tab 123]**

[97] Minutes of the Second Session of Committee I (Summary Version), held on November 10, 1969, as reproduced in Thomas Buergenthal and Robert E. Norris, eds, *Human Rights The Inter-*

ibid., page 32. Venezuela objected, however, on the grounds that domestic legislation could not be competent in the area: *ibid.*, page 31. Ecuador suggested removal of the phrase "and in general." *Ibid.* El Salvador favoured the present text of the draft: *ibid.* The delegate of Guatemala suggested that the clause on arbitrary deprivation of life be omitted. *Ibid.*, page 32. Following these debates the draft was approved without modification. *Ibid.*

148. The prohibition on re-establishing capital punishment in states that have abolished it (found in Article 4(3) of the *American Convention*), was suggested by the Uruguayan delegate in the following terms:

> The death penalty shall not be established in States that have abolished it, nor shall its application be extend to crimes with respect to which it does not presently apply.[98]

149. However during debates the US delegate, Richard D. Kearney, stated that he was "not completely convinced of the good effect that might be derived from the proposal of the Delegate of Uruguay, since that addition could bring results totally different from the general intent of the *Convention*." *Ibid.*, pages 32-33. The delegate from El Salvador, although personally sympathetic to the Uruguayan position, also stated that he "fears the effects it could have on modern American penal codes in preparation." Thus, even though the proposed Uruguayan text was adopted, pending study and approval, there was some disagreement about its compatibility with the overall purpose of the *Convention*.

150. The summary of these debates, published in the Report of the Rapporteur of Committee I ("Protection"), of 19 November 1969, at pages 162-63, states:

> Article 3
>
> The subject of this article, "the right to life", gave rise to extensive debate. A large part of the discussion centered on the question of the inherence of this right. In addition, the concept of arbitrary deprivation of life was the subject of lengthy consideration.
>
> Discussion was also devoted to the matter of capital punishment. The delegations of Uruguay, Honduras and Costa Rica offered criteria for a conciliatory formula, taking into account the trend in the Americas toward eliminating this form of punishment.
>
> The Committee reflected this trend by adding the following text to the second paragraph of the article: "The death penalty shall not

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American System, Part 2: The Legislative History of the American Convention on Human Rights, Chapter 1: Summary Minutes of the Conference of San José, Part 12 **[Annex, Tab 122]**.

98 Minutes of the Second Session of Committee I (Summary Version), held on November 10, 1969, *ibid.*, at p. 32.

> be reestablished in states that have abolished it, nor shall its application be extended to crimes to which it does not presently apply."
>
> Another topic of extensive debate in connection with this article was the concept of "political offense." Most of the delegates agreed on the need to define it, and five delegations—Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua—expressed the wish that the appropriate American organizations carry on with the study of the problem.
>
> As for the rest, the approved article has practically the same text as the draft [99]

151. This summary shows that disagreement related to capital punishment continued, and that the provision was drafted so as to reflect a compromise position.

152. When debate on the article occurred in the Plenary Session, a new proposal was made by Uruguay to replace paragraph 2 of Article 4 so as to read "No one shall be sentenced to death," and as a consequence, to delete paragraphs 3-6.[100] This proposal was defeated when only eight members voted in favour of it and eleven members abstained: *ibid.* Further, in *ibid.*, the delegations of the United States and Brazil asked that the following declaration be made part of the record:

> The United States and Brazil interpret the language of paragraph 1 of Article 4 as preserving to State Parties discretion with respect to the content of legislation in light of their own social development, experience and similar factors.

153. Thus, even during the plenary session the strong debates about capital punishment reoccurred. These debates were never resolved. As a result several states, in the Closing Plenary Session, made a declaration to the conference that an additional protocol to the *American Convention* should be formulated to abolish the death penalty.[101]

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[99] Report of the Rapporteur of Committee I ("Protection"), of 19 November 1969, as reproduced in Thomas Buergenthal and Robert E. Norris, eds, *Human Rights: The Inter-American System*, Part 2: The Legislative History of the American Convention on Human Rights, Chapter 1: Summary Minutes of the Conference of San José, Part 12 **[Annex, Tab 124]**.

[100] Minutes of the Second Plenary Session (Summary Version), of November 20, 1969, as reproduced in Thomas Buergenthal and Robert E. Norris, eds, *Human Rights: The Inter-American System*, Part 2: The Legislative History of the American Convention on Human Rights, Chapter 1: Summary Minutes of the Conference of San José, Part 12 **[Annex, Tab 121]**, at p. 248.

[101] Minutes of the Closing Plenary Session (Summary Version), of November 22, 1969, as reproduced in Thomas Buergenthal and Robert E. Norris, eds, *Human Rights: The Inter-*

154. In sum, over ten years of drafting records make clear that there was no consensus on the issue of the death penalty. States were deeply divided on this issue and their division is clearly reflected in the records of the debates, drafts and final text of Article 4 of the *American Convention*. As a result the text of Article 4 must be read strictly and, it is submitted, cannot support either an abolitionist agenda or any restriction on the right of States to impose mandatory capital punishment.

(2) New Rights to be Created Only by Amendment or Through New Protocols

155. It should also be noted that the idea of creating a new protocol to establish rights not already protected under the *American Convention*, as suggested during the Closing Plenary Session, was itself expressly contemplated by the drafters of the *Convention*. This is why the drafts, and the final *Convention*, both set out limitations on the manner in which new rights can be included under the *Convention*. As provided for in Articles 31, 76 and 77 of the *American Convention*, the protection of any new rights is expressly limited to those rights which are included by formal amendment of the *Convention* or are set out in new protocols to it:

> **Article 31. Recognition of Other Rights**
>
> Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.
>
> **Article 76**
>
> 1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.
>
> 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

American System, Part 2: The Legislative History of the American Convention on Human Rights, Chapter 1: Summary Minutes of the Conference of San José, Part 12 **[Annex, Tab 120]**, at p 270.

Article 77

1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.

2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

156. The earlier drafts of these articles, as set out in the Draft Inter-American Convention on Protection of Human Rights, adopted by the Council of the Organization of American States on October 2, 1968, at page 2, make this condition for reception of new rights even clearer:

Article 30

The scope of protection of this Convention may be extended to include other rights and freedoms that may be recognized in accordance with the procedure set forth in Articles 69 and 70.

Article 69

1. Any State Party, the Commission or the Court may propose an amendment to this Convention and present it to the General Assembly through the Secretary General of the Organization.

2. The amendments approved shall enter into force on the date when instruments of ratification thereof by an absolute majority of the States Parties to this Convention have been deposited

Article 70

1. Pursuant to Article 30, the Commission may submit additional protocols to this Convention for approval by the States Parties, with a view to the gradual expansion of its scope of protection through the inclusion of other rights and freedoms set forth in the American Declaration of the Rights and Duties of Man, as soon as the Commission believes that the States are prepared to accept the obligations inherent in each of those rights and freedoms. The States Parties shall be obliged to submit each Protocol to the approval of the appropriate authority, in accordance with their respective constitutional procedures.

> 2. Each protocol shall enter into force on the date of deposit of the seventh instrument of ratification thereof and shall be applicable only between the States Parties thereto.[102]

157. As seen in draft Article 30, above, the scope of protection of human rights in the *American Convention* was only to be altered by the States Parties themselves. Further, as seen in draft Article 70, the Commission was expressly limited to proposing only those rights and freedoms which the States themselves would be prepared to accept.

158. This formal limitation upon the inclusion of additional rights is supported in the Annotations on the Draft Inter-American Convention on Protection of Human Rights, prepared by the Secretariat of the Inter-American Commission on Human Rights, of 22 September 1969, in which, at page 33, the following explanation is provided for the name of the *Convention*:

> c. The use in the Spanish text of the term "de derechos humanos" (of human rights) instead of "de los derechos humanos" (of the human rights) reflects the basic concept that the Convention initially contemplates only certain rights and freedoms, which are precisely those to which the American states are now able to grant an international protection extending beyond the limits of their domestic jurisdiction, after all domestic recourses have been exhausted, without prejudice to the future inclusion in the text of the Convention of other rights and freedoms that the states may agree upon through the progressive method provided for in the Convention itself.[103]

159. The Annotation on Article 30 (the previous draft of Article 31 of the *American Convention*), in *ibid.*, at page 63, again makes this limitation clear:

> The IACHR, in line with its view that the Convention should initially contemplate only certain rights and freedoms (Opinion – Part One), prepared this provision for the eventuality of the States

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[102] Draft Inter-American Convention on Protection of Human Rights, adopted by the Council of the Organization of American States on October 2, 1968, as reproduced in Organization of American States, *Inter-American Specialized Conference on Human Rights*, San José, Costa Rica, November 1969, OEA/Ser. K/XVI/1.1 (English), Doc. 5, 22 September 1969 (emphasis added) **[Annex, Tab 117]**

[103] Annotations on the Draft Inter-American Convention on Protection of Human Rights, prepared by the Secretariat of the Inter-American Commission on Human Rights, of 22 September 1969, as reproduced in Thomas Buergenthal and Robert E. Norris, eds, *Human Rights: The Inter-American System*, Part 2: The Legislative History of the American Convention on Human Rights, Chapter II: Working Documents, Part 13 (emphasis added) **[Annex, Tab 113]**

> Parties' deciding progressively to include other rights and freedoms in the system of protection.[104]

160. The inclusion of future rights by formal amendment or through the drafting of additional protocols is expressly endorsed, both in the drafting records and in the final version of the *American Convention*. Inclusion of additional rights *outside of these mechanisms*, however, is not permitted. As a result, the rights protected in the *American Convention* must be understood to be those established in the carefully drafted text of the *Convention*, with additional rights only becoming available through express amendment or new protocols.

(3) Previous Interpretations of the Scope of Article 4 of the *Convention* by the Commission and Court are Problematic and Not in Conformity with the Rules Regarding Interpretation of Treaties

161. In this regard, it is respectfully submitted that neither this Honourable Court nor the Inter-American Commission on Human Rights is permitted to take an abolitionist approach towards the death penalty. Such an approach is not warranted by the clear wording of the *American Convention*, nor by the existence of the subsequent *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, nor by textual, subjective or teleological interpretations of these documents.

162. An abolitionist attitude on the part of the Court was first enunciated in a non-binding[105] advisory opinion, that regarding *Restrictions to the Death Penalty*.[106] After correctly indicating, in paragraphs 52 and 56 of the opinion, that the text of Article 4 of the *Convention* restricts the scope of the death penalty, the Court commented, in paragraph 57, that:

> 57. On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope,

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[104] Emphasis added.

[105] On the non-binding quality of Advisory Opinions in the Inter-American system see *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, I-A Ct H.R., Advisory Opinion OC-1/82, September 24, 1982, Series A, No. 1 (1982) **[Annex, Tab 75]**, para. 51; *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, I-A Ct H.R., Advisory Opinion OC-3/83, September 8, 1983, Inter Am. Ct. H.R., Series A, No. 3 (1983) **[Annex, Tab 80]**, para. 32.

[106] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, I-A Ct H.R., Advisory Opinion OC-3/83, September 8, 1983, Inter Am. Ct. H.R., Series A, No. 3 (1983) **[Annex, Tab 80]**.

> in order to reduce the application of the penalty to bring about its gradual disappearance.[107]

163. The latter, highlighted portion of the second sentence steps beyond a textual interpretation of the *Convention*. It is also incompatible with a subjective interpretation of the *Convention*, since the records of the drafting process make clear that there was no consensus about the abolition of the death penalty. The Court itself admits this in the very next paragraph of the same opinion when it highlights the fact that the "proposal of various delegations that the death penalty be totally abolished did not carry because it failed to receive the requisite number of votes in its favor."

164. Perhaps in an attempt to diminish the effect of the latter statement, the Court alludes to the fact that "not one vote was cast against" the proposal to abolish the death penalty. But the inference drawn from this statement is clearly incorrect. It is accepted that no vote was cast against the proposal. But it is improper to infer from this fact that a *lack of votes* against the proposal amounted to an *endorsement* of the proposal. Barbados respectfully submits that such a conclusion amounts to a *non sequitur*. Further, it shows a clear misunderstanding of the reality of voting procedures before international bodies, where states that do not approve of a resolution often choose to abstain from voting, rather than vote against it, for a wide range of reasons. As seen above, the drafting records show that *eleven states abstained* and only eight members voted in favour of the proposal. These numbers do not, and cannot, indicate support for an abolitionist position.

165. Moreover, upon a purely textual interpretation of Article 4, if a consensus really had emerged about the desirability of abolishing the death penalty or of prohibiting mandatory capital punishment, states would not have included subsections in Article 4 which expressly *allow* the application of the death penalty. Nor, it is submitted, would states have later felt the need to draft the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* (1990).[108]

166. Also, as clearly recognised by the Court in the case of *Case of Neira-Alegría et al. vs. Peru*,[109] in paragraph 74, the word "arbitrary" was included in Article 4(1) *for the precise purpose of allowing the death penalty*:

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[107] Emphasis added.

[108] *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* (1990), O.A.S. Treaty Series No. 73, adopted OAS GA Res. 1042, 20th Regular Session (8 June 1990) **[Annex, Tab 7]**.

[109] *Case of Neira-Alegría et al. vs. Peru*, Judgement of January 19, 1995, Series C, No. 20 **[Annex, Tab 47]**

> 74. Article 4(1) of the Convention states that "[*n*]*o one shall be arbitrarily deprived of his life*." The expression "arbitrarily" excludes, as is obvious, the legal proceedings applicable in those countries that still maintain the death penalty. . .[110]

167. In other words, "arbitrarily" was inserted in Article 4(1) to draw a distinction between impermissible and permissible losses of life, the latter including loss of life as a result of the application of the death penalty.

168. It is respectfully submitted by Barbados that subsequent reiterations of an original mistaken position by the organs of the OAS cannot validate that mistaken position without the consent of the Member States. Thus, the later references by the Inter-American Court of Human Rights to these passages of the advisory opinion on *Restrictions to the Death Penalty*, in such cases as *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*,[111] paragraph 99, cannot 'cure' or correct the original, incorrect application of the international rules regarding treaty interpretation. Inter-American bodies such as this Honourable Court and the Commission are not empowered to indirectly amend the *American Convention*, nor may they fundamentally transform the nature of the obligations that states have assumed under that *Convention* without their consent. Such matters must be addressed either by formally amending the *American Convention on Human Rights*, or by creating separate, optional protocols, to which states may consent to become parties if they so choose.

169. The *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* fulfils this role by allowing states to choose to commit themselves to the abolition of the death penalty. Should Barbados decide to abolish its death penalty it may become a party to this *Protocol*. Until that point, however, Barbados is only required to accept those obligations arising from the clear texts of the *Charter of the Organization of American States* and the *American Convention*.

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[110] Emphasis added

[111] *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, I-A Ct H R , Judgement of June 21, 2002, Series C, No 94 **[Annex, Tab 57]**.

F. Even the Protocol to the American Convention on Human Rights to Abolish the Death Penalty Itself Does Not Prevent Mandatory Capital Punishment

170. It should be noted that although the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*[112] came into force on 28 August 1991, it has attracted only nine signatories, of which eight later became parties.[113] It is submitted that this low level of ratification would be surprising if there was clear consensus about the undesirability of the death penalty.

171. Further, contrary to the very name of the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, the text of the treaty does not abolish the death penalty. Although Article 1 purports to abolish the death penalty in the territory of States Parties, Article 2 provides for reservations to the *Protocol* that would allow the same States Parties to impose the death penalty. Articles 1 and 2 state:

> **Article 1**
>
> The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.
>
> **Article 2**
>
> 1. No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.
>
> 2. The State Party making this reservation shall, upon ratification or accession, inform the Secretary General of the Organization of American States of the pertinent provisions of its national legislation applicable in wartime, as referred to in the preceding paragraph.

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[112] *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* (1990), O.A.S. Treaty Series No. 73, adopted OAS GA Res. 1042, 20th Regular Session (8 June 1990) **[Annex, Tab 7]**

[113] "Protocol to the American Convention on Human Rights to Abolish the Death Penalty (Signatures and Current Status of Ratifications)," as reproduced in *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 2004)*, OEA, Ser. L/V/I.4 rev. 10 (31 May 2004), at pp. 89-90 **[Annex, Tab 14]**.

> 3. Said State Party shall notify the Secretary General of the Organization of American States of the beginning or end of any state of war in effect in its territory.[114]

172. Brazil did in fact make the following reservation under Article 2:

> a. **Brazil**
>
> In ratifying the Protocol to Abolish the Death Penalty, adopted in Asunción on June 8, 1990, make hereby, in compliance with constitutional requirements, a reservation under the terms of Article 2 of the said Protocol, which guarantees states parties the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature [115]

173. As a result, even the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* does not require the abolition of the death penalty. Nor does it expressly prohibit mandatory capital punishment.

174 In sum, an abolitionist trend in the Inter-American system of human rights cannot be substantiated by the texts of any of its treaties and declarations, including the *Protocol*. There is no prohibition against use of capital punishment, nor is there a restriction placed upon mandatory capital punishment.

IX. MANDATORY CAPITAL PUNISHMENT IS LAWFUL UNDER CUSTOMARY INTERNATIONAL LAW

175. Barbados further submits that no evidence has been presented, and that in fact *no such evidence could be presented*, to support either a global or regional customary international legal rule that prohibits either mandatory capital punishment or the death penalty *per se*.

176. As this Honourable Court will be aware, a party alleging the existence of a rule of international law bears the burden of proving the rule. To prove the existence of a rule of customary international law one must show evidence of both state practice and *opinio juris*. The burden rests squarely upon the Petitioners or the

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[114] Emphasis added

[115] "Protocol to the American Convention on Human Rights to Abolish the Death Penalty (Signatures and Current Status of Ratifications)," as reproduced in *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 2004)*, OEA, Ser. L/V/I 4 rev 10 (31 May 2004), at pp 89-90 **[Annex, Tab 14]**

Commission to prove the existence of such a custom. Barbados submits that they have not. Moreover, as will be demonstrated, they cannot.

A. No Constant and Uniform State Practice Prohibiting Mandatory Capital Punishment Exists

177. There is no evidence of the "constant and uniform usage practiced by the States in question" that is required to prove that mandatory capital punishment is contrary to a norm of customary international law. The requirement for constant and uniform usage was established by the International Court of Justice in the *Asylum Case*.[116] In that case Columbia sought to prove that there was a regional custom in South America allowing the asylum-granting state to decide the nature of the crime of the asylum-requesting party. Columbia failed to satisfy the burden of proof and the Court stated, at pages 276-77 of its judgment:

> The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party ... that the rule invoked ... is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'.
>
> [...]
>
> The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and the official views expressed on different occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law...

178. Similarly, in the *North Sea Continental Shelf Cases*,[117] at page 43 (in paragraph 74), the Court required strict evidence of "both extensive and virtually uniform" practice:

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[116] *Asylum Case* (Columbia v Peru), I.C.J. Reports 1950, p. 266 **[Annex, Tab 31]**

[117] *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark, Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969, p. 3 **[Annex, Tab 74]**

> an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[118]

(1) State Practice Supports Capital Punishment: The Majority of States Retain the Death Penalty

179. There is no evidence of a constant and uniform practice prohibiting capital punishment internationally. In fact, statistics indicate the opposite – that the majority of states use capital punishment. The statistics of Amnesty International, for example, set out in their document entitled "Facts and Figures On the Death Penalty," do not support a widespread practice of abolition:

> **1. Abolitionist and retentionist countries**
>
> Over half the countries in the world have now abolished the death penalty in law or practice. Amnesty International's latest information shows that:
>
> - **88** countries and territories have **abolished the death penalty for all crimes**;
> - **11** countries have **abolished the death penalty for all but exceptional crimes** such as wartime crimes;
> - **30** countries can be considered **abolitionist in practice**: they retain the death penalty in law but have not carried out any executions for the past 10 years or more and are believed to have a policy or established practice of not carrying out executions,
>
> making a total of **129** countries which have abolished the death penalty in law or practice.

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[118] Emphasis added. See also, Malcolm Shaw, *International Law*, 4th ed. (1997), pp. 60-61 **[Annex, Tab 106]**; Ian Brownlie, *Principles of Public International Law*, 6th ed. (2003), pp. 7-8 **[Annex, Tab 93]**

- **68** other countries and territories **retain** and use the death penalty, but the number of countries which actually execute prisoners in any one year is much smaller.[119]

180. Despite the clever way in which these statistics have been presented, a careful analysis reveals that a *majority* of countries retain capital punishment: out of the 197 countries surveyed by Amnesty International, 109 still apply the death penalty. This means that a little over *fifty-five per cent* of nations around the globe reserve the right to, and most use, the death penalty.

181. Similar statistics are available in the recent Report of the Secretary General on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (9 March 2005).[120] In the tables at the end of the report statistics are presented which show

a. 62 countries as being "retentionist," meaning that they retain the death penalty for ordinary crimes and have carried out executions within the last ten years (*ibid.*, Table 1, page 44),

b. 12 countries as being abolitionist "for ordinary crimes only," meaning that they carry out executions for certain serious crimes (*ibid.*, Table 3, page 47),

c. 41 countries as being "*de facto* abolitionist" countries, meaning countries which impose death sentences but have not carried them out within the last ten years (*ibid.*, Table 4, pages 48-49), and

d. 79 countries as being completely abolitionist, meaning those which had abolished use of the death penalty for all crimes, whether in times of peace or war (*ibid.*, Table 2, pages 45-46).[121]

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[119] Amnesty International, "Facts and Figures on the Death Penalty" (Updated: 21 November 2006), as available at http://web.amnesty.org/pages/deathpenalty-facts-eng (last accessed 27 November 2006) **[Annex, Tab 142]**

[120] Report of the Secretary General, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Economic and Social Council, Doc E/2005/3 (9 March 2005), as available at http://daccessdds.un.org/doc/UNDOC/GEN/V05/819/20/PDF/V0581920.pdf?OpenElement (accessed November 27, 2006) **[Annex, Tab 103]**

[121] See generally the descriptions of the terms used in the Report of the Secretary General, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Economic and Social Council, Doc. E/2005/3 (9 March 2005), as available at http://daccessdds.un.org/doc/UNDOC/GEN/V05/819/20/PDF/V0581920.pdf?OpenElement (accessed November 27, 2006) **[Annex, Tab 103]**, at pp. 3-4.

182. These latter statistics reveal that out of the 194 countries and territories surveyed in the UN report, 115 – a little over 59% – still retain, and many use, the death penalty.

183. Although the manner in which both the statistics of the Secretary General and Amnesty International are presented suggests a gradual movement towards abolition, this is highly misleading.

184. To put it bluntly, the category of '*de facto* abolitionist' countries is completely suspect. Barbados, for example, is listed as a *de facto* abolitionist country in Table 4 of the Report of the Secretary General.[122] Moreover, as paragraph 21 of the latter report make clear, "*de facto* abolitionist" countries *have resumed executions*:

> 21. Three formerly de facto abolitionist countries resumed executions. In the Philippines in 1999 an adult male was the first person to be executed in 23 years. This was followed by five more executions in that year and one in 2000. Since then there have been no further executions. After a period of 11 years without executions, they were resumed by Qatar when, in June 2000, two men and a woman were executed for murder. And in 2001, seven people were executed in Guinea, the first since 1984. This is a lower figure than the seven formerly de facto abolitionist countries that resumed executions during the quinquennium 1994-1998.

185. Thus a lack of executions for a ten year period cannot be used as an indicator that a country will move towards abolishing capital punishment, or even that it will not carry out existing death sentences. Further, as indicated in paragraph 24 of the Report of the Secretary General, several countries that have not carried out executions may have been considering resumption during the ten year survey period, and others simply may have been unable to carry out death sentences because of ongoing legal challenges:

> 24. It needs to be recognized, however, that at least five of the countries that, according to the "10-year rule" remained de facto abolitionist in 2004, have intended to resume executions but have not been able to do so because of legal interventions or have been considering the resumption of executions. This has been the case in Barbados (last execution 1984), Belize (1986), Jamaica (1988), Papua New Guinea (around 1950) and Sri

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[122] Report of the Secretary General, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Economic and Social Council, Doc E/2005/3 (9 March 2005), as available at http://daccessdds.un.org/doc/UNDOC/GEN/V05/819/20/PDF/V0581920.pdf?OpenElement (accessed November 27, 2006) **[Annex, Tab 103]**, at p. 48

> Lanka (1976). As regards the imposition of death sentences by de facto abolitionist countries, they continued to be imposed in the Gambia, Mali and Togo during the period 1999-2003.[123]

186. Further, as explicitly recognised in the same Report, in paragraph 34, there is significant uncertainty as to whether so-called "de facto abolitionist" countries actually intend to abandon the practice of enforcing the death penalty:

> 34. It is difficult to establish how many of the 15 countries that had not executed any persons for at least 10 years as at 1 January 1999 are indeed intending to abandon the practice of enforcing the death penalty, for in most of them death sentences have continued to be imposed, even if relatively rarely. As already noted, Chad had briefly become de facto abolitionist, but resumed executions within the period of the survey. The country became de facto abolitionist in 2001 on the basis that the last execution had been carried out in Chad in 1991. However, executions were resumed in November 2003, when nine prisoners who had been convicted by the Criminal Court in August 2003 of murder or assassination, were executed.[124]

187. This comment reveals the fallacy inherent in the statistics of both the Secretary General and Amnesty International: states that *continue to impose the sentence of death* are labelled "*de facto* abolitionist."

188. As a result, Barbados submits that it is impossible to characterize this state practice of imposing, and carrying out, the death sentence as revealing any practice of abolitionism. Moreover, this practice is not that of a few pariah states. Rather, a *majority of the states in the world* fully support the use of, and use, the death penalty.

(2) Many States Use Mandatory Capital Punishment

189. In addition, there is no evidence of a constant and uniform practice prohibiting *mandatory* capital punishment internationally; nor is there any such practice in the Americas. Globally, a number of states impose, and assert the lawful right to impose, mandatory capital punishment for a wide range of criminal offences. Although statistics regarding *mandatory* capital punishment are not generally compiled by non-governmental organisations and interest groups concerned with the death penalty, a quick survey of press releases and news reports indicates that states that have recently applied, or sought to apply mandatory capital

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[123] Emphasis added; citations omitted

[124] Emphasis added; citations omitted

punishment include: Armenia, Bahrain, Barbados, Botswana, Brunei, Burundi, China, Cook Islands, Equatorial Guinea, El Salvador, Guinea, Guyana, Iraq, Japan, Kenya, Malawi, Malaysia, Morocco, Myanmar, Nigeria, North Korea, Pakistan, Rwanda, Saudi Arabia, Singapore, Tanzania, Thailand, Turkey, Ukraine, United Arab Emirates, Yemen and Zambia. For example, the following newspaper reports and other documents allude to the imposition of mandatory capital punishment by the above states:

1) **Armenia** – Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions,"[125]

2) **Bahrain** – Report of the Secretary General, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (9 March 2005),"[126]

3) **Barbados** – Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions,"[127]

4) **Botswana** – Botswana Centre for Human Rights, "Death Penalty in Botswana",[128]

5) **Brunei** – US Department of State, "Consular Information Sheets: Brunei",[129]

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[125] Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions," UN General Assembly Doc. A/55/288 (11 August 2000), at pp. 8-9 (para. 36), as available at http://www.un.org/documents/ga/docs/55/a55288.pdf (accessed November 27, 2006) **[Annex, Tab 99]**.

[126] Report of the Secretary General, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Economic and Social Council, Doc E/2005/3 (9 March 2005), as available at http://daccessdds.un.org/doc/UNDOC/GEN/V05/819/20/PDF/V0581920.pdf?OpenElement (accessed November 27, 2006) **[Annex, Tab 103]**, p. 19 (para. 72).

[127] Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions," UN General Assembly Doc. A/55/288 (11 August 2000), at pp. 8-9 (para. 36), as available at http://www.un.org/documents/ga/docs/55/a55288.pdf (accessed November 27, 2006) **[Annex, Tab 99]**.

[128] Botswana Centre for Human Rights, "Death Penalty in Botswana" (stated as having been updated to 12 November 2002, but containing information as recent as 2 February 2006), as available at http://www.ditshwanelo.org.bw/index/Current_Issues/Death_Penalty.htm (accessed 27 November 2006) **[Annex, Tab 157]**

[129] US Department of State, "Consular Information Sheets: Brunei" (current to November 27, 2006), as available at http://travel.state.gov/ travel/brunei.html (accessed 27 November 2006) **[Annex, Tab 165]**

6) **Burundi** – Interim Report of the Special Rapporteur of the Commission on Human Rights on the "Human Rights Situation in Burundi,"[130]

7) **China** – Michael Sheridan, "Chinese execute with 'death vans'", *The Sunday Times* (March 20, 2005),[131]

8) **Cook Islands** – New South Wales Council for Civil Liberties, "The Death Penalty in the Asia-Pacific Region,"[132]

9) **Equatorial Guinea** – Amnesty International, "Death Penalty News" (May 2006),[133]

10) **El Salvador** – Report of the Secretary General, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,[134]

11) **Guinea** – Amnesty International, "The Wire" (October 2005),[135]

12) **Guyana** – UN Human Rights Committee, "Communication No 913/2000: Guyana (23/01/2006),"[136]

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[130] Special Rapporteur of the Commission on Human Rights, "Interim Report on the Human Rights Situation in Burundi," UN General Assembly Doc. A/53/490 (13 October 1998), as available at http://www.hri.ca/fortherecord1999/documentation/genassembly/a-53-490.htm (accessed November 27, 2006), para 73 **[Annex, Tab 108]**.

[131] Michael Sheridan, Far East Correspondent, "Chinese execute with 'death vans'", *The Sunday Times* (March 20, 2005) http://www.timesonline.co.uk/article/0,,2089-1533087,00.html (accessed 27 November 2006) **[Annex, Tab 161]**.

[132] New South Wales Council for Civil Liberties, "The Death Penalty in the Asia-Pacific Region," as available at http://www.nswccl.org.au/issues/death_penalty/asiapac.php (accessed 27 November 2006) **[Annex, Tab 164]**.

[133] Amnesty International, "Death Penalty News" (May 2006), AI Index: ACT 53/002/2006, p 6, as available at http://www.amnesty.org.ru/library/pdf/ACT530022006ENGLISH/$File/ACT5300206.pdf (accessed 27 November 2006) **[Annex, Tab 143]**.

[134] Report of the Secretary General, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Economic and Social Council, Doc. E/2005/3 (9 March 2005), p 20 (para 73), as available at http://daccessdds.un.org/doc/UNDOC/GEN/V05/819/20/PDF/V0581920.pdf?OpenElement (accessed 27 November 2006) **[Annex, Tab 103]**.

[135] Amnesty International, "The Wire" (October 2005), Vol. 35, No. 09, AI Index: NWS 21/009/2005 ("Guinea: Executions Imminent," p 3), http://www.amnesty.org.ru/library/pdf/NWS210092005ENGLISH/$File/NWS2100905.pdf (accessed 27 November 2006) **[Annex, Tab 144]**.

13) **Iraq** – Human Rights Watch, "Iraq: The Death Penalty, Executions, and 'Prison Cleansing,'" *Human Rights Watch Briefing Paper* (March 2003),[137]

14) **Japan** – Report of the Secretary General, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,[138]

15) **Kenya** – BBC News, "Three charged over Kenyan murder",[139]

16) **Malawi** – BBC News, "Malawi: president's opponent denies treason",[140]

17) **Malaysia** – BBC News, "Juveniles 'can't be hanged' in Malaysia",[141]

18) **Morocco** – Report of the Secretary General, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,[142]

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[136] UN Human Rights Committee, "Annex: Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Eighty-Fifth Session, Communication No 913/2000 (Guyana)," CCPR/C/85/D/913/2000 (23 January 2006), para 6.5, as available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b69fa1d51ad367c6c1257106005028 4c?Opendocument (accessed November 27, 2006) **[Annex, Tab 112]**

[137] Human Rights Watch, "Iraq: The Death Penalty, Executions, and 'Prison Cleansing,'" *Human Rights Watch Briefing Paper* (March 2003), as available at http://www.hrw.org/backgrounder/mena/iraq031103.htm (accessed: July 27, 2006) **[Annex, Tab 159]**

[138] Report of the Secretary General, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Economic and Social Council, Doc E/2005/3 (9 March 2005), p. 20 (para 73), as available at http://daccessdds.un.org/doc/UNDOC/GEN/V05/819/20/PDF/V0581920.pdf?OpenElement (accessed 27 November 2006) **[Annex, Tab 103]**

[139] BBC News, "Three charged over Kenyan murder" (Last Updated: 2 October, 2003), as available at http://news.bbc.co.uk/2/hi/africa/3158004.stm (accessed 27 November 2006) **[Annex, Tab 152]**

[140] BBC News, "Malawi: president's opponent denies treason" (18 October 2001), as available at http://news.bbc.co.uk/2/hi/africa/1599361.stm (accessed 27 November 2006) **[Annex, Tab 148]**

[141] BBC News, "Juveniles 'can't be hanged' in Malaysia" (9 March 2001), as available at http://news.bbc.co.uk/2/hi/asia-pacific/1210891.stm (accessed 27 November 2006) **[Annex, Tab 147]**; Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions," UN General Assembly Doc A/55/288 (11 August 2000), at pp 8-9 (para 36), as available at http://www.un.org/documents/ga/docs/55/a55288.pdf (accessed November 27, 2006) **[Annex, Tab 99]**

19) **Myanmar** – Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions,"[143]

20) **Nigeria** – BBC News, "Nigeria stoning appeal delayed",[144]

21) **North Korea** – U.S. Department of State, "Korea, Democratic People's Republic of," *Country Reports on Human Rights Practices – 2001* (March 4, 2002),[145]

22) **Pakistan** – BBC News, "Death penalty in blasphemy case" (Pakistan),[146]

23) **Rwanda** – BBC News, "Rwanda updates genocide list",[147]

24) **Saudi Arabia** – BBC News, "Despatches, Sex pills sell in Saudi" (mandatory death sentence for drug smuggling),[148]

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[142] Report of the Secretary General, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Economic and Social Council, Doc. E/2005/3 (9 March 2005), p. 19 (para 72), as available at http://daccessdds.un.org/doc/UNDOC/GEN/V05/819/20/PDF/V0581920.pdf?OpenElement (accessed 27 November 2006) **[Annex, Tab 103]**.

[143] Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions," UN General Assembly Document A/55/288 (11 August 2000), at pp. 8-9 (para 36), as available at http://www.un.org/documents/ga/docs/55/a55288.pdf (accessed November 27, 2006) **[Annex, Tab 99]**

[144] BBC News, "Nigeria stoning appeal delayed" (14 January 2002), as available at http://news.bbc.co.uk/2/hi/africa/1758794.stm (accessed 27 November 2006) **[Annex, Tab 149]**

[145] U.S. Department of State, "Korea, Democratic People's Republic of," *Country Reports on Human Rights Practices – 2001*, Released by the Bureau of Democracy, Human Rights, and Labor (March 4, 2002), as available at http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8330.htm (accessed November 27, 2006) **[Annex, Tab 166]**.

[146] BBC News (Paul Anderson), "Death penalty in blasphemy case" [Pakistan] (12 November 2003), as available at http://news.bbc.co.uk/2/hi/south_asia/3265127.stm (last accessed 27 November 2006) **[Annex, Tab 145]**.

[147] BBC News, "Rwanda updates genocide list" (22 January 2000), as available at http://news.bbc.co.uk/2/hi/africa/614186.stm (accessed 27 November 2006) **[Annex, Tab 150]**; Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions," UN General Assembly Doc. A/55/288 (11 August 2000), at pp. 8-9 (para 36), as available at http://www.un.org/documents/ga/docs/55/a55288.pdf (accessed November 27, 2006) **[Annex, Tab 99]**.

[148] BBC News, "Despatches, Sex pills sell in Saudi" (18 May 1998), as available at http://news.bbc.co.uk/2/hi/special_report/1998/viagra/95208.stm (accessed 27 November 2006) **[Annex, Tab 146]**

25) **Singapore** – Ministry of Foreign Affairs, "The Singapore Government's Response To Amnesty International's Report 'Singapore - The Death Penalty: A Hidden Toll Of Executions'",[149]

26) **Tanzania** – BBC News, "World: Africa, Tanzania charges two over bombing",[150]

27) **Thailand** – National Coalition to Abolish the Death Penalty, "Lethal Injection Replaces Death By Shooting In Thailand",[151]

28) **Trinidad and Tobago** – Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions,"[152]

29) **United Arab Emirates** – BBC News, "UAE upholds death sentences",[153]

30) **Yemen** – BBC News, "World: Middle East Verdict expected in Yemen kidnap trial",[154]

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[149] Ministry of Foreign Affairs, "The Singapore Government's Response to Amnesty International's Report 'Singapore - The Death Penalty: A Hidden Toll of Executions'" (30 January 2004), as available at http://www2.mha.gov.sg/mha/detailed.jsp?artid=990&type=4&root=0&parent=0&cat=0 (accessed 27 November 2006) **[Annex, Tab 162]**. See also BBC News, "Second Briton faces drugs charge" [Singapore] (22 October 2004), as available at http://news.bbc.co.uk/2/hi/asia-pacific/3944355.stm (accessed 27 November 2006) **[Annex, Tab 151]**

[150] BBC News, "World: Africa, Tanzania charges two over bombing" (21 September 1998), as available at http://news.bbc.co.uk/2/hi/africa/176720.stm (accessed 27 November 2006) **[Annex, Tab 155]**

[151] National Coalition to Abolish the Death Penalty, "Lethal Injection Replaces Death by Shooting in Thailand," BANGKOK, Thailand (AP) (21 October 2003), as available at http://www.demaction.org/dia/organizations/ncadp/news.jsp?organization_KEY=206&news_item_KEY=294 (accessed 27 November 2006) **[Annex, Tab 163]**

[152] Interim Report of the Special Rapporteur of the Commission on Human Rights on "Extrajudicial, Summary or Arbitrary Executions," UN General Assembly Doc. A/55/288 (11 August 2000), at pp. 8-9 (para. 36), as available at http://www.un.org/documents/ga/docs/55/a55288.pdf (accessed November 27, 2006) **[Annex, Tab 99]**; Jon Robins, "Death row: some states simply can't stop killing," *The Times* (September 13, 2005), as available at http://www.timesonline.co.uk/article/0,,8163-1773848.00.html (accessed November 27, 2006) **[Annex, Tab 160]**.

[153] BBC News, "UAE upholds death sentences" (14 December 1999), as available at http://news.bbc.co.uk/2/hi/middle_east/564901.stm (accessed 27 November 2006) **[Annex, Tab 153]**

31) **Zambia** – BBC News, "World: Africa, Soldiers guilty of treason in Zambia".[155]

190. It should be noted that the above list likely represents a small portion of the total of the states which allow mandatory capital punishment. This is because in the absence of concerted data collection on this topic only cases which attract widespread public attention, such as those listed above, will be reported in the media and elsewhere.

191. Further, prior to a series of negative decisions by the Judicial Committee of the Privy Council, most states of the Commonwealth Caribbean provided for mandatory capital punishment for the most serious offences. Following the Privy Council's decisions in the cases of *Boyce and Joseph v The Queen*[156] and *Matthew v The State*,[157] Barbados and Trinidad and Tobago have been recognised as having retained the constitutional right to impose their respective systems of capital punishment.

(3) In Any Event, the Practice of Abolition is Irrelevant to International Custom Since it Merely Provides Evidence of Domestic Preferences

192. Regarding the regional practice that does exist in the Americas, Barbados submits that this practice is of no value for the purposes of proving the existence of a customary norm because it merely amounts to the *domestic* practice of several South and Central American states. At most this practice proves that these states have *chosen for themselves*, by legal means and as a matter of domestic law, to remove the death penalty from their criminal justice systems.

193. It is submitted that no international legal consequences can be inferred from such practice. In this regard there is a fundamental difference between examples of domestic practice – of states choosing of their own accord to exercise their sovereign rights to amend their own domestic laws so as to remove the death penalty – and a global or even regional customary practice supporting the existence of a rule compelling them to do so.

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[154] BBC News, "World: Middle East Verdict expected in Yemen kidnap trial" (4 May 1999), as available at http://news.bbc.co.uk/2/hi/middle_east/335520.stm (accessed 27 November 2006) **[Annex, Tab 156]**.

[155] BBC News, "World: Africa, Soldiers guilty of treason in Zambia" (17 September 1999), as available at http://news.bbc.co.uk/2/hi/africa/450190.stm (accessed 27 November 2006) **[Annex, Tab 154]**

[156] *Boyce and Joseph v The Queen* [2004] UKPC 32 **[Annex, Tab 36]**.

[157] *Matthew v The State* [2004] UKPC 33 **[Annex, Tab 67]**

194. In sum, there is no constant and uniform practice that would support the existence of a rule of customary international law prohibiting mandatory capital punishment, either globally or regionally.

B. There is No Evidence of the Recognition of a Binding Legal Obligation on the Part of States (opinio juris sive necessitatis)

195. In addition to state practice, in order to prove a customary rule one must also show recognition on the part of states that the practice is required by a rule of law. This is the requirement for proof of *opinio juris sive necessitatis*. This requirement is strict, as seen in the *North Sea Continental Shelf Cases*,[158] at page 44 (paragraph 77):

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[159]

196. In the more recent *Case Concerning Military and Paramilitary Activities in and against Nicaragua*[160] the Court referred to the *North Sea Continental Shelf Cases* and held at pages 108-9 (paragraph 207), that

> for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice," but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is
>
> > "evidence of belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*" (I.C.J. Reports 1969, p. 44, para. 77)

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[158] *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark, Federal Republic of Germany v Netherlands), I C J Reports 1969, p. 3 **[Annex, Tab 74]**

[159] Emphasis added.

[160] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v U S.), Merits, I C J Reports 1986, p. 14 **[Annex, Tab 40]**.

197. There is no belief on the part of Barbados that mandatory capital punishment has been rendered illegal by means of a regional or global rule of customary international law, nor have the Petitioners or any other body provided proof of the existence of the *opinio juris* necessary to establish such a rule.

C. In the Alternative, Barbados Is a Persistent Objector to Any Such a Rule

198. In the alternative, even if such a customary rule prohibiting mandatory capital punishment had come into being – which the State expressly denies – such a rule nevertheless would not affect Barbados as she has persistently objected to being bound by any such rule.

(1) Nature and Consequences of Persistent Objection

199. The effect of persistent objection under international law is clear. A state that persistently objects to the applicability of an emerging rule of customary international law to itself prior to the formation of that rule will not be subsequently bound by it. Michel Virally, in "The Sources of International Law,"[161] explains, at pages 136 and 137, respectively:

> [I]t must be admitted that even a customary rule of general international law will not apply to a state which has consistently refused to recognize it and has, throughout the period of its creation, resisted its application.
>
> [...]
>
> [I]t would seem to be generally admitted that the persistent opposition of a state to a customary rule during the process of its formation can, in certain circumstances at least, render the rule inapplicable to that state.[162]

200. Persistent objection by one or a few states will not prevent the formation of a general customary international rule.[163] However it will prevent the applicability of that rule to those states that have persistently objected to it.

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[161] Michel Virally, "The Sources of International Law," in Max Sorensen, ed., *Manual of Public International Law* (1968) **[Annex, Tab 110]**

[162] See also Maurice Mendelson, "The Subjective Element in Customary International Law" (1995) 66 Brit. Yrbk. Int'l Law 177 **[Annex, Tab 100]**, at p. 193; Malcolm Shaw, *International Law*, 4th ed. (1997), pp. 71-72 **[Annex, Tab 106]**

[163] Michel Virally, "The Sources of International Law," in Max Sorensen, ed., *Manual of Public International Law* (1968) **[Annex, Tab 110]**, at p. 137

201. The inapplicability of a customary rule of international law to a state which has objected to it has been expressly recognised by the Inter-American Commission on Human Rights. In the case of *Roach and Pinkerton v. United States*, for example, the Commission stated in paragraph 54 in relation to the United States that "[s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist."[164]

202. In sum, Barbados submits that a prohibition on mandatory capital punishment cannot exist as a matter of customary international law, and even if it did – a point strenuously denied – that in the alternative the State has persistently objected to such a rule and therefore cannot be bound to it.

(2) Persistent Objection and *Jus Cogens* Rules

203. In the further alternative, Barbados submits that even if such a rule did exist, which the State again denies, this rule could not have achieved a *jus cogens* status. But even if it did Barbados submits that the State still would remain outside of the scope of the *jus cogens* norm as a result of the persistent objector rule. In other words, Barbados submits that the persistent objector rule applies to peremptory norms in the same way that it applies to ordinary rules of customary international law.

a) Status of Jus Cogens Rules Under the Law of Treaties

204. To clarify, international law recognises a special category of rules which permit no derogation: peremptory norms of international law or rules of *jus cogens* standing. Articles 53 and 64 of the *Vienna Convention on the Law of Treaties* describe the nature of these rules for the purposes of the *Vienna Convention*, as well as their consequences for the law of treaties:

Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from

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[164] *Roach and Pinkerton v. United States* (Case 9647), Resolution No. 3/87, I-A C.H.R., *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, OEA/Ser.L/V/II.71, Doc. 9, Rev. 1, 22 September 1987 **[Annex, Tab 81]**, para. 54. See also, *ibid.*, para. 52.

> which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
>
> **Article 64**
>
> *Emergence of a new peremptory norm of general international law (jus cogens)*
>
> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

205 As this Honourable Court will be aware, there is no authoritative list of the rules of international law that may be considered to have a *jus cogens* standing. The International Law Commission, when drafting the 1969 *Vienna Convention on the Law of Treaties*, expressly rejected the idea of listing the norms it considered to possess *jus cogens* character, primarily because the International Law Commission itself could not agree on this question.[165]

206 Although norms of *jus cogens* do have special standing, in the sense that they are able to void prior and subsequent treaties that conflict with them, *they nevertheless otherwise remain subject to the normal rules of treaty law*. For example, treaties that violate rules of *jus cogens* and that therefore must be invalidated or terminated are not immediately or automatically void under the *Vienna Convention on the Law of Treaties*. Rather, such treaties are subject to the same processes for termination or invalidation, including lengthy waiting periods, as ordinary treaties.[166]

b) Onerous Requirements for Proof of Jus Cogens *Rules*

207. Further, *jus cogens* rules originate from normal rules of law, usually from customary international law. This is made clear by Antonio Cassese in his work *International Law in a Divided World*,[167] at page 175:

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[165] International Law Commission, "Final Draft Articles and Commentary to the Vienna Convention on the Law of Treaties," *Yearbook of the International Law Commission* (18th Session, 1966) Vol. II, p. 177, as reproduced in Sir Arthur Watts, *The International Law Commission, 1949-1998*, Volume Two: The Treaties, Part II (1999), p 619 *ff*, at pp 741-42 (comment to Draft Article 50) **[Annex, Tab 119]**

[166] See, *Vienna Convention on the Law of Treaties*, Arts 65-67 **[Annex, Tab 12]**

[167] Antonio Cassese, *International Law in a Divided World* (1986) **[Annex, Tab 94]**

> [T]his endeavour [to build the concept of jus cogens rules] sought not to create a new source of law, but rather to upgrade certain of the norms produced by the traditional sources.

208. In order to demonstrate the existence of a *jus cogens* rule, therefore, it must be first proved that there *exists* a prior customary or treaty-based rule from which the *jus cogens* rule can arise. For example, in order to establish the existence of a rule of *jus cogens* character arising from a customary rule, the existence of the antecedent customary rule must first be proved. Proof of such a rule requires proof of the two basic elements required for the formation of any rule of customary international law that were discussed earlier: (1) evidence of state practice, accompanied by (2) the recognition of a legal obligation to behave in such a manner (*opinio juris sive necessitatis*)

209 Furthermore, in order to prove that an antecedent customary international rule has given birth to a *jus cogens* rule, it must first be demonstrated that the earlier customary rule was *universally recognised* as being a rule of customary international law. According to Professor Menon, in *An Introduction to the Law of Treaties*,[168] at page 87:

> [T]he notion of a peremptory norm does not apply to every principle of general international law. It is only concerned with fundamental rules which are universally recognized by the international community.[169]

210. After a *jus cogens* rule passes this threshold of universal recognition, it must also be recognised as being non-derogable by an *overwhelming majority* of states. As summarised by Michael Akehurst in "Notes: The Hierarchy of the Sources of International Law,"[170] at page 285 (following his discussion of the differing views on the topic during the United Nations Conference on the Law of Treaties):

> The true answer appears to be that a rule, in order to qualify as *jus cogens*, must pass two tests – it must be accepted as law by all the States in the world, and an overwhelming majority of States must regard it as *jus cogens*.[171]

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[168] P.K. Menon, *An Introduction to the Law of Treaties* (1992) **[Annex, Tab 101]**

[169] Emphasis added.

[170] Michael Akehurst, "Notes: The Hierarchy of the Sources of International Law" (1974-75) 47 Brit. Yrbk. Int'l Law 273 **[Annex, Tab 90]**

[171] Emphasis added. *Accord*: Malcolm Shaw, *International Law*, 4th ed. (1997), p. 97 **[Annex, Tab 106]**.

211. In sum, *jus cogens* rules must be (a) universally recognised as being customary rules of international law and (b) need overwhelming recognition as also having a *jus cogens* character. *Jus cogens* rules are therefore exceedingly difficult to establish.

c) Susceptibility of Jus Cogens *Rules to Persistent Objection*

212. Moreover, a second consequence of their derivation from ordinary rules of conventional or customary international law is that *jus cogens* rules are subject to the same limitations that affect those rules. This means that a rule of *jus cogens* derived from customary international law, for example, must be susceptible to persistent objection. This is clearly articulated by Cassese, in *International Law in a Divided World*,[172] at pages 178-79:

> [P]eremptory norms suffer from the same limitations inherent in the sources to which they owe their existence, namely custom and treaties. Like the rules generated by these two sources, peremptory norms bind States to the extent only that the latter have not staunchly and explicitly opposed them at the moment of their emergence (see § 97). It follows that a State which has clearly and consistently expressed its dissent at the stage when a peremptory norm was taking shape, and has not changed its attitude subsequently, is not bound by the norm even if it comes to possess the overriding role proper to jus cogens. Such a State can make an agreement contrary to the peremptory norm with another State which also consistently objected to the norm, without the agreement becoming void. The ultimately consensual foundation of jus cogens clearly indicates the limitations of this class of norms (as well as of all international law-making). No doubt much headway has been made, in that a body of supreme or 'constitutional' principles has been created; however, they are not necessarily endowed with universal force, nor are they 'heteronomous' for, as stated before, they ultimately rest on the will of the members of the world community.[173]

213. In sum, the State of Barbados submits:

a. that there is no evidence of a rule of customary international law prohibiting either the death penalty or mandatory death penalty,

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[172] Antonio Cassese, *International Law in a Divided World* (1986) **[Annex, Tab 94]**

[173] *Accord*: Ted L. Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law" (1985) 26 HILJ 457 **[Annex, Tab 109]**; Humphrey Waldock, "General Course on Public International Law," *Recueil des cours*, Vol. 106 (No. II)-1996 **[Annex, Tab 111]**, at pp. 49-50.

b. that, in the alternative, that even if such a rule existed, because Barbados has persistently objected to its application to itself, Barbados would not be bound by it, and

c. that, in the further alternative, even if such a rule achieved the status of *jus cogens*, since it has persistently objected Barbados would not be bound by the rule.

d) The Impossibility of Jus Cogens Rules Arising Solely Within the Inter-American System

214. In addition, the State must draw the attention of this Honourable Court to one further matter, namely, the impossibility of *jus cogens* norms arising entirely within the Inter-American system of human rights. Customs may begin in a regional system of human rights, and then gradually achieve the kind of universal recognition required to become peremptory norms. But by definition *jus cogens* norms firstly must be *universally recognised* as binding rules of international law, and secondly, require recognition by the vast majority of states as also having a *jus cogens* character.

215. In several cases this Honourable Court, or individual Judges of the Court, have suggested that certain rules have evolved to the level of *jus cogens* norms:

a. Rules against slavery and slave trading – see e.g., *Aloeboetoe et al. v. Suriname, Reparations*,[174] paragraph 57 [a 1762 treaty that imposed an obligation to sell prisoners as slaves "would today be null and void because it contradicts the norm of *ius cogens superveniens*"];

b. Equality before the law, equal protection before the law and non-discrimination – see e.g., *Juridical Condition and Rights of the Undocumented Migrants*,[175] paragraph 101 ["the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws"];

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[174] *Aloeboetoe et al v Suriname. Reparations (Art 63(1) American Convention on Human Rights)*, I-A Ct H.R., Judgment of September 10, 1993, Series C, No 15 **[Annex, Tab 30]**

[175] *Juridical Condition and Rights of the Undocumented Migrants*, I-A Ct H.R., Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct H.R., Ser. A, No 18 (2003) **[Annex, Tab 61]**

c. Prohibition of torture – see e.g., *Maritza Urrutia vs Guatemala*,[176] paragraph 92 ["the absolute prohibition of torture, in all its forms, is now part of international *jus cogens*"];

d. Sanctity of the right to life – see e.g., *Villagran Morales et al. Case (The "Street Children" Case)*,[177] paragraph 2 [Joint Concurring Opinion of Judges A. A. Cançado Trindade and A. Abreu-Burelli: "2. The right to life implies not only the negative obligation not to deprive anyone of life arbitrarily, but also the positive obligation to take all necessary measures to secure that that basic right is not violated. Such interpretation of the right to life, so as to comprise positive measures of protection on the part of the State, finds support nowadays in international case-law as well as doctrine. There can no longer be any doubt that the fundamental right to life belongs to the domain of *jus cogens*"];

e. Prohibition of forced disappearances – see e.g., *Blake Case, Preliminary Objections*,[178] paragraph 11 [Separate Opinion of Judge A. A. Cançado Trindade: "11. ... cases of disappearance, such as the present one, encompass, among related rights, *non-derogable* fundamental rights, and this, in my understanding, places the interdiction of that crime in the domain of *jus cogens*, of the peremptory norms of general international law"].

216. Further, in several cases the Inter-American Commission on Human Rights has suggested that particular rules have achieved the status of *jus cogens* norms:

a. Prohibition on execution of children – see e.g., *Roach and Pinkerton v. United States*,[179] paragraph 56 [there is a recognized norm of *jus cogens* which prohibits State execution of children];

b. Sanctity of the right to life – see e.g., *Victims of the Tugboat "13 De Marzo" vs. Cuba*,[180] paragraph 79 [the right to life enshrined in the *American Convention* has the status of *jus cogens*];

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[176] *Maritza Urrutia vs Guatemala*, I-A Ct H R., Judgement of 27 November 2003, Ser. C, No. 103 (2003) **[Annex, Tab 66]**.

[177] *Villagrán-Morales et al v Guatemala (Case of the "Street Children")*, Judgement of November 19, 1999, Series C, No 63 **[Annex, Tab 88]**.

[178] *Blake Case, Preliminary Objections*, I-A Ct H.R., Judgement of July 2, 1996, Ser. C, No. 27 (1996) **[Annex, Tab 34]**.

[179] *Roach and Pinkerton v United States* (Case 9647), Resolution No. 3/87, I-A C H R., *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, OEA/Ser L/V/II 71, Doc 9, Rev. 1, September 22, 1987 **[Annex, Tab 81]**.

c. Equality before the law, equal protection before the law and non-discrimination – see e g , *Maya Indigenous Communities of the Toledo District v Belize*,[181] paragraphs 164-65 [application of Advisory Opinion OC 18/03, above].

217. Barbados respectfully submits that although some of these norms may have achieved at *jus cogens* character as a matter of general public international law, that they could never achieve this status solely within the Inter-American system.

218. This is because in order to be properly classified as *jus cogens* norms they must satisfy the above tests of (a) universal acceptance as a customary rule and (b) overwhelming recognition as a *jus cogens* rule. The first part of this test causes significant problems for any norm suggested to have *jus cogens* quality in the Inter-American system. In order to be so classified such norms by their very nature must be *global or universal*, not regional in scope and character. It is respectfully submitted that neither this Honourable Court nor the Inter-American Commission on Human Rights has exposed all of the above norms to the kind of rigorous scrutiny that would be necessary to show that they satisfy the requirements of general customary international law – being supported by constant and uniform state practice that is accepted as law (*opinio juris*). Nor is there any evidence that all of these norms have been accepted as having a *jus cogens* character by an overwhelming majority of the states of the world. Without such evidence, it is respectfully submitted that as a matter of law neither the Commission nor the Court can establish the *jus cogens* character of these, or any other, norms. To the extent that purportedly 'peremptory' rules do not satisfy these requirements, they cannot be *jus cogens* rules.

219. Moreover, even if *some* of the above norms may be said to have evolved into *jus cogens* ones (for example, the prohibition against slavery and slave trading, the prohibition against torture), the right to life in the abstract cannot meaningfully be ascribed a *jus cogens* status.

220. This is because the right to life is not absolute. If every individual had an absolute right to life, a right which, for example, could not be subject to capital punishment, then every treaty which directly permits capital punishment would need to be voided in its entirety. As highlighted by Anthony Aust, in *Modern*

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[180] *Victims of the Tugboat "13 De Marzo" vs Cuba* (Case 11 436), Report No 47/96, I-A C H R , *Annual Report of the Inter-American Commission on Human Rights 1996*, OEA/Ser L/V/II 95, Doc 7, Rev , March 14, 1997 **[Annex, Tab 87]**

[181] *Maya Indigenous Communities of The Toledo District v Belize* (Case 12 053), Report No. 40/04, I-A C H R , *Annual Report of the Inter-American Commission on Human Rights 2004*, OEA/Ser L/V/II 122, Doc 5, rev 1, February 23, 2005 **[Annex, Tab 68]**.

Treaty Law and Practice,[182] at page 258: "If part only of a treaty conflicts with an existing *jus cogens* the whole of the treaty is void, not just the offending part (Article 44(5))."[183] Since both the *American Convention on Human Rights* and its optional *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* allow imposition of the death penalty under certain circumstances, under the rules of Article 64 of the *Vienna Convention on the Law of Treaties* both treaties would have to be voided.

221. In sum, the State submits that no rule prevents or restricts mandatory capital punishment, *per se*, under either the *Charter of the Organization of American States* (as interpreted by the American Declaration), or the *American Convention on Human Rights*. The State has demonstrated that under all three permissible methods of treaty interpretation, namely, the textual, subjective and teleological, neither of the above treaties can be interpreted so as to impugn Barbados' system of mandatory capital punishment. Further, the State has demonstrated that no rule of customary international law exists which could restrict or prevent the use of mandatory capital punishment. Nor, of course, does a rule of *jus cogens* exist in this area. And in the alternative, even if a rule of custom or *jus cogens* did exist, which is emphatically denied, the State cannot be subject to either since it has been a persistent objector to the emergence of any such rules. Finally, and in the further alternative, if this Honourable Court were to find that a rule of *jus cogens* regarding the right to life existed, then any treaty which infringes this right would need to be voided in its entirety, including both the *American Convention on Human Rights* and the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*.

X. SPECIFIC RESPONSES TO THE ALLEGATIONS OF THE PETITIONERS

222. It is also submitted that the laws and practices of Barbados do not in any event violate the *Charter of the Organization of American States* (as interpreted by the American Declaration) or the *American Convention on Human Rights*.

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[182] Anthony Aust, *Modern Treaty Law and Practice* (2000) **[Annex, Tab 91]**

[183] Note in this regard that Article 44 of the *Vienna Convention* is silent about the possibility of separability of treaty provisions that come into conflict with Article 64 as a result of the emergence of a new rule of *jus cogens*. However Article 71, captioned "Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law," does not contemplate separability and instead requires voiding of the entire treaty

223. In particular, contrary to the allegations of the Petitioners in their Communication of September 3, 2004, and the allegations of the Commission in its Application of August 18, 2006, Barbados firmly asserts:

a. that its system, and method, of capital punishment do not violate the rights of the Petitioners under Articles 1, 2, 4, 5 and 8 of the *American Convention*, or the related provisions of the American Declaration;

b. that the reading of warrants of execution to the Petitioners has at no time violated their rights under Articles 1, 2, or 5 of the *American Convention*, or the related provisions of the American Declaration; and

c. that the prison conditions experienced by the Petitioners have not violated their rights under Articles 1, 2, or 5 of the *American Convention*, or the related provisions of the American Declaration.

A. No Violations of Articles 1 or 2 of the American Convention as a Result of Barbados' Laws or Practices

224. The Petitioners suggest that Barbados' legal system and practices violate a number of provisions of the *American Convention on Human Rights* As articulated below, Barbados submits that its laws fully conform to the requirements of the *OAS Charter* and the *American Convention*.

225. As a result, there can be no violations of Articles 1 and 2 of the *American Convention*, because such violations *cannot be independently established*; rather, their violation is contingent upon the violation of other provisions of the *American Convention*.

226. Articles 1 and 2 of the *American Convention* provide:

> **Article 1. Obligation to Respect Rights**
>
> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
>
> 2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

227. As established in the text of these two articles, a violation of Article 1 is contingent upon a finding of a violation of another article of the *Convention*. The Inter-American Court of Human Rights confirms this interpretation in the *Case of Neira-Alegría et al vs Peru*.[184] In paragraph 85 of this case the Court clearly establishes the need for a separate, prior human rights violation before a violation of Article 1 will arise:

> 85. In accordance with Article 1(1) of the Convention, "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms." Thus, as a consequence, this provision is a general one, and its violation is always related to the violation of a provision that establishes a specific human right. As the Court already expressed in a previous case, Article 1
>
> > specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated. (Velásquez Rodríguez Case, supra 63, para. 162; Godínez Cruz Case, supra 63, para. 171.)[185]

228. Further, a violation of Article 1 is a condition precedent for a violation of Article 2; without a violation of Article 1 there can be no violation of Article 2.

229. Barbados submits that its laws fully conform to the requirements of the *OAS Charter* and the *American Convention* and as a result it has not violated either of Articles 1 or 2 of the *American Convention*.

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[184] *Case of Neira-Alegría et al vs Peru*, Judgement of January 19, 1995, Series C, No. 20 **[Annex, Tab 47]**

[185] Emphasis added

230. Further, the 'existing laws' clause in Section 26 of the *Constitution of Barbados* cannot in and of itself amount to a violation of Article 2 of the *American Convention*. Section 26 of the *Constitution*[186] provides:

> **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 so 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.

231. The effect of Section 26 is to remove existing laws, meaning laws which have not been substantively changed or modified following independence, from challenge under the Bill of Rights. Since, in Barbados' submission, no right has been violated, Section 26 has had no impact upon any of the rights of the four Petitioners.

232. Further, under the laws of Barbados Section 26 of the *Constitution* is limited in nature. It does not immunise existing laws which have been subject to substantive change. Such laws are fully subject to constitutional scrutiny. Nor does Section 26 in any manner prevent the amendment, repeal, or substitution of existing laws by Parliament. Parliament is sovereign and free to amend, repeal and create new laws, and this power extends to all areas of the Barbadian legal system.

233. Also, the effect of Section 26 is not – as suggested by the Commission in paragraph 140 of its Application of August 18, 2006 – to allow the State "to maintain and apply legislation that is manifestly *contrary* to the rights under the

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[186] *Constitution of Barbados* **[Annex, Tab 17]**.

Constitution of Barbados" (emphasis added). Such a situation could never exist. *No constitutional incompatibility can exist* for the simple reason that the rights protected under the *Constitution* are subject to Section 26. In other words, no constitutional right can ever be violated by an existing law, all existing laws are *ipso facto* constitutional, and the Judicial Committee of the Privy Council did not at *any* point in the case of *Boyce and Joseph v. The Queen* hold to the contrary.[187]

234. Finally, the holding of this Honourable Court in the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, in paragraph 152(c) in relation to the existing laws clause of Trinidad and Tobago cannot be read so as to find an existing law provision *per se* incompatible with the norms of the Inter-American system of human rights.[188] This Honourable Court clearly predicated any incompatibility upon a prior finding of a breach of an Inter-American human right by another law. The State submits that no such breach has occurred in this case, and thus the situation in *Hilaire* is clearly distinguishable.

235. As a result, Barbados submits that the arguments of the Petitioners in paragraphs 55-57 of the Petition of September 3, 2004, and the Commission in paragraphs 5, 6(d), and 129-144 of the Application of August 18, 2006, are fundamentally misconceived. The existing laws clause in the *Constitution of Barbados* in no way impedes the exercise of the Petitioners, or any other persons, of any of the rights protected under the *OAS Charter*, as interpreted by the American Declaration, or the *American Convention*. As submitted by the State, none of these rights have been violated by the laws or practices of Barbados, and therefore there can be no violation of Article 1 or 2 of the *American Convention*.

B. The Laws and Practices of Barbados in Relation to its System of Capital Punishment Fulfil Its Treaty Obligations

(1) No Violations of Article 4 of the *American Convention* or Article I of the American Declaration in Relation to Capital Punishment

a) Previous Decisions of the Inter-American Commission and Court in This Area are Ultra Vires

236. For the reasons set out above, to the extent that any of the past cases of this Honourable Court and the Inter-American Commission on Human Rights can be read to prohibit mandatory capital punishment, the State submits that they should

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[187] *Boyce and Joseph v The Queen* [2004] UKPC 32 **[Annex, Tab 36]**.

[188] *Hilaire, Constantine and Benjamin et al. v Trinidad and Tobago*, I-A Ct H.R., Judgement of June 21, 2002, Series C, No. 94 **[Annex, Tab 57]**.

not be followed. As has been demonstrated, the correct interpretation of the provisions of both the American Declaration and the *American Convention* neither prohibits nor restricts mandatory capital punishment. As a result, a ruling such as that in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*[189] regarding the illegality of mandatory capital punishment cannot constitute binding, or even persuasive, precedent. It is not supported by the *OAS Charter*, the American Declaration or the *American Convention*.

b) The Correct Approach to Treaty Interpretation Allows Mandatory Capital Punishment

237. Barbados submits that in light of the State's submissions on the international legal rules of treaty interpretation and the rules concerning the creation of customary international law, *all* of the issues related to application of the death penalty, and the permissible forms of capital punishment, must be open for reconsideration by this Honourable Court.

238. As illustrated above, the international legal rules of treaty interpretation require this Honourable Court and the Inter-American Commission on Human Rights to uphold the clear texts of the *OAS Charter* (as interpreted by the American Declaration) and the *American Convention*. In doing so the Court and Commission will respect the sovereign choice of each Member State to implement its system of punishment in any manner not expressly prohibited by the clear texts of the American Declaration or *American Convention* (subject to any reservations attached by that State when accepting the latter obligations).

239. In this regard, because the American Declaration is silent regarding capital punishment it cannot, and does not, limit its use. In the alternative, as established earlier, any implied limitations do not impinge upon the permissibility of mandatory capital punishment.

240. Regarding the *American Convention*, the use of capital punishment is limited by the express words of Article 4, subject to any reservations that a State Party attaches to its acceptance of that provision. For convenience, Article 4 reads:

Article 4. Right to Life

> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

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[189] *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, I-A Ct H R , Judgement of June 21, 2002, Series C, No. 94 **[Annex, Tab 57]**

> 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
>
> 3. The death penalty shall not be re-established in states that have abolished it.
>
> 4. In no case shall capital punishment be inflicted for political offences or related common crimes.
>
> 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
>
> 6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

241. Regarding subsections (2)-(6) of Article 4, Barbados does not understand the Petitioners to be challenging its laws on any of these grounds. If Barbados is incorrect in this regard it reserves the right to fully respond to any such allegations in later written pleadings and during oral argument.

242. It must be noted here that even though Barbados attached a reservation to Article 4(5) (as reproduced above in paragraph 50), it has voluntarily changed its laws and now conforms to that provision: see Section 14 of the *Juvenile Offenders Act*.[190]

(1) Mandatory Capital Punishment is Not "Arbitrary" under Article 4(1) of the American Convention

243. Regarding Article 4(1) of the *Convention*, the most important portion in relation to the death penalty is the final sentence, which provides: "No one shall be arbitrarily deprived of his life." Both this Honourable Court and the Commission have interpreted the word "arbitrarily" so as to exclude mandatory capital punishment. Barbados respectfully submits that these interpretations are fundamentally misconceived for four reasons.

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[190] *Juvenile Offenders Act*, Cap. 138 **[Annex, Tab 22]**.

244. Firstly, under a textual interpretation of the *American Convention*, looking at Article 4(1) in the overall context of the *Convention*, including in the context of the other subsections of the article, it is impossible to read the word "arbitrarily" so as to exclude capital punishment. As seen earlier the word "arbitrarily" was added precisely to *authorise and allow* capital punishment.

245. In addition, several authoritative dictionary definitions clearly show that mandatory capital punishment cannot fall within the ambit of the term "arbitrary." For example, "Arbitrary" is defined in the *Oxford English Dictionary* as meaning:

> **A.** *adj.*
>
> †**1.** To be decided by one's liking; dependent upon will or pleasure; at the discretion or option of any one. *Obs.* in general use.
>
> **2.** *Law.* Relating to, or dependent on, the discretion of an arbiter, arbitrator, or other legally-recognized authority; discretionary, not fixed
>
> **3.** Derived from mere opinion or preference; not based on the nature of things; *hence*, capricious, uncertain, varying.
>
> **4.** Unrestrained in the exercise of will; of uncontrolled power or authority, absolute; *hence*, despotic, tyrannical.[191]

246. "Arbitrarily" is defined in *Stroud's Judicial Dictionary of Words and Phrases*,[192] at page 166, as follows:

> **ARBITRARILY.** To act "arbitrarily" is to act "without any reasonable cause"; to act "capriciously" is to act "without any apparent reason" (*per* Farwell J., *Quinion v. Horne* [1906] 1 Ch. 596, cited UNWILLING). [...]

247. It is further defined in *Words and Phrases Legally Defined*,[193] at page 105 (following a quotation from the same *Quinion v. Horne*, case above), as:

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[191] *Oxford English Dictionary*, Second Edition, 1989, as available at http://dictionary.oed.com/cgi/display/ 00011312?keytype=ref&ijkey=qDrtlH/i5Ojb6 (accessed on 29-Nov-04) (emphasis added) **[Annex, Tab 167]**. Definitions 5 and 6, dealing with a special type of printing character and number, respectively, have been omitted

[192] *Stroud's Judicial Dictionary of Words and Phrases*, 6th ed. (2000) **[Annex, Tab 168]**

[193] *Words and Phrases Legally Defined*, 3rd ed., Vol. I: A-C (1988) **[Annex, Tab 169]**

ARBITRARILY

'In my opinion the expressions "unreasonably", "wholly unreasonably", and "without reasonable cause" practically mean the same thing. Each of these expressions, I think, correctly defines the meaning of the word "arbitrarily" as used in the underlease." *Mills v Cannon Brewery Co* [1920] 2 Ch 38 at 45, per P O Lawrence J

South Africa 'Capricious or proceeding merely from will and not based on reason or principle.' *Buckingham v Boksburg LLB* 1931 TPD 280

248. "Arbitrary" is defined in the 2003 Supplement of *Words and Phrases Legally Defined,*[194] at page 44, as follows:

ARBITRARY

New Zealand 'Something is arbitrary when it is not in accordance with the law or which is not in accordance with the principles which the law regards as appropriate for a discretion to be operated within.' *Re M* [1992] 1 NZLR 29 at 41, per Gallen J

249. It is submitted that any form of capital punishment, including mandatory capital punishment, which is imposed in accordance with pre-existing law after a full and fair legal hearing cannot be deemed to be arbitrary under any of the above definitions. Barbados' form of capital punishment is entirely in accordance with the law. It does not fall under the categories of unrestrained exercise of will or uncontrolled power. It is not capricious; nor is it wholly unreasonable or without reasonable cause. Thus, under a textual interpretation of the term, Barbados' form of capital punishment cannot be considered arbitrary.

250. Secondly, under a subjective interpretation, as seen in the above review of the drafting records of both the American Declaration and *American Convention*, the term "arbitrarily" was placed in Article 4 *precisely for the purpose of allowing states to continue to impose the death penalty*. Since many of the states of the Americas provided for mandatory forms of capital punishment in their laws at the times of the drafting of both the American Declaration and *American Convention*, the intention of these documents cannot have been to exclude mandatory capital punishment.

251. Thirdly, it is submitted that the meaning of the word "arbitrary" in relation to criminal hearings and punishments must be interpreted in its proper context – in

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[194] *Words and Phrases Legally Defined,* 3rd ed., Supplement 2003 (2003) **[Annex, Tab 170]**

the light of other provisions of the American Declaration and *American Convention*. In this regard, and as will be fully established below, the Barbadian legal processes which can result in the imposition of capital punishment fully protect all human rights related to fairness and due process, and thus cannot be considered arbitrary. The Inter-American system protects due process rights in Article 8 of the *American Convention*, which provides:

Article 8. Right to a Fair Trial

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
>
> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
>
> > a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
> >
> > b. prior notification in detail to the accused of the charges against him;
> >
> > c. adequate time and means for the preparation of his defense;
> >
> > d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
> >
> > e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
> >
> > f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
> >
> > g. the right not to be compelled to be a witness against himself or to plead guilty; and
> >
> > h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

252. These Article 8 rights are fully protected under the laws of Barbados, through the State's *Constitution* and statutory laws, and under the common law. Section 18 of the *Constitution*, for example, provides:

Provisions to secure protection of law

18. – (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence -

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;

(c) shall be given adequate time and facilities for the preparation of his defence;

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,

and, except with his consent, the trial shall not take place in his absence unless he so conducts himself as to render the proceedings in his presence impracticable and the court has ordered the trial to proceed in his absence.

(3) When a person is tried for any criminal offence, the accused person or any person authorized by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is more severe in degree or nature than the most severe penalty that might have been imposed for that offence at the time when it was committed.

(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal proceedings relating to the conviction or acquittal.

(6) No person shall be tried for a criminal offence if he shows that he has been granted a pardon for that offence.

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(8) Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such court or other tribunal, the case shall be given a fair hearing within a reasonable time.

(9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other tribunal, including the announcement of the decision of the court or other tribunal, shall be held in public.

(10) Nothing in subsection (9) shall prevent the court or other tribunal from excluding from the proceedings persons other

than the parties thereto and their legal representatives to such extent as the court or other tribunal -

(a) may by law be empowered so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of decency, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or

(b) may by law be empowered or required so to do in the interests of defence, public safety or public order.

(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of-

(a) subsection (2)*(a)* to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

(b) subsection (2)*(e)* to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or

(c) subsection (5) to the extent that the law in question authorizes a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court so trying such a member and convicting him shall, in sentencing him to any punishment, take into account any punishment awarded him under that disciplinary law.

(12) Nothing contained in subsection (2)*(d)* shall be construed as entitling a person to legal representation at public expense.

253. It is submitted that Article 8 of the *American Convention* establishes the standard of fairness for a fair trial. As illustrated by the extensive guarantees in Section 18 of the *Constitution*, Barbados' legal system provides protections *above and beyond that standard*. Further, as will be explored in detail in the following

section, Barbados' legal system protects these process rights *in fact* as well as in law.

254. As a result Barbados' system of laws cannot be deemed to be arbitrary in any sense of that word interpreted in its legal context. It cannot be arbitrary under either its ordinary meaning, its legal meaning, or under the legal standards required for a fair trial.

255. Finally, mandatory capital punishment must be recognised as compatible with the object and purpose of the Inter-American system of human rights, including its human rights treaties. The Inter-American system is based in large part upon respect for the two principles of sovereign equality of states and participatory democracy. Within that sovereign democratic context Member States of the OAS have chosen to carefully negotiate and open for ratification a number of human rights treaties. These treaties have been negotiated and drafted with the consent of the Member States, and only those states which voluntarily decide to join them become States Parties. In this context it must be emphasised that the consent of States Parties is given to a particular, carefully drafted text, not to a free-ranging and ever-expanding set of obligations. Although the texts of treaties may change and evolve in accordance with the international rules regarding amendment of treaties, any such evolution only can come about with the consent of the States Parties concerned.

256. In this respect the object and purpose of the *American Convention* must be seen to be to protect the fundamental rights of individuals within the limits provided by the clear text of the treaties and the overarching principle of consent of the States Parties. To the extent that states have not consented to an extension of those rights or obligations beyond the meaning of the text, such an extension cannot be opposable to them.

257. Further, and in the alternative, even if the phrase "arbitrarily" could be stretched to cover some forms of mandatory capital punishment, its application to the Barbadian system of laws would not expose any violation of the *American Convention*. It is submitted that the fundamental criterion used by both the Commission and Court in past jurisprudence, namely, that of the need for individualised treatment, is fully satisfied by a system of laws which provides for individualised consideration before a mercy committee, as is the case in Barbados. In fact, Barbados submits that any emphasis upon individualised consideration *only at the judicial sentencing phase* is not only misplaced, but is itself *arbitrary*.

258. As the state will now demonstrate, Barbados' legal system, when looked at in its entirety – including its laws and procedures, its system of court hearings and the processes of the Barbadian Privy Council (the mercy committee) – cannot be seen to be arbitrary in its application of the death penalty.

c) Barbadian Laws Imposing Capital Punishment are Not Arbitrary

259. The Petitioners have suggested that Barbadian capital punishment provisions violate their fundamental human rights. Barbados firmly rejects such a characterisation. As demonstrated below, Barbados' legal system provides all of the necessary human rights protections from the moment a person is charged with a capital offence until the moment of execution, or commutation, of his or her sentence.

(1) Only Applied to the Most Serious Offences

260. The State's system of capital punishment is only applied to the most serious offences.

261. Under the laws of Barbados it is extremely difficult for a person to be sentenced to death. The death penalty is only available for two, exceptionally serious crimes: murder and treason.[195] These crimes were subject to capital punishment prior to Barbados' ratification of the *American Convention*.

262. Further, capital punishment has been specifically *excluded* for a number of crimes that would normally fall under the definitions of murder or treason where other circumstances make such punishment inappropriate. The following statutes *exclude* capital punishment:

a. *Sentence of Death (Expectant Mothers) Act*[196] – Section 2 of the *Act* commutes a death sentence imposed upon a pregnant woman to life imprisonment;

b. *Offences Against the Person Act*[197] – several provisions of this *Act* make a killing which would otherwise qualify as murder into a lesser offence, subject to life imprisonment or less. Other provisions expressly allow common law defences to murder, including diminished responsibility (including insanity) and provocation. For example,

- Under section 6 of the *Offences Against the Person Act*, if a person is charged with murder but convicted of manslaughter he or she is subject to life imprisonment,

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[195] See the *Treason Act*, Cap. 155A, s. 7 **[Annex, Tab 28]**, the *Offences Against the Person Act*, Cap. 141, s. 2 **[Annex, Tab 23]**, and the *Anti-Terrorism Act, 2002*, s. 3 **[Annex, Tab 15]**

[196] *Sentence of Death (Expectant Mothers) Act* **[Annex, Tab 27]**

[197] *Offences Against the Person Act* **[Annex, Tab 23]**

- Under sections 3, 9-13 and 14 of the *Offences Against the Person Act* killings which otherwise could constitute murder are subject to lesser punishments, such as imprisonment for life or imprisonment up to a maximum period, by being deemed to be the lesser offences of, respectively,
    - section 3 – killing in the course or furtherance of some other offence,
    - section 9 – attempted murder,
    - section 10 – threatening murder through letters,
    - section 11 – conspiracy to murder,
    - section 12 – aiding suicide,
    - section 13 – acting in pursuance of a suicide pact, and
    - section 14 – infanticide.

263. As a result capital punishment is only imposed for the most serious crimes and a number of provisions in Barbadian law have been drafted so as to specifically exclude cases involving mitigating circumstances.

(2) Full Range of Statutory and Common Law Defences and Justifications Available to Prevent Capital Punishment

264. Further, if a person is charged with either of the crimes of murder or treason she or he has available a very broad range of statutory and common law defences and justifications that can prevent the imposition of the death sentence.

265. In this regard, several common law *pre-conviction* defences or mechanisms for relief can be used to avoid the death penalty, including:

a. self defence,

b. diminished responsibility (also protected by section 4 of the *Offences Against the Person Act*),

c. provocation (also protected by section 5 of the *Offences Against the Person Act*),

d. accident,

e. insufficient *mens rea* based on the rule in *R. v. Church*,[198]

f. insanity and the related bars to a finding of fitness to plead, and

g. incapacity by infancy.

266. Additionally, during the course of a criminal trial there are several rules of procedural fairness which may be used by an accused to avoid the death penalty, including:

a. the requirement for unanimity of the jury in murder and treason verdicts,[199] and

b. the provision of legal aid for all capital cases in Barbados. This legal assistance is effective in Barbados from the initial police interview, since a person accused of a crime which merits capital punishment is entitled to have his or her lawyer present from that moment onwards.

267. *Post-conviction* mechanisms that can be used to avoid capital punishment include:

a. the right to appeal to the Barbados Privy Council (the mercy committee) under the *Constitution*,[200] which appeal includes the right to make written submissions, as provided by the *Constitution Amendment Act, 2002*,[201] and

b. the rules established by recent decisions of the Judicial Committee of the Privy Council, including those set out in *Pratt v. Attorney-General for*

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198 *R v Church* [1966] 1 Q.B. 59, [1965] 2 All E.R. 72 (CCA) **[Annex, Tab 77]**

199 Section 38 of the *Juries Act* **[Annex, Tab 21]** requires a unanimous jury for either conviction or acquittal of an individual accused of murder or treason

200 *Constitution of Barbados* **[Annex, Tab 17]**

201 *Constitution Amendment Act, 2002* **[Annex, Tab 18]** The State draws the attention of this Honourable Court to the fact despite the inapplicability of the *Constitutional Amendment Act 2002* to the four Petitioners (since the consideration of the exercise of the prerogative of mercy pre-dated the *Act*, which is not retroactive), the State nevertheless allowed Jeffrey Joseph and Lennox Ricardo Boyce to make written submissions to the Barbados Privy Council. Despite this express invitation, and repeated reminders, neither the petitioners Boyce and Joseph, nor their legal representatives, chose to avail themselves of this invitation. See, e.g., paras 6-7 of the decision of the Court of Appeal in *Boyce and Joseph v The Attorney General et al* (Unreported), Barbados Court of Appeal, Civil Suit No. 29 of 2004 (May 31, 2005) **[Annex, Tab 35]**.

Jamaica, as applied to Barbados in *Bradshaw v Attorney-General of Barbados*.[202]

268. In sum, in order for a person to be executed following a capital punishment conviction, his offence must have been proved beyond a reasonable doubt before a unanimous jury, during a trial in which he would have been eligible for legal aid and would have had his full due process rights respected, and during which he could have availed himself of a number of legal excuses, defences or incapacities, both under statutory and common law in his favour. After the conclusion of this trial he then would have had available two further levels of judicial appeal – to the Court of Appeal and, historically, to the Judicial Committee of the Privy Council – before his sentence was final. These rights to judicial appeal have been further strengthened by the replacement of the Judicial Committee of the Privy Council by the Caribbean Court of Justice, a regional court made up of eminent persons which is located in closer proximity to Barbados – in Trinidad and Tobago.

269. Even after that, as outlined below, each of the four Petitioners had the right to appeal to the Barbados Privy Council (the mercy committee), a body empowered to consider all of the personal circumstances of the individual, under a full and fair process.[203] Finally, if any of the four Petitioners was held in detention awaiting capital punishment longer than the period established in *Pratt*, that person would have the right to have his sentence commuted to that of life imprisonment.[204]

d) The Mercy Prerogative of the Privy Council Provides Individualised Consideration

270. In order for this Honourable Court to fully appreciate how capital punishment in Barbados cannot be deemed to be arbitrary, a brief explanation of the nature of the Barbados Privy Council will be helpful.

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[202] *Pratt v Attorney-General for Jamaica* [1994] 2 A C 1 **[Annex, Tab 76]**; *Bradshaw v Attorney-General of Barbados* [1995] 1 W L R 936 **[Annex, Tab 37]**

[203] This full and fair process includes the guarantees provided for in *Lewis et al v Attorney General of Jamaica and Another* [2001] 2 AC 50 (JCPC) **[Annex, Tab 65]**, as applied to Barbados by the Caribbean Court of Justice in the decision of *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]**

[204] See *Pratt v Attorney-General for Jamaica* [1994] 2 A.C. 1 **[Annex, Tab 76]**, as applied to Barbados in *Bradshaw v Attorney-General of Barbados* [1995] 1 W L R 936 **[Annex, Tab 37]**

(1) Nature of the Barbadian Privy Council and Its Processes 0000265

271 Under the laws of Barbados a person who has been sentenced to death has a right of appeal to the Barbadian Privy Council, or mercy committee, which exercises the prerogative of mercy. This body is described in sections 76-78 of the *Constitution*.[205] The Privy Council is constituted by eminent members of the executive (previous and present, without reference to partisan political consideration), academia, the church and the private sector.

272 Under section 77(1) the Privy Council is summoned by the Governor-General. Under section 78(1) the Governor-General may, in Her Majesty's name and on Her Majesty's behalf: (a) grant a pardon, (b) grant a respite, (c) substitute a less severe form of punishment, or (d) remit the whole or part of any punishment. In exercising such functions, section 78(2) provides that the Governor-General must act in accordance with the advice of the Privy Council.

273 Following a conviction in death penalty matters, under subsections 78(3)-(4) the Governor-General is required to forward a written report from the trial judge, along with such other information as the Governor-General may require, to the Privy Council – either on the recommendation of the Privy Council or on his own initiative. If there is no appeal by the convicted person then the Privy Council can meet to exercise the prerogative of mercy.

274 If on the other hand the convicted person makes an appeal, and the Court of Appeal dismisses that appeal, then the Court of Appeal must, within twenty-one days of its dismissing of the appeal, forward the complete record to the Clerk of the Privy Council. The Clerk then alerts the condemned person that the matter will be considered by His Excellency the Governor General and the Privy Council and that written representations may be made pursuant to Section 78(5) of the *Constitution*, as amended by the *Constitution Amendment Act 2002*.[206] Further the Clerk, upon the instruction of the Governor General, requests reports from the Superintendent of Prisons, Commissioner of Police, Chaplain of the Prison, as well as a psychiatric evaluation and *any additional material or reports deemed necessary for consideration*. The Clerk of the Privy Council then

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[205] *Constitution of Barbados* **[Annex, Tab 17]**.

[206] *Constitution (Amendment) Act 2002-14* **[Annex, Tab 18]**, adds the following new subsection to Section 78 of the *Constitution*:

(5) A person has a right to submit directly or through a legal or other representative written representation in relation to the exercise by the Governor-General or the Privy Council of any of their respective functions under this section but is not entitled to an oral hearing

The State notes that although the amendments brought into force by this *Act* were not applicable to the Petitioners (the Act having prospective application), the Petitioners were nonetheless invited by the State to make written submissions to the Privy Council.

forwards all of the material to the convicted person to allow him to make written representations either directly or through a friend (Attorney at Law), if he so desires.

275. Regarding the procedures required for hearings of the Privy Council, the State can confirm to this Honourable Court that as of November 8, 2006, as a result of the decision of the Caribbean Court of Justice in the case of *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce*,[207] the rules established by the Judicial Committee of the Privy Council in the Jamaican case of *Lewis et al. v. Attorney General of Jamaica and Another*[208] have become applicable to Barbados.[209]

276. The ruling in *Lewis et al. v Attorney General of Jamaica and Another* clarifies and establishes a number of rights for condemned persons in relation to the procedures of the mercy committee.

277. In *Lewis et al. v. Attorney General of Jamaica and Another* at pages 75 and 79, the Judicial Committee of the Privy Council held that although the *merits* of a decision of the mercy committee are not subject to review, the "procedures followed in the process of considering a man's petition are ... in their Lordships' view open to judicial review." This means, as described in the judgement in the *Lewis* case, at pages 79-80 and 85, that the condemned person must be according the following procedural rights and benefits:

a. the condemned man must be given notice of the date when the Privy Council (mercy committee) will consider his case,

b. the period of notice must be adequate for him or his advisers to prepare representations before a decision of the mercy committee is taken,

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[207] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]**.

[208] *Lewis et al v Attorney General of Jamaica and Another* [2001] 2 AC 50 (JCPC) **[Annex, Tab 65]**.

[209] *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]**, Joint Judgement of the Rt Honourable Mr Justice de la Bastide (President of the Court) and the Honourable Mr Justice Saunders, pages 8-9 (paragraph 18) Nevertheless the State wishes to emphasise that although the rules established in *Lewis* are now binding upon Barbados they only became such at the date of the decision of the Caribbean Court of Justice, through the application of the doctrine of legitimate expectation. In this regard, see further the State's submissions in Section X C(2), below.

c. the condemned man has the right to see all of the documents that will be considered by the mercy committee,

d. the condemned man has a right to make written representations to the mercy committee and the mercy committee is bound to consider them, although it need not accept them,

e. if a report of an international human rights body regarding the condemned man is available, it must be considered by the mercy committee and, if it is not accepted, the mercy committee must explain why,

f. the condemned man is entitled under his right to due process (right to protection of the law) to complete international human rights petition procedures and to obtain the reports of those international human rights bodies for the mercy committee to consider before it deals with his application for mercy, and

g. the condemned man has the right to have his execution stayed until the reports of the international human rights bodies have been received and considered.[210]

278. As a result, the condemned person is ensured that the consideration of his petition for mercy will be conducted in a fair and proper way by the Privy Council.

279. It should be noted in this regard that the submissions of the Commission and representatives of the alleged victims in relation to the Advisory Committee on the Power of Pardon of Trinidad and Tobago, and the subsequent negative finding of the Court against that state in the case of *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, solely concerned the lack of implementation of the above *Lewis* requirements.[211] Since Barbados fully complies with these requirements the *Hilaire* finding is distinguishable and inapplicable.

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[210] The latter two propositions are stated in the following words by the Board at p. 85 of the judgement of Lord Slynn of Hadley in the *Lewis* case:

> In their Lordships' view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered

[211] *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, I-A Ct H R , Judgement of June 21, 2002, Series C, No. 94, paras. 173-189 **[Annex, Tab 57]**.

280. Continuing with the description of the mercy committee process in Barbados, the State notes that if, at the end of its determinations, the Privy Council advises the Governor General to commute the sentence of death, then capital punishment will not be applied.

281. If, however, the Privy Council advises the Governor General not to commute the sentence of death, then His Excellency will sign the Death Warrant, which is then served on the Superintendent of Prisons and the convicted person by the Chief Marshal. The practice has always been and continues to be that the Warrant is served five days before the date of execution so as to allow the convicted person the opportunity both to meet with family members and his Attorney at Law and to apply for a stay of execution.

282. It is customary for the condemned person at this point to make an application to the High Court for a stay of execution of the Death Warrant so as to allow him the right to apply for leave to appeal to the Judicial Committee of the Privy Council (now to the Caribbean Court of Justice) if he so desires. Such stays are granted as a matter of course. It should be noted that expenses related to the appeal are defrayed by the State, including the right to have a local Attorney at Law travel to assist in the representation of the Appellant. These practices apply, *mutatis mutandis*, to the new Caribbean Court of Justice, which is based in Trinidad and Tobago.

283. If the Judicial Committee of the Privy Council (now the Caribbean Court of Justice) refuses leave to appeal or dismisses the appeal having heard it, a practice has arisen whereby a second, *constitutional* motion is then filed by the convicted person seeking to prevent the application of the death penalty. It should be noted again that in the constitutional motion the Appellant is entitled to funding assistance for an Attorney at Law of his choice to represent him in the filing and arguing of the constitutional motion.

284. Further, this constitutional motion, being a new motion, entitles the Appellant to be heard by both the High Court and Court of Appeal of Barbados. The constitutional motion also may be appealed to the Judicial Committee of the Privy Council (now to the Caribbean Court of Justice).

285 It is only if this entire process is unsuccessful that resort is then made to the organs of the Inter-American human rights system or to the United Nations Human Rights Committee. In this context, as noted earlier, the condemned person has the right to complete these international human rights petition procedures and to obtain the reports of the international human rights bodies for the mercy committee to consider before it deals with the application for mercy.

286. Further, as highlighted in the *Lewis* case, this period of waiting for the completion of international petition processes is to be included within the time limit imposed upon the State by the decision in *Pratt*. As a result, if the entire

process, including all domestic appeals and international petitions, exceeds the time limits as established by *Pratt v. Attorney-General for Jamaica* and later applied to Barbados in *Bradshaw v. Attorney-General of Barbados*,[212] then, as has happened with *all* of the condemned persons whose time has exceeded the *Pratt* guidelines, the sentence of death will be commuted.[213]

287. In sum, in expressly providing for written submissions to the Privy Council and Governor-General under section 78(5) of its *Constitution*, and in providing wide discretion to consider any relevant materials in section 78(3), Barbados allows each individual subject to capital punishment to fully avail himself or herself of the prerogative of mercy. The Privy Council is able to consider all of the mitigating circumstances in relation to the individual, including the character and record of the offender, the subjective factors that might have influenced the offender's conduct, and the possibility of reform and social re-adaptation of the offender. Each person therefore has the right to have his or her situation fully assessed, *as an individual*.

(2) Rationale. The Necessary Distinction Between Proving the Elements of a Crime and the Later Process of Individualised Consideration of the Person

288. It must be noted that the Barbadian criminal justice system makes a clear distinction between the *constituent elements of crimes* subject to capital punishment, on the one hand, and the various *factors and mitigating circumstances related to the person* that may be relevant to imposition of a lesser punishment, on the other. The above exceptions, defences and other circumstances preventing capital punishment arise as part of the trial and appeal processes. They are concerned with the legal and factual elements of the crimes of murder and treason. In contrast, the various factors and mitigating circumstances related to the *person* that may be relevant to imposition of a lesser punishment are assessed by the Barbados Privy Council when exercises the prerogative of mercy.

289. Unfortunately, it is respectfully submitted that the jurisprudence of the Inter-American system of human rights reflects a more limited understanding of the relationship between the legal and non-legal elements of criminal justice. In the Inter-American jurisprudence emphasis is placed upon the need to consider all

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[212] *Pratt v Attorney-General for Jamaica* [1994] 2 A C 1 **[Annex, Tab 76]**; *Bradshaw v Attorney-General of Barbados* [1995] 1 W L R 936 **[Annex, Tab 37]**

[213] It must be noted in this regard that the amendments brought about by the *Constitution (Amendment) Act 2002-14* **[Annex, Tab 18]**, are not applicable to the Petitioners (with the exception of the permission granted to them to make written submissions to the Barbados Privy Council)

aggravating and mitigating factors *during the sentencing phase alone*. This is seen, for example in the case of *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*,[214] where the Court suggests, in paragraph 99, that there is a requirement for *judicial* consideration of aggravating and mitigating factors during the trial process, at sentencing.

290. This is a very limited understanding of the meaning of individualised consideration. It is submitted by Barbados that judicial assessment during sentencing cannot be the *only* form of criminal process that allows for individualised consideration; nor, it is submitted, is it the best one. Barbados respectfully submits that there is no valid reason for this Honourable Court or the Commission to require such factors to be taken into consideration *during this precise phase* of the criminal justice process. Rather, what is important is that factors related to the individual are taken into consideration in the fullest manner, as occurs before the Barbados Privy Council. As a result, the State submits – contrary to the statement of the Commission in paragraph 94 of its Application of August 18, 2006 – that its legal system provides full and proper, individualised consideration of the various mitigating factors and circumstances related to the person that are relevant to punishment, including the character and record of the offender, the subjective factors that might have influenced the offender's conduct, and the possibility of reform and social re-adaptation of the offender.

291. In fact in this regard Barbados submits that its legal system possesses a number of features that make it juridically superior. Because Barbadian law makes a *clear distinction* between judicial processes, on the one hand, and the processes undertaken by the Privy Council on the other, it provides a level of certainty and objectivity not found in other legal systems.

292. Moreover, this distinction between the legal and non-legal is not unusual. It is clearly reflected in the division of powers in the domestic legal systems of most states. Thus, in the context of the death penalty, it is the role of Parliament to proscribe the nature of the penalty, the role of the courts of law to interpret and apply it, and the right of the Executive through the Head of State acting on the advice of the Privy Council to determine mercy as the fair, extra-legal process.

293. Interestingly, this distinction is supported by the text of Article 4 of the *American Convention*, which divides consideration of aspects of the death penalty into legal processes in Article 4(2) and extra-legal process in Article 4(6). The *separation of these two sets of requirements in the text of Article 4 itself* clearly supports the position taken by the Barbadian legal system. Article 4(6) envisages the consideration of the personal circumstances of the individual as properly occurring *after* his or her conviction.

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[214] *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, I-A Ct H R., Judgement of June 21, 2002, Series C, No. 94 **[Annex, Tab 57]**.

294. Furthermore, Barbados submits that its legal model is of fundamental juridical importance because it protects and enhances the objectivity of its judicial system. In Barbados the Privy Council in its advisory capacity to the Governor General is the body properly authorised to consider the personal and social factors related to the individual and his or her criminal behaviour; the judge, in contrast, is concerned only with legal elements related to the crime itself. This creates an enhanced level of objectivity, one which is especially important for small, socially cohesive states like Barbados.

295. In this regard the State wishes to draw this Honourable Court's attention to the fact that the crimes of murder and treason will more dramatically and deeply affect the small population of Barbados than they will that of larger states. The impact of one or two murders upon the close-knit Barbadian social consciousness is hard to imagine for those living in larger, less socially connected states. Barbados' small population (approximately 260,000 persons) and very small land area (430 square kilometres) greatly heighten the impact of such crimes. If five or six murders happened in quick succession in Barbados, public concern could easily spiral out of control, causing citizens to panic and call for drastic measures. The tourism sector, a crucial component of the Barbadian economy, also would become highly vulnerable.

296. Barbados therefore considers it essential that for the exceptionally serious crimes of murder and treason that its legal system clearly distinguishes and separates the elements of the offence from the circumstances of the individual. As seen above, there is a very high threshold for proof of capital offences, and furthermore there are a number of exceptions, defences and other factors that may prevent the Crown from proving beyond a reasonable doubt all of the elements of the offence. All of these factors will be weighed by a court of law, using legal standards. The factors related to the individual, however, are properly weighed by the body specifically mandated under the Barbados *Constitution* to do so, namely, the Privy Council.

(2) No Violations of Article 5 of the *American Convention* or Articles XXV and XXVI of the American Declaration in Relation to Capital Punishment

297. In the Petition of September 3, 2004 and in the Application of the Commission of August 18, 2006, it is suggested that mandatory capital punishment *per se* violates Article 5 of the *American Convention* and Articles XXV and XXVI of the American Declaration by amounting to cruel, inhuman or degrading punishment or treatment. It is submitted that such a suggestion is erroneous both as a matter of fact and at law.

a) Barbados' Capital Punishment Is Not Cruel, Inhuman or Degrading

298. For the same reasons set out above in relation to Article 4 of the *Convention* and Article I of the Declaration, Barbados submits that the State is not in violation of Article 5 of the *Convention*. Article 5 provides:

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. 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.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

299. Articles XXV and XXVI of the American Declaration provide:

Article XXV.

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article XXVI.

> Every accused person is presumed to be innocent until proved guilty.
>
> Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

300. Article 5 of the *American Convention* and Articles XXV and XXVI of the Declaration prohibit "cruel, inhuman or degrading punishment or treatment," "cruel, infamous or unusual punishment," and protect the right to "humane treatment." Barbados rejects all allegations that its system of capital punishment violates these rights for a number of reasons.

301. Firstly, Barbados submits that, as demonstrated above, the system of capital punishment provided by its systems of laws is fully in accordance with the State's obligations under the *American Convention* and *OAS Charter*. Secondly, as demonstrated above, 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" as required in Article 5 of the *Convention*. As already established, Barbados' criminal justice system allows every person accused of a crime of murder or treason the full range of due process rights and procedures, access to common law and statutory defences and exceptions, and judges each person's guilt or innocence at law individually. Thirdly, Barbados' Privy Council looks at all of the considerations that may be said to apply to the individual – looking at that person in her or his unique circumstances – in order to decide whether to commute the death sentence. Thus Barbados provides full and proper, individualised consideration that respects the inherent dignity of the human person.

302. Further, because mandatory capital punishment cannot violate either Article 4 of the *American Convention* or Article I of the American Declaration, then neither the sentencing decision, nor the period of wait for execution which, under Barbadian law applicable to the Petitioners is limited to a duration of approximately five years (as established in *Pratt v. Attorney-General for Jamaica*),[215] can amount to cruel, inhuman or degrading punishment or treatment under Article 5 of the *Convention*

303. In this regard it is important to make clear that although any death might, in the abstract, appear to give rise to the possibility of injury to personal integrity, that *death in and of itself* cannot give rise to a claim of cruel, inhuman or degrading punishment or treatment under Article 5 of the *Convention*. Further proof of an actual violation of Article 5 is required.

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[215] *Pratt v Attorney-General for Jamaica* [1994] 2 A.C. 1 **[Annex, Tab 76]**.

304. This distinction is made clear in the case of *Case of Neira-Alegría et al. vs. Peru*,[216] where despite the State's clear violation of the right to life of the petitioners under in Article 4(1) of the *American Convention*, the Court nevertheless required proof of a *distinct violation* of Article 5. The Inter-American Court of Human Rights, in paragraph 86 of the same case, stated:

> 86. This Court considers that in this case the Government has not violated Article 5 of the Convention. While the deprivation of a person's life could also be understood as an injury to his or her personal integrity, this is not the meaning of the cited provision of the Convention. In essence, Article 5 refers to the rule that nobody should be subjected to torture or to cruel, inhuman, or degrading punishment or treatment, and that all persons deprived of their liberty must be treated with respect for the inherent dignity of the human person. It has not been demonstrated that the three persons to whom this matter refers had been subjected to cruel treatment or that the Peruvian authorities had damaged their dignity during the time that they were being detained at the San Juan Bautista Prison. Nor is there proof that said persons would have been deprived of the judicial guarantees to which Article 8 of the Convention refers during the proceedings brought against them.

305. As demonstrated by the *Case of Neira-Alegría et al. vs. Peru*, even wrongful death by the state will not, *per se*, violate Article 5 of the *Convention*.

306. In sum, as established above, the legal processes leading to lawful execution in Barbados cannot in and of themselves violate the Petitioners' rights to be free from cruel, inhuman or degrading punishment or treatment.

b) Hanging per se Cannot Violate Inter-American Human Rights Norms

307. Perhaps for this reason the Petitioners have also alleged that the form of execution used in Barbados – hanging – itself amounts to cruel, inhuman or degrading punishment or treatment. The State firmly rejects this allegation on two fundamental grounds.

308. Firstly, Barbados' system of hanging cannot be challenged under the *American Convention* because the State made an express reservation regarding its form of

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[216] *Case of Neira-Alegría et al vs Peru*, Judgement of January 19, 1995, Series C, No 20 **[Annex, Tab 47]**

capital punishment, a reservation which was accepted without objection.[217] This reservation provides:

> In respect of 4(4) the Criminal Code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point in as much as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4) [218]

Because Barbados specifically alluded to the *precise form* of its capital punishment in its reservation, and the State's obligations under the *Convention* must be read *subject to its reservations*,[219] it is submitted that the penalty of death by hanging cannot fall within the scope of rights protected under the *American Convention* in relation to Barbados.

309. In addition, since the American Declaration does not expressly or impliedly deal with the method of execution, and since hanging was a method which would have been shared by many, if not most, of the states in the region which practiced capital punishment at the time, the State submits that questions related to hanging equally must fall outside the scope of the American Declaration.

310. Secondly, and in the alternative, this allegation is in any event unsupportable in fact or at law. Hanging has been practised in most common law jurisdictions for hundreds of years and is in fact the "traditional method of execution at common law".[220] Hanging remains a well-accepted method of execution in many countries today and has been upheld as constitutional in several jurisdictions in the United States, including Delaware, Oregon, Iowa, Montana and Washington. As noted by Gary E. Hood, in "Campbell v. Wood: The Death Penalty in

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[217] "American Convention on Human Rights, 'Pact of San José, Costa Rica' (Signatures and Current Status of Ratifications)," as reproduced in *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 2004)*, OEA, Ser. L/V/I.4 rev. 10 (31 May 2004) **[Annex, Tab 13]**, at pp. 59-60.

[218] Emphasis added

[219] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, I-A Ct H.R., Advisory Opinion OC-3/83 of September 8, 1983, Series A, No. 3, para. 45 **[Annex, Tab 80]**

[220] *Campbell v Wood* 18 F.3d 662 (9th Cir.) (*en banc*), cert. denied, 114 S. Ct. 2125 (1994) **[Annex, Tab 38]**

Washington State: "Hanging" on to a Method of Execution,"[221] at pages 166-167:

> Though the Supreme Court has not reviewed a case involving hanging, several state courts have had the opportunity to do so. In DeShields v. State, the Delaware Supreme Court held that there was no evidence showing that hanging was cruel and unusual punishment. [FN33] Similarly, in State v. Butchek [FN34] and State v. Burris, [FN35] the respective courts upheld hanging as constitutional. Montana and Washington have also upheld hanging as a method of execution. [FN36][222]

311. The United States Court of Appeal, Ninth Circuit, sitting *en banc* for the case of *Campbell v Wood*,[223] comprehensively examined the question of whether hanging *per se* violates the prohibition against "cruel and unusual punishments" contained in the Eighth Amendment to the United States Constitution. The Ninth Circuit remanded the question to the district court for an evidentiary hearing on whether execution by hanging was unconstitutional, and upheld the district court's decision that it did not violate the Eighth Amendment. The Ninth Circuit held, firstly, that hanging was acceptable when the Bill of Rights was adopted, and secondly, that it was democratically chosen by society's elected representatives: *Campbell v Wood, ibid.*, pages 681-82. In this regard it should be noted that democratic choice is important to any analysis of whether a punishment is cruel and inhuman because it provides a clear guide to the evolving standards of a society. As indicated by Gary E. Hood, in *ibid.*, at pages 175-77, the Supreme Court has required deference from courts with respect to legislative action as an indicator of the evolving standards of society, and such legislative action must to be preferred over the personal beliefs or convictions of judges, who are unelected and may not reflect the view of society as a whole:

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[221] Gary E. Hood, "Campbell v. Wood: The Death Penalty in Washington State: "Hanging" on to a Method of Execution" (1994/1995) 30 Gonz. L. Rev. 163 **[Annex, Tab 97]**

[222] *Citing*: [FN33] 534 A.2d 630, 640 (Del. 1987) [FN34] 253 P. 367, 370 (Or. 1927) (holding that hanging for murder "in its highest degree" does not violate the Oregon Constitution) [FN35] 190 N.W. 38, 43 (Iowa 1922) ("The infliction of the death penalty by hanging is of ancient origin, and is not a cruel and unusual punishment within the meaning of the Constitution.") [FN36] See, e.g., State v. Rupe, 101 Wash. 2d 664, 701, 683 P.2d 571, 593 (1984) (citing State v. Frampton, 95 Wash. 2d 469, 492, 627 P.2d 922, 934 (1981)); State v. Coleman, 605 P.2d 1000, 1059 (Mont. 1979) (explaining that hanging is the only form of execution prescribed by Montana statute); Fitzpatrick v. State, 638 P.2d 1002, 1011 (Mont. 1981) (leaving it to the legislature to determine acceptable modes of punishment).

[223] *Campbell v Wood* 18 F.3d 662 (9th Cir.) (en banc), cert. denied, 114 S. Ct. 2125 (1994) **[Annex, Tab 38]**

The court in Campbell adopted the evolving standards of society test from Gregg. [FN141] It considered legislative action as an indicator of the evolving standards of society [FN142] and presumed that a punishment selected by a democratically elected legislature was constitutionally valid. [FN143] The Ninth Circuit's deference to the Washington legislature was indeed well-founded.

The Supreme Court has discussed on several occasions the deference to be paid the judgement of state legislatures. [FN144] This deference is even greater where the specification of punishments by these legislatures is concerned. [FN145]

Despite the Supreme Court's long line of decisions, the Campbell dissent refused to defer to the Washington legislature. It believed that judges, by virtue of training and experience, were particularly well-equipped to decide the issue at hand. [FN146] The dissent chose to reject the Washington State legislature's action as evidenced in the state's capital punishment statute. [FN147]

Though judges are no doubt highly trained and experienced individuals, the legislatures in a democratic society are the bodies constituted to respond to the will and moral values of the people. [FN148] The Supreme Court summarized the issue quite cogently in Dennis v. United States:

Courts aren't representative bodies. They are not designed to be a good reflex of a democratic society. History teaches that the independence of the judiciary is jeopardized when the courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures. [FN149]

Legislatures are representative, and courts should thus defer to legislative judgement.

The dissent, in addition to improperly ignoring the Supreme Court's mandate regarding deference to legislative action, asserted that judges, by virtue of life tenure, could decide the constitutionality of an execution method free of political pressures or other extraneous considerations. [FN150] However, this very freedom can be viewed as allowing judges to assert, with virtual impunity, their own subjective beliefs without fear of electoral retribution. Once appointed, a federal judge can rest on life tenure and assert personal beliefs without fear of losing his or her judgeship.

Legislators, on the other hand, are elected for specified periods. To ensure re-election, they are likely to act in accordance with their constituents' desires Their judgment is more likely to

> incorporate representative beliefs. It is, arguably, less likely to be influenced by personal, subjective beliefs.
>
> A judge, in deciding whether a state statute violates the Eighth Amendment, must carry out his duty in determining the constitutionality of the state's statute. The Supreme Court has, on many occasions, directed that judges in doing so defer to state legislative judgment. In refusing to do so, a court shuts off the ability of the people to express their standards through normal democratic processes and ballot referenda. [FN151] Therefore, to ensure the preservation of societal standards over personal beliefs of judges, courts must defer to legislative action.[224]

312. Further in rejecting the allegation that hanging was contrary to "the evolving standards of decency that mark the progress of a maturing society", the Ninth Circuit in *Campbell v Wood*[225] held, at page 683, that hanging could not be considered cruel and unusual simply because it causes death, or pain in doing so:

> We do not consider hanging to be cruel and unusual simply because it causes death, or because there may be some pain associated with death. "Punishments are cruel when they involve torture or a lingering death...." *In re Kemmler,* 136 U.S. 436, 447, 10 S.Ct. 930, 933, 34 L.Ed. 519 (1890). As used in the Constitution, "cruel" implies "something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Resweber,* 329 U.S. at 464, 67 S.Ct. at 376 Campbell is entitled to an execution free only of "the unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (plurality opinion).

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[224] Gary E. Hood, "Campbell v. Wood: The Death Penalty in Washington State: "Hanging" on to a Method of Execution" (1994/1995) 30 Gonz. L. Rev. 163 **[Annex, Tab 97]**, pp. 175-177 [*citing*: [FN141] Wood, 18 F.3d at 682 [FN142] Id. at 682 (1994) [FN143] Id. (citing Gregg v. Georgia, 428 U.S. 153, 175 (1976), aff'd sub nom, Jurek v. Texas, 428 U.S. 262 (1976)) [FN144] See, e.g., Gregg v. Georgia, 428 U.S. 153, 176 (1976); Furman v. Georgia, 408 U.S. 238, 465-70 (1976) (Rehnquist, J., dissenting); Dennis v. United States, 341 U.S. 494, 525-26 (1951) (Frankfurter, J., concurring in affirmance of judgment). [FN145] Gregg, 428 U.S. at 176 (citing Gore v. United States, 357 U.S. 386, 393 (1958)). [FN146] Wood, 18 F.3d at 697 (9th Cir. 1994) (Reinhardt, J., dissenting). [FN147] Id. at 697 [FN148] Furman v. Georgia, 408 U.S. 238, 383 (1976) (Burger, C.J., dissenting). [FN149] 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment). [FN150]. Wood, 18 F.3d at 697 [FN151] See Gregg v. Georgia, 428 U.S. 153, 176 (1976), aff'd sub nom, Jurek v. Texas, 428 U.S. 262 (1976)]

[225] *Campbell v Wood* 18 F.3d 662 (9th Cir.) (en banc), cert. denied, 114 S. Ct. 2125 (1994) **[Annex, Tab 38]**.

313. Thus the Court recognized that any form of capital punishment may entail pain and suffering, but held that capital punishment could only be cruel and unusual if it involves inhuman and barbarous or unnecessary and wanton infliction of pain.

314. After an extensive analysis of the methodology of hanging employed in Washington State – that prescribed for military executions by the US Army (the Field Instruction) – the Ninth Circuit held that this methodology did not involve unnecessary and wanton infliction of pain. On the contrary, as explained by the Court, in *ibid.*, at page 687, unconsciousness and death occur extremely rapidly using the methods prescribed in the Field Instruction:

> [44] The district entered findings that judicial hanging conducted according to the Washington Field Instruction is not cruel and unusual punishment. The court found that the mechanisms involved in bringing about unconsciousness and death in judicial hanging occur extremely rapidly, that unconsciousness was likely to be immediate or within a matter of seconds, and that death would follow rapidly thereafter. The court found that the risk of death by decapitation was negligible, and that hanging according to the protocol does not involve lingering death, mutilation, or the unnecessary and wanton infliction of pain. We find no error in these findings. The evidence fully supports the district court's findings of fact.[226]

315. In coming to the conclusion that hanging was not cruel and unusual punishment, the Ninth Circuit properly rejected the mere possibility of error during a hanging. As the Court held, in *ibid.*, at page 687:

> Campbell charges that judicial hanging poses an unacceptable risk of causing death by either asphyxiation or decapitation. We reject this argument. Campbell failed to establish that the risk of either result is more than slight. [FN17] He has also failed to demonstrate that the presence of a slight risk of decapitation or asphyxiation renders judicial hanging unconstitutionally cruel. We reiterate that Campbell is not entitled to a painless execution, but only to one free of purposeful cruelty. *Resweber,* 329 U.S. at 464, 67 S.Ct. at 376. The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.
>
> We hold that judicial hanging, as conducted under the Washington Field Instruction, does not involve the wanton and

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[226] Emphasis added.

> unnecessary infliction of pain, and therefore does not violate the Eighth Amendment.[227]

316. The Ninth Circuit also expressly rejected as moot Campbell's argument about the lack of trained hangmen in Washington State. Following an appropriate prescribed methodology obviates the need for practiced hangmen. The Ninth Circuit stated in this regard, in *ibid*., at page 688:

> [47] Campbell claims in his petition that in Washington there is no person employed or retained by the State who is qualified to conduct a judicial hanging. He relies in part on Justice Dolliver's statement in *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922, 936 (1981), that
>
> > "[i]t is uncontested that there are no trained hangers at the Washington State Penitentiary, nor are the prison authorities aware of any in the United States."
>
> Washington's adoption of the Field Instruction renders the employment of a "trained hanger" unnecessary. The Field Instruction provides that
>
> > [t]he Superintendent will appoint and provide a briefing to those individuals as required to implement the Execution process. No individual will be required to participate in any part of the execution procedure.
>
> Field Instruction ¶ VI.G.2.a. The Instruction provides for rehearsals of all phases of the execution, up to the springing of the door. Superintendent Tana Wood testified that the prison officials conducted many rehearsals of the Dodd execution. The state officials' reliance on the Field Instruction to perform judicial hanging obviates the need for employing a specific person trained to perform the execution. We therefore reject Campbell's claim as moot.

317. In sum, hanging *per se* is not a cruel and unusual punishment under US constitutional law: unconsciousness and death occur rapidly; the risk of decapitation or asphyxiation is negligible; hanging does not involve lingering death, mutilation or wanton infliction of pain; following a structured methodology, with rehearsals, obviates the need for a trained hangman.

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[227] *Campbell v Wood, ibid*., p. 687 [stating: [FN 17] The expert testimony did not yield a reliable estimate of the risk of either decapitation or asphyxiation. We accept for purposes of this case that such a risk does exist. However, the evidence compels the conclusion that the risk has been minimized as much as possible through the adoption of the Field Instruction.]

318. The question of whether hanging is cruel and inhuman also has been raised before the Judicial Committee of the Privy Council in several cases; but the Board has consistently refused to decide this issue and has instead consistently reaffirmed the legality of the laws imposing death by hanging.

a. In the case of *Michael de Freitas v. George Ramoutar Benny and Others*,[228] Lord Diplock, writing for a unanimous Board, held at page 246:

> The method of execution, viz. by hanging, is specified in the warrant and is in accordance with the common law of England that was in force in Trinidad and Tobago at the commencement of the Constitution. It is in their Lordships' view clear beyond all argument that the executive act of carrying out a sentence of death pronounced by a court of law is authorised by laws that were in force at the commencement of the Constitution.

b. In the case of *Larry Raymond Jones and Others v Attorney-General of the Commonwealth of the Bahamas*,[229] Lord Lane, writing for a unanimous Board, answered the question of whether "the method of execution of the death sentence, namely by hanging, [is] provided for by the law of the Commonwealth of The Bahamas," by stating succinctly at page 896:

> In short, the common law which authorised the execution of a sentence of death by way of hanging was in force at all material times.

c. In the case of *Nankissoon Boodram (also called Dole Chadee) and Others v. Cipriani Baptiste (Commissioner of Prisons) and Others*,[230] Lord Slynn of Hadley, writing for a unanimous Board, held:

> It seems to their Lordships that these statutory provisions quite clearly must be read with the Bill of Rights, and that in Trinidad and Tobago they authorise hanging, not only as a method but as the only method of execution which may be ordered by the Court

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[228] *Michael de Freitas v George Ramoutar Benny and Others* [1976] A.C. 239 **[Annex, Tab 70]**

[229] *Larry Raymond Jones and Others v Attorney-General of the Commonwealth of the Bahamas* [1995] 1 W.L.R. 891 **[Annex, Tab 63]**; also reproduced: [1995] 4 All E.R. 1.

[230] *Nankissoon Boodram (also known as Dole Chadee) and Others v Cipriani Baptiste (Commissioner of Prisons) and Others* (Oral judgement of the Judicial Committee of the Privy Council upon petition for special leave to appeal and/or for a stay of execution, 26 May 1999), as available at http://www.privy-council.org.uk/files/other/boodram2.rtf (accessed 10 December 2006) **[Annex, Tab 73]**. Note that page numbering has been added to this judgement for the convenience of the Court

> and the only method which may be carried out subsequent to the President's Order. That means that the Bill of Rights in itself is not a basis upon which the petitioners can put their case since it is to be read with subsequent legislation; the rules of the common law must be read also subject to those statutory provisions.
>
> It has been further suggested in this case that it has not been shown that hanging is carried out in the way which is the least painful for the person being hanged; on the other hand, apart from factors which are inherent in any form of execution by these means, there has been nothing to show on the evidence that in Trinidad and Tobago the procedure is not properly carried out.
>
> Another argument is put forward that there is outstanding a Petition to the Inter-American Commission on Human Rights on behalf of a number of other prisoners that the death penalty in itself is unlawful. These petitioners have, however, already made two applications to the Inter-American Commission, each of which has been refused. It seems to their Lordships that it would not be right to order that the outcome of these present proceedings should await the further decision of that Commission.
>
> For these reasons given very briefly their Lordships will refuse leave.[231]

319. In sum, the Board has consistently confirmed that hanging is a lawful method of execution, one supported by both the constitutions and statutory law of the states concerned. Further, the appeal in each of the above cases was unanimously dismissed.

320. Elsewhere in the jurisprudence of the Commonwealth Caribbean there is clear precedent which establishes that hanging is both a lawful and humane method of execution. For example, in the unreported decision of Judge Meerabux of the Supreme Court of Belize in the case of *Mejia et al v. The Attorney General of Belize et al*,[232] the applicants sought, *inter alia*, a "declaration that the execution of the applicants by hanging constitutes inhuman and degrading treatment or punishment contrary to section 7 of the Constitution."[233] Judge Meerabux examined the statutory provisions which authorized hanging and held, at page

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[231] *Nankissoon Boodram Others v Cipriani Baptiste and Others, ibid.*, at pp 3-4 (emphasis added)

[232] *Mejia et al v The Attorney General of Belize et al.*, Unreported Judgement of April 16, 1998, Suit No. 149 of 1996, CARILAW citation # BZ 1998 SC 7 (Supreme Court of Belize) **[Annex, Tab 69]**. Since the unreported decision from the CARILAW database is not paginated, all references will be to the page numbers of the computer generated version found in the Annex.

[233] *Mejia et al v The Attorney General of Belize et al.*, p 3

39, that they were based upon the Common Law of England and were merely declaratory of that law. After considering decisions of the courts of the U.S., South Africa and India, Judge Meerabux concluded, at pages 40-41, that hanging did not violate the Belize *Constitution*:

> I find that the wise framers of the Belize Constitution in 1981, some 32 years after the Indian Constitution with the benefit of contemporary opinions on the merits or demerits of death penalty, must have likewise considered the imposition of the death penalty by hanging and held it to be a valid penalty for murder.
>
> I therefore find that this death penalty which is recognised in sec.4 of the Belize Constitution is not unconstitutional either per se or because of its execution by hanging.

321. In sum, the mode of execution by hanging has long-standing as well as contemporary acceptance, and does not constitute inhuman and degrading treatment or punishment.

322. The State submits that these findings in relation to hanging in the United States and Belize are equally applicable in the Barbadian context. As a result hanging *per se* cannot constitute cruel, inhuman or degrading punishment or treatment.

c) The System of Hanging in Barbados

323. Regarding the procedures and mechanisms for hanging in Barbados, under Rule 132 of the *Prisons Rules, 1974*,[234] executions must be carried out by a public executioner, with efficient and well-maintained equipment, and are not open to the general public:

> **132.** (1) All executions shall be carried out by a public executioner.
>
> (2) The Officer-in-charge shall satisfy himself that every precaution is taken to ensure efficiency and despatch and that all appliances to be used at such execution are maintained in good condition.
>
> (3) Unless authorised by a written order by the Minister, no person shall attend any execution other than the Chief Marshal, the Officer-in-charge, the public executioner, the medical officer, the Chaplain or Minister of the denomination to which the

[234] *Prisons Rules, 1974* **[Annex, Tab 26]**

prisoner belongs, and such other prison officers as the Officer-in-charge directs. 0000284

324. In practice, as seen in the Affidavit of the Superintendent of Prisons of December 14, 2006,[235] Barbados possesses well-regulated, and humane, procedures for hanging.

325. These procedures are initiated each time a warrant of execution is read to an inmate by the Chief Marshal.[236] After the reading of the warrant, all extra clothing and potentially dangerous items are removed from that inmate's cell in order to prevent suicide or other potential injury.[237] The immediate family of the inmate are then informed of the impending execution and are allowed to visit the inmate.[238]

326. After the reading of the warrant the physical structure of the hanging Chamber is checked, refurbished, cleaned and aired.[239] All of the equipment used to hang an inmate is inspected, and repaired or replaced if necessary.[240] The Head of the Works Department is responsible for ensuring that all equipment is in working order.[241] The equipment is put in place in readiness for the execution, and the Gallows is inspected by an Engineer from the Ministry of Transport and Public Works.[242] The Engineer is required to issue a certificate attesting to the good working order of the equipment.[243]

327. The noose used for hanging in Barbados is a purpose-made device, one that does not use a knot. The noose is about seven (7) inches in length and is attached to a solid chain suspended from two large beams in the roof of the Chamber. A small amount of oil is placed on the noose to ensure that it slips freely and neatly on the inmate's neck, and a pin or rubber washer is drawn to lock the noose until the

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235 Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006 [**Annex, Tab 173**].

236 Affidavit of John Nurse, *ibid*, paras 7-12 [**Annex, Tab 173**]

237 Affidavit of John Nurse, *ibid*., para. 13 [**Annex, Tab 173**]

238 Affidavit of John Nurse, *ibid*, para. 14 [**Annex, Tab 173**]

239 Affidavit of John Nurse, *ibid*, paras 15-20 [**Annex, Tab 173**]

240 Affidavit of John Nurse, *ibid* [**Annex, Tab 173**]

241 Affidavit of John Nurse, *ibid* [**Annex, Tab 173**]

242 Affidavit of John Nurse, *ibid* [**Annex, Tab 173**]

243 Affidavit of John Nurse, *ibid* [**Annex, Tab 173**]

moment of execution.[244] The noose is positioned according to the height of the inmate, who is measured prior to the execution.[245] For this purpose the noose is also tied with a piece of light cord so as to remain positioned exactly at the height of the inmate's neck in order to prevent unnecessary delay while it is put in place. These preparations ensure a speedy and humane execution.

328. On the night leading to the execution the Executioner is required to sleep at the prison along with the Works Officer.[246] All night Duty Officers are asked to remain on duty for enhanced security.[247] Phone lines also must be kept clear in case the Superintendent of Prisons is to be reached urgently.[248]

329. On the morning of the execution inmates are fed early and returned to their cells.[249] Admission to the prison is restricted to persons rostered for duty and two officers are stationed at the Vehicle Gate to allow the Superintendent and execution party into the compound without delay.[250] Only the following persons are allowed into the Chamber on the morning of the execution:

a. The Superintendent of Prisons,

b. The Assistant Superintendent of Prisons,

c. The Chief Officer of the Prison,

d. The Chief Marshall,

e. A Police Officer,

f. The Chaplain,

g. A High Court Judge,

h. Five (5) Prison Officers, and

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[244] Affidavit of John Nurse, *ibid*, paras 34-37 [**Annex, Tab 173**]

[245] Affidavit of John Nurse, *ibid*, para. 33 [**Annex, Tab 173**]

[246] Affidavit of John Nurse, *ibid*., para. 21 [**Annex, Tab 173**]

[247] Affidavit of John Nurse, *ibid*, para. 22 [**Annex, Tab 173**]

[248] Affidavit of John Nurse, *ibid*, para. 23 [**Annex, Tab 173**]

[249] Affidavit of John Nurse, *ibid*, para. 24 [**Annex, Tab 173**]

[250] Affidavit of John Nurse, *ibid*., paras. 25-26 [**Annex, Tab 173**]

i. The Executioner (collectively, the "Execution Party").[251]

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330. Immediately prior to the execution two Prison Officers handcuff the inmate and lead him to the first door of the Chamber. A hood is then placed over his head by a third Officer.[252] The prop is removed from under the trap door of the Gallows. The inmate is then led to, and positioned over, the trap door in the inner Chamber, where two Officers are waiting.[253] Once the inmate is in position an Officer places the rope around his neck and the other straps his feet.[254] By this time the Execution Party is already in place so as to ensure that there will be no delay.[255]

331. The Superintendent is responsible for removing the pin in order for the execution to be carried out, or he may assign this responsibility to the Assistant Superintendent.[256]

332. Once the pin has been removed the Superintendent signals for the Executioner to pull the lever and the trap door opens, causing the inmate to drop to his death.[257] The inmate remains hanging for a period of thirty minutes, during which time the Execution Party waits in the Superintendent's Office.[258] At the expiration of this time period the Execution Party returns and the inmate's body is taken down and placed on a table.[259] After the Prison Doctor has confirmed the death, the body is placed in a coffin, which is nailed shut and buried.[260] The Execution Party then departs.[261]

333. As can be seen, the above procedure ensures that the person to be executed is treated with respect and humanity during the execution process. The machinery

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[251] Affidavit of John Nurse, *ibid*., para 27 [**Annex, Tab 173**].

[252] Affidavit of John Nurse, *ibid*, para 28 [**Annex, Tab 173**].

[253] Affidavit of John Nurse, *ibid*, para 29 [**Annex, Tab 173**]

[254] Affidavit of John Nurse, *ibid*, para. 30 [**Annex, Tab 173**].

[255] Affidavit of John Nurse, *ibid*, para 31 [**Annex, Tab 173**].

[256] Affidavit of John Nurse, *ibid*., para. 32 [**Annex, Tab 173**]

[257] Affidavit of John Nurse, *ibid*, paras 38-39 [**Annex, Tab 173**]

[258] Affidavit of John Nurse, *ibid*, para. 40 [**Annex, Tab 173**].

[259] Affidavit of John Nurse, *ibid*, para 41 [**Annex, Tab 173**]

[260] Affidavit of John Nurse, *ibid*, para 42 [**Annex, Tab 173**]

[261] Affidavit of John Nurse, *ibid*., para. 43 [**Annex, Tab 173**].

used for the procedure is checked and tested in advance; measurements are made and mechanisms put in place so as to ensure that there are no delays. And the noose has been designed so as to ensure a speedy and humane execution.

(3) No Violations of Article 8 of the American Convention or Articles XVIII and XXVI of the American Declaration in Relation to Capital Punishment

334. In the Petition of September 3, 2004, and the Application of August 18, 2006, it is suggested that mandatory death sentences violate due process rights under Article 8 of the *Convention* and Articles XVIII and XXVI of the American Declaration

335. For convenience, Article 8 of the *Convention* provides:

Article 8. Right to a Fair Trial

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

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

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

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

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

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

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

> f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
>
> g. the right not to be compelled to be a witness against himself or to plead guilty; and
>
> h. the right to appeal the judgment to a higher court.
>
> 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
>
> 4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
>
> 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

336. Articles XVIII and XXVI of the American Declaration provide:

> **Article XVIII.**
>
> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.
>
> **Article XXVI.**
>
> Every accused person is presumed to be innocent until proved guilty.
>
> Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

337. If the Petitioners' allegation is that mandatory capital punishment violates an individual's due process rights because that individual is unable to challenge the permissibility or appropriateness of the death penalty *per se*, Barbados submits that such an argument is manifestly unfounded. An individual in Barbados may challenge the constitutionality of any law used against her or him in a criminal matter. Barbados' form of capital punishment itself in fact was recently subject to the most intensive form of judicial scrutiny when the State defended itself before the Judicial Committee of the Privy Council in the case of *Boyce and*

Joseph v. The Queen.[262] In this case the Judicial Committee ruled in favour of the state, holding that Barbados' form of capital punishment was compatible with its constitution.

338. The *American Convention* and *OAS Charter* protect the individual's rights to due process. They do not guarantee favourable results from the exercise of those due process rights. The due process rights of the four Petitioners have been upheld in full.

C. Reading of Warrants of Execution Did Not Violate Human Rights of Petitioners

(1) Reading of Warrants Prior to Appeal to the Judicial Committee of the Privy Council Does Not Violate Either the Domestic Law of Barbados or its Inter-American Obligations

339. In correspondence and other documents from the Petitioners and the Inter-American Commission on Human Rights which have been copied to this Honourable Court the suggestion has been made that warrants of execution were read to the petitioners Jeffrey Joseph and Lennox Ricardo while appeals were *still pending* before the Judicial Committee of the Privy Council. This is manifestly incorrect. As expressly noted in the 2005 decision of the Barbados Court of Appeal in the case of *Boyce and Joseph v The Attorney General et al*,[263] at paragraph 2, when their death warrants were first read on June 26, 2002, Joseph and Boyce *had not yet filed an appeal*; their appeals were filed nearly one month later, on July 25, 2002. The Petitioners concede this point in paragraph 25 of their Petition of September 3, 2004, when they acknowledge that their Solicitors had merely indicated to Charles Russell, Solicitors, that they were "*instructed* to Petition the Judicial Committee of the Privy Council."[264] As a result the warrants of execution of Boyce and Joseph were 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.

340. If, in the alternative, the Petitioners may now be taken to allege that by reading the warrants of execution to the Petitioners Boyce and Joseph *prior* to the filing

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[262] *Boyce and Joseph v The Queen* [2004] UKPC 32 **[Annex, Tab 36]**.

[263] *Boyce and Joseph v The Attorney General et al* (Unreported) Barbados Court of Appeal, Civil Suit No 29 of 2004 (May 31, 2005), as available through http://www.lawcourts.gov.bb/LawLibrary/CasesYears.asp?Years=2005&Court=COA (accessed 30 November 2006) **[Annex, Tab 35]**

[264] Emphasis added

of their appeals to the Judicial Committee of the Privy Council, Barbados has violated their rights to a fair trial, to equal protection, or to judicial protection, the State firmly rejects such allegations. The State is under an obligation to carry out its constitutionally entrenched legal processes, including executions, in a timely manner. If it were *not* to do so, it would violate the Petitioners' rights not to be subjected to cruel, inhuman, and degrading treatment or punishment: *Pratt v. Attorney-General for Jamaica*.[265]

341. Further, as a matter of law the mere *possibility* of the Petitioners filing an appeal is not a ground for delaying the reading of the warrants of execution. The serving of a notice of an *intention* to appeal does not amount to an appeal. This point of law is fully supported in the jurisprudence of the Commonwealth Caribbean. As emphatically stated by Judge Meerabux when dealing with a similar argument in the case of *Mejia et al. v. The Attorney General of Belize et al*,[266] at page 19:

> 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 in accordance with the rules, bearing in mind the time limit constraints for execution after convictions as emphasised by the learned law lords in Pratt v Attorney [General] for Jamaica [1994] 2 A.C. 1. I note that although there was an intention to appeal to the Privy Council in March 1995, the application for Leave to Appeal to Privy Council was lodged only a few hours before the time set for execution on 24th August, 1995.
>
> Am I to understand that the Belize Authorities must await 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?
>
> I note with approval their Lordships' ruling in Pratt v Attorney [General] for Jamaica supra in which they made it quite clear that "frivolous and time wasting resort to legal proceedings" by the accused provides "no ground for saying that execution after such delay infringes the Constitutional right." (at pp.29 30).

342. Further, the State notes that once the Petitioners applied to the Barbadian courts for stays of execution, these stays were *promptly granted*. This was the scope of their legal entitlement and the State fully and promptly provided it. No warrants

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[265] *Pratt v Attorney-General for Jamaica* [1994] 2 A.C. 1 **[Annex, Tab 76]**, applied to Barbados in *Bradshaw v Attorney-General of Barbados* [1995] 1 W.L.R. 936 **[Annex, Tab 37]**.

[266] *Mejia et al v The Attorney General of Belize et al*, Unreported Judgement of April 16, 1998, Suit No. 149 of 1996 (Supreme Court of Belize), CARILAW citation # BZ 1998 SC 7 **[Annex, Tab 69]**.

were read to the Petitioners subsequent to the appeal of their cases to the Judicial Committee of the Privy Council, or while any such appeal was pending. Consequently, the State denies that it has violated any of the Petitioners' rights to a fair trial, to equal protection, or to judicial protection.

(2) Reading of the Warrants of Execution While the Matter was Before the Commission Does Not Violate American Convention Obligations

343. The Petitioners have suggested that in reading their warrants of execution while their communications lay before the Commission Barbados has violated their right to petition the Commission and has subjected them to cruel, inhuman or degrading treatment and punishment. Barbados rejects these arguments as groundless for three principal reasons:

a. Firstly, there has never has been, nor is there now, a legal right to petition the Commission in Barbadian law since, strictly speaking, the process is entirely an international legal one. Neither the *American Convention* nor any other instrument of the Inter-American system of human rights has been made part of the law of Barbados by incorporation by Act of Parliament. As a result none of the instruments of the Inter-American system of human rights have binding force under the laws of Barbados, nor can they be relied upon before courts of Barbados. Rather, the only legal right, following the decision in *Attorney General et al. v Jeffrey Joseph and Lennox Ricardo Boyce*,[267] is to not have one's legitimate expectations frustrated by the state. Only from November 8, 2006, the date of the final binding decision of the Caribbean Court of Justice, did the legitimate expectation of an individual in Barbados to be able to complete international human rights petition processes give rise to enforceable rights under Barbadian law.[268] Thus *the legitimate expectation did not exist at any of the times that warrants of execution were read to the Petitioners*. In the alternative, even if the legitimate expectation could have been said to have arisen earlier, on the date of the decision of the Court of Appeal in the same matter, namely, May 31,

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[267] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]**

[268] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce, ibid*, Joint Judgement of President the Rt Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders, paras 107 and 125

2005 – a point which the state expressly denies[269] – this date also fell after the reading of any of the warrants of execution with relation to the Petitioners. Thus there existed no binding right under the laws of Barbados to complete the petition processes of the Inter-American Commission on Human Rights or any other international body at the time of the reading of any of the warrants of execution to the Petitioners. As a result no rights in relation to these processes can have been violated under the laws of Barbados;

b. Secondly, even under the jurisprudence of the Inter-American system of human rights the Petitioners have no binding right, *per se*, to complete their petitions with respect to the Inter-American Commission on Human Rights. The Commission cannot issue binding decisions and all of its processes, including reports, decisions, precautionary measures, *et cetera*, only constitute recommendations. This is why the Commission has been given the power to request Provisional Measures from this Honourable Court. Provisional Measures Orders can give rise to binding obligations under international law and the State has consistently respected each of

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[269] The State denies the possibility of a right arising under the doctrine of legitimate expectations prior to the decision of the Caribbean Court of Justice. The decision of the Court of Appeal was based entirely upon the applicability of previous jurisprudence of the Judicial Committee of the Privy Council, namely, the *Lewis* case, and did not in any way rely upon the doctrine of legitimate expectation. The reasoning of the *Lewis* case was expressly rejected by the Caribbean Court of Justice which instead chose to rely upon the doctrine of legitimate expectation. For example, in the Joint Judgement of President the Rt Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders, in *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce*, *ibid.*, in para. 76, their Lordships clearly stated:

> [76] Mr. Shepherd QC urged us to accept the decisions in *Thomas* and *Lewis* as good law for the reasons given by their Lordships and to apply it to the decision of the BPC to advise the Governor-General on the exercise of the prerogative of mercy in this case. We would respectfully agree that it would not be right for the BPC, before tendering its advice to the Governor-General, wholly to ignore either the fact that a condemned man has a petition pending before an international body or that a report has been made by such a body. We are unable to accept however the reasoning which underpins the decisions in *Thomas* and *Lewis*. Many of the trenchant criticisms of Lord Hoffmann in *Lewis* and Lord Goff and Lord Hobhouse in *Thomas* appear, with respect, to have merit. The majority judgments in those two cases did not explain how mere ratification of a treaty can add to or extend, even temporarily, the criminal justice system of a State when the traditional view has always been that such a change can only be effected by the intervention of the legislature, and not by an unincorporated treaty. It seems to us that the effect which the majority gave to the treaty i.e. expansion of the domestic criminal justice system so as to include the proceedings before the Commission, was inconsistent with their protestations of support for the strict dualist doctrine of the unincorporated treaty. Nor did the judgments explain how, if ratification has that effect, the appropriate domestic authorities can be entitled to impose even reasonable time-limits for the disposal of the case in the absence of any such limitation on the State's obligation in the treaty itself. In the result, both the accretion to the domestic criminal justice system and its disappearance after the lapse of a reasonable time according to Lord Millett's judgment in *Thomas*, were unsupported by legal principle. [Emphasis added.]

See also, *ibid.*, para. 132. As a result no legitimate expectation could arise at the date of the decision of the Court of Appeal.

the Orders of this Honourable Court: the State has not read any warrants of execution with respect to any Petitioner covered by a Provisional Measures Order. As a result, Barbados has not violated any of their rights to a fair trial, to equal protection, or to judicial protection in reading warrants of execution; and

c. Thirdly, in the alternative, even if the reading of warrants of execution could constitute a violation of their rights, a point expressly denied by the State, the right to petition the Commission does not include the further right to extend the petition process for an unlimited or indefinite duration. As a result even if the reading of the warrants could constitute a breach of the *Convention*, a point which Barbados expressly denies, the State submits that the Commission is estopped from arguing for reparations in light of its consistent practice of delay in relation to death penalty cases.

344. The State sets out these arguments in greater detail in the following paragraphs.

a) Inter-American Processes do not per se Give Rise to Rights to Conclude Petition Processes Under the Laws of Barbados, at Most Giving Rise to Limited Rights in Relation to Legitimate Expectations

345. Regarding its first response, the State submits that the reading of the warrants of execution to the Petitioners cannot amount to cruel, inhuman, or degrading punishment or treatment under the laws of Barbados because there is no *legal right* to petition the Commission, *per se*, under domestic law. Under the *Constitution* persons are only entitled to the protection of the laws of Barbados. International and Inter-American legal norms have no direct applicability in Barbadian law, anymore than have the laws of a foreign state, such as Mexico. This is succinctly stated by Lord Hoffman in paragraph 25 of the majority decision of the Judicial Committee of the Privy Council in the case of *Boyce and Joseph v. The Queen*, when his Lordship held that "[t]he rights of the people of Barbados in domestic law derive *solely* from the Constitution."[270] In sum, there is no constitutional or statutory right conferred on an individual by the laws of Barbados to petition the Inter-American Commission or any other international body, or any right to have such a petition heard and determined prior to the execution of the individual.

346. Because this is a matter of domestic law and not all of the Members of this Honourable Court may be familiar with the constitutional systems of Commonwealth Caribbean states, the State takes this opportunity to further clarify its position as to why Inter-American processes, including petitions to the

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[270] *Boyce and Joseph v. The Queen* [2004] UKPC 32 **[Annex, Tab 36]** (emphasis added).

Commission, do not exist within, nor can they give rise to any rights within, the laws of Barbados.

347. Firstly, there ***is*** no right existing in the *Constitution*, or statutory law, or the common law of Barbados which *in and of itself* requires the state to allow petitions to the Commission or any other international body, or that requires the state to await the completion of any such process, once initiated. After the judgement of the Caribbean Court of Justice in the case of *Attorney General et al. v Jeffrey Joseph and Lennox Ricardo Boyce*,[271] a right not to have one's legitimate expectations frustrated has arisen in relation to the Commission, but this is another matter and will be discussed further below.

348. Secondly, there ***can be*** no right under the laws of Barbados in relation to international legal entities or international treaties without such a right having been made part of the laws of Barbados by Act of Parliament or binding judicial determination. In this regard it is important to remember that the *OAS Charter* and *American Convention* are not part of the laws of Barbados and neither this Honourable Court nor the Inter-American Commission on Human Rights can be considered a court of Barbados. Sections 27(1) and 117 of the *Constitution of Barbados*,[272] respectively, define "court" and "law" for Barbados as follows:

> **Interpretation**
>
> 27. 1. In this chapter -
>
> [...]
>
> "court" means any court of law having jurisdiction in Barbados, other than a court established by a disciplinary law, and includes the Caribbean Court of Justice and–
>
> *(a)* in section 12, section 13, section 14, subsections (2), (3), (5), (8), (9) and (10) of section 18, section 22 and subsection (7) of section 23 includes, in relation to an offence against a disciplinary law, a court established by such a law; and
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> *(b)* in section 13, section 14 and subsection (7) of section 23 includes, in relation to an offence against a disciplinary

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[271] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]**

[272] *Constitution of Barbados* **[Annex, Tab 17]**

> law, any person or authority empowered to exercise jurisdiction in respect of that offence;[273]

> **117.** (1) In this Constitution –
>
> "law" includes any instrument having the force of law and any unwritten rule of law;

The term "unwritten rule of law" refers to the common law. "Common law" is defined in Section 46 of the *Interpretation Act*, 1966,[274] as being "the common law of England." The meaning of statutory law is defined under the following two terms in Section 2 of the *Interpretation Act* 1966:

> "enactment" means an Act or a statutory instrument or any provision in an Act or statutory instrument;"
>
> "Act" means an Act of Parliament or an Act of the Legislature of Barbados passed before the 30th November, 1966;

Section 3 of the *Interpretation Act* 1966 extends the temporal application of the Act beyond 1966:

> **3.** (1) Every provision of this Act shall extend and apply to every enactment whether passed or made before or after the 16th June, 1966; unless a contrary intention appears in this Act or in the enactment.
>
> (2) The provisions of this Act shall apply to this Act as they apply to an enactment passed after the 16th June, 1966 and references in this Act to an enactment so passed shall be construed accordingly.

As a result of these provisions persons in Barbados are legally entitled to the protection of the laws of Barbados, including statutory laws and the common law, by the courts of Barbados. Persons are not legally entitled to protection of

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[273] As amended by the *Constitution (Amendment) Act 2003-10* **[Annex, Tab 18]** Section 27(1) of the *Constitution* defines "disciplinary law" and "disciplined force" as follows:

"disciplinary law" means a law regulating the discipline of any disciplined force;

"disciplined force" means –

(a) a naval, military or air force;

(b) a police force;

(c) a prison service; or

(d) a fire service;

[274] *Interpretation Act*, 1966, Cap 1 **[Annex, Tab 20]**.

international law or foreign law, nor are they entitled to enforce protections through international bodies or tribunals. The *OAS Charter* and *American Convention* are *not* part of the laws of Barbados and neither this Honourable Court nor the Inter-American Commission on Human Rights is a *court* of Barbados. Thus, under Barbadian law no right exists to petition the Commission and the petition process does not, and cannot, give rise to a substantive legal right as a matter of domestic law

349. Thirdly, it is a fundamental rule of domestic constitutional law that international legal obligations derived from treaties are not part of the domestic law of Barbados until they have been transformed by an Act of Parliament. This was stated succinctly by Lord Bridge of Harwich in the case of *R v Secretary of State for the Home Department, ex parte Brind*,[275] at page 747:

> It is accepted, of course, by the applicants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it.[276]

350. There are circumstances in which domestic tribunals may refer to unincorporated treaties for the purposes of interpreting *ambiguous* domestic legislation.[277] The term "ambiguous," however, is strictly limited. The Judicial Committee of the Privy Council in *Boyce and Joseph v The Queen* indicated that a provision would be ambiguous if "... it is capable of a meaning which either conforms to or conflicts with the [treaty]."[278] And even then, such limited interpretive uses of an unincorporated treaty do not affect the fundamental rule that treaties are not part of the domestic law of Barbados until they have been transformed by an Act of Parliament.

351. This rule is required to uphold the division of powers and the system of democratic accountability provided for in the *Constitution* and under the common law. The division of powers in the Barbadian constitutional system provides the Executive with the power to enter into international legal obligations on behalf of the state; but it also provides that *only Parliament* is

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[275] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 **[Annex, Tab 79]**

[276] See also *Boyce and Joseph v The Queen* [2004] UKPC 32 **[Annex, Tab 36]**, para. 25.

[277] *Boyce and Joseph v. The Queen, ibid*, para. 25

[278] *Boyce and Joseph v The Queen, ibid*, [*citing*: Lord Bridge of Harwich in *R v Home Secretary, ex parte Brind* [1991] 1 AC 696, 747]. [See **Annex, Tab 79,** for the latter case]

allowed to make law for the people. As stated by Lord Hoffman in *Higgs and Another v Minister of National Security and Others*,[279] at page 241:

> The point of departure in considering the effect of the petitions is the fact that the Constitution of the O A S. (including the Statute which established and conferred powers upon the commission) is an international treaty. In the law of England and The Bahamas, the right to enter into treaties is one of the surviving prerogative powers of the Crown. Her Majesty does not require the advice or consent of the legislature or any part thereof to authorise the signature or ratification of a treaty. The Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government
>
> But the corollary of this unrestricted treaty-making power is that treaties form no part of domestic law unless enacted by the legislature.

352. In sum, under Barbadian law only the legal rights and obligations recognised and existing under the laws of Barbados are enforceable; none of the Inter-American treaties has legal status under the laws of Barbados and neither the Inter-American Court no Inter-American Commission has legal status under the laws of Barbados.

353. Further, the only right that arises in relation to the Inter-American system is one not to have one's legitimate expectations frustrated. On November 8, 2006, this right was extended by the judgement of the Caribbean Court of Justice to include the completion of international petition processes.[280] It is now part of the law of Barbados. *But this right did not exist at the time of the reading of any of the warrants of execution*. Thus no such right can have been violated by the State.

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[279] *Higgs and Another v Minister of National Security and Others* [2000] 2 A C 228 **[Annex, Tab 56]**.

[280] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]**. It should be noted that the decision in *Boyce and Joseph v The Attorney General et al* (Unreported) Barbados Court of Appeal, Civil Suit No. 29 of 2004 (May 31, 2005), as available through http://www.lawcourts.gov.bb/LawLibrary/CasesYears.asp?Years=2005&Court=COA (accessed 30 November 2006) **[Annex, Tab 35]**, did not depend upon the doctrine of legitimate expectations, but rather the applicability of previous jurisprudence of the Judicial Committee of the Privy Council, which was not upheld by the Caribbean Court of Justice. As a result no legitimate expectation could arise at the date of the decision of the Court of Appeal, nor in fact was one recognised in its judgement

354. Further, the right not to have one's legitimate expectations frustrated is in any event a *very weak right*, one which can be defeated by official statements of the Government to the contrary or by overriding public interest. This is explained in the Joint Opinion of Mr. Justice de la Bastide (the President of the Caribbean Court of Justice), and Mr. Justice Saunders.[281] In paragraph 126 of their judgement, when speaking about cases of persons who are not covered by the *Constitution (Amendment) Act 2002* (including the four Petitioners), their Lordships state:

> [126] By the amendment of section 15 of the Constitution, the State of Barbados no longer has the constraint of the *Pratt* five-year time-limit. Even without *Pratt* however, we expect the relevant authorities to strive for completion within a reasonable time of all the criminal justice processes including those that span the period between conviction and the carrying out of a death sentence. Where *Pratt* is applicable, as it was in Barbados for these respondents, we would have been inclined to the view, if the issue of the five-year time-limit was still a live one before us, that where the time taken in processing a condemned man's petition before an international body exceeded eighteen months, the excess should be disregarded in the computation of time for the purpose of applying the decision in *Pratt*. In any event, protracted delay on the part of the international body in disposing of the proceedings initiated before it by a condemned person, could justify the State, notwithstanding the existence of the condemned man's legitimate expectation, proceeding to carry out an execution before completion of the international process. This may be regarded either as a situation which is catered for by the terms of the legitimate expectation itself or as one which creates an overriding public interest in support of which the State may justifiably modify its policy of compliance with the treaty.[282]

355. As a result, the legitimate expectation in question is a limited one. In fact, the right to have the execution of a death warrant stayed is only available for *a reasonable period of time*. This is expressly stated by their Lordships in paragraph 128:

> [128] For all the foregoing reasons we are of the view that the BPC ought not to have decided to advise the Governor-General

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[281] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006), Joint Judgement of President the Rt Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders **[Annex, Tab 32]**.

[282] Emphasis added.

> to proceed with the executions before allowing the respondents a reasonable time to complete the processing of their petitions. In giving this advice without waiting a reasonable time for the Commission's report, the BPC defeated the legitimate expectation of the respondents and deprived itself of any opportunity of considering the Commission's report or if the matter was referred to the Inter-American Court, that Court's judgment. The reading of the death warrants on the 15th September 2004 constituted an infringement of the respondents' right to the protection of the law.[283]

356. Moreover, in the opinion of the majority of judges of the Caribbean Court of Justice, legitimate expectations are not indefeasible. Justice de la Bastide and Justice Saunders, in paragraph 130 of their Joint Opinion, held that the legitimate expectation in question is not indefeasible:

> [130] In our view the respondents' legitimate expectation can only be defeated by some overriding interest of the State. If, pursuant to section 78(6) of the Constitution, the Governor-General acting in accordance with the advice of the Privy Council, imposes reasonable time-limits within which a condemned man may "appeal to, or consult" extra-territorial bodies, then it could not be said that such time-limits did not evince an intention on the part of the State to address its treaty obligations in good faith. The State cannot reasonably be expected to delay indefinitely the carrying out of a sentence, even a sentence of death, lawfully passed by its domestic courts pending the completion of the hearing of a petition by an international body even though the State has by treaty conferred on the person sentenced the right to pursue that petition.[284]

357. The majority of the Justices of the Caribbean Court of Appeal concurred in this position.[285]

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[283] Emphasis added.

[284] Emphasis added. See also, *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce*, *ibid*, para 126.

[285] See the judgements of Mr Justice M. de la Bastide and Mr. Justice A. Saunders, Mr Justice R. Nelson, and Mme. Justice D. Bernard in the case of *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]** Only Justices D. Pollard and D. Hayton believed that a legitimate expectation could be indefeasible, a view not shared by the majority. Justice J. Wit rejected the entire dualist system of the relation of international law and municipal law, a view *no other judge* supported, and thus made no relevant pronouncement on the question of indefeasibility.

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b) Only Orders of the Inter-American Court are Binding, and Barbados Complied with All Orders Made in Relation to the Petitioners with Stays of Execution

358. In addition, under the jurisprudence of the Inter-American system of human rights the Petitioners have no binding right, *per se*, to complete their petitions with respect to the Inter-American Commission on Human Rights. The Commission cannot issue binding decisions and all of its processes, including precautionary measures, only constitute recommendations. Examples of non-binding powers of the Commission include those found in Article 41 of the *American Convention*, Articles 18-20 of the *Statute of the Inter-American Commission on Human Rights*,[286] and Articles 10, 24 and 25 of the *Rules of Procedure of the Inter-American Commission on Human Rights*.[287] The only binding obligation states have with respect to the Commission, one imposed by Article 43 of the *American Convention*, is "to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention."[288]

359. This is why the Commission has requested Provisional Measures from this Honourable Court in the present case, because only the Orders and Judgements of the Court can give rise to binding obligations under international law. Examples of binding powers attributed to the Court can be found in, for example, Articles 63 and 68 of the *American Convention*, and Articles 25, 29 and 59(4) of the *Rules of Procedure of the Inter-American Court of Human Rights*.[289] Provisional measures orders may be considered binding in international law, as established in the International Court of Justice decision in the case of *La Grande* (Germany v. U.S.A.), paragraphs 98-110, and 128(5) and as perhaps may be implied from the decision of this Honourable court in the *Constitutional Court Case*, Provisional Measures, Order of the Inter-American Court of Human Rights of August 14, 2000, paragraphs 12-15 (Considering).[290]

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[286] *Statute of the Inter-American Commission on Human Rights* **[Annex, Tab 10]**

[287] *Rules of Procedure of the Inter-American Commission on Human Rights* **[Annex, Tab 8]**

[288] An indirect binding obligation also arises with respect to guarantees of protection to witnesses that attend Commission hearings under Art. 61 of the *Rules of Procedure of the Inter-American Commission on Human Rights* **[Annex, Tab 8]**, but this is not a binding power of the Commission. Rather it is a binding obligation imposed by the *Rules* themselves.

[289] *Rules of Procedure of the Inter-American Court of Human Rights* **[Annex, Tab 9]**

[290] *LaGrand* (Germany v. United States of America), I.C.J. Reports 2001, p. 466 **[Annex, Tab 62]**; *Constitutional Court Case, Provisional Measures*, I-A Ct H.R., Order of August 14, 2000, Ser. E, (2000), as available through http://www.corteidh.or.cr/medidas.cfm (accessed 04 December 2006) **[Annex, Tab 54]**

360. In this regard the State wishes to highlight the fact that it has consistently respected each of the Provisional Measures Orders of this Honourable Court. As a result, after the original Provisional Measures Order of September 17, 2004, and the later Expansion of Provisional Measures Orders, the state has adopted all necessary measures to preserve the life and physical integrity of, and has not read warrants of execution to,

a. Lennox Ricardo Boyce or Jeffrey Joseph (following the Provisional Measures Order by the President of the Court of September 17, 2004, which was ratified by the full Court with the Provisional Measures Order of November 25, 2004),

b Frederick Atkins (following the Order by the President regarding Expansion of Provisional Measures of February 11, 2005), and

c. Michael Huggins (following the Order by the President regarding Expansion of Provisional Measures of May 20, 2005).

361 In sum, the State has not read any warrants of execution with respect to any Petitioner covered by a Provisional Measures Order, and thereby has not violated any of their rights to a fair trial, to equal protection, or to judicial protection as protected under the Inter-American system of human rights.

c) An Unlimited Right of Petition Cannot Exist Under Inter-American Jurisprudence and the Commission is Estopped in Light of Its Practice of Consistent Delay

362. Finally, as fully established below, even though a right to petition the Commission is expressed in Article 44 of the *American Convention*, it is submitted that such a right does not, and cannot, include a *further right* to extend the petition process for an unlimited or indefinite duration. The Commission itself must hear communications in a prompt and expeditious manner. If it cannot do so, Barbados submits that the Commission is estopped from alleging a violation. As the State will illustrate, to hold otherwise would defeat the object and purpose of the *Convention* by allowing the Commission to put the State in a position where it must violate the rules of its own legal system as well as the rights of those subject to the death penalty to have their sentence carried out within a reasonable period of time.

(1) No Legal Right to an Indefinite Communication Process Before the Commission

363. At the international level the State has accepted certain obligations under Article 44 of the *American Convention* with respect to the Commission's complaints procedures. Article 44 of the *Convention* provides:

Article 44 0000302

> Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

364. The State accepts that Article 44 creates an obligation under international law (not domestic law) to allow petitions to be lodged with the Commission. Barbados is also willing to allow these petitions to be both lodged and *determined* by the Commission, ***provided***, however, that the Commission is able to do so within a reasonable period of time. This is the position endorsed by its highest court, the Caribbean Court of Justice, as illustrated above.

365. However, under its *Constitution* the State cannot lawfully allow petitions to be continued past the time period established in *Pratt v. Attorney-General for Jamaica*[291] because to do so would violate the Petitioners rights not to be subject to cruel, inhuman, and degrading treatment or punishment.

366. This places the State in a very difficult, 'Catch-22' position, where *if it allows unlimited access to international petition procedures it will violate its own laws*. This difficult position is clearly illustrated in the Joint Opinion of Mr. Justice de la Bastide and Mr Justice Saunders, in paragraph 49, where they quote from a portion of the transcript of the oral hearings before the Court:

> [49] We shall comment further in due course on the reasoning underpinning this aspect of the *Lewis* decision. It is sufficient to state here that *Pratt* and *Lewis* have the combined effect of creating a dilemma since a State Party to a human rights treaty like the ACHR has no control over the pace of proceedings before the relevant international human rights body and the standard prescribed in *Pratt* has come to be applied with guillotine-like finality. A State, for example, desirous of making good its pledge under Article 4(6) of the ACHR not to execute a prisoner while his petition is pending, may find that when the period of five years after conviction elapses, the international proceedings before the Commission or the Inter-American Court have not yet been completed. The result is that the State may ultimately through no fault of its own be unable to carry out the constitutionally sanctioned death penalty because of the conjoint effect of the decisions in *Pratt and Morgan* and *Lewis*. The sense of frustration on the part of regional governments in this Catch–22 situation is well illustrated in the following exchange between the

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[291] *Pratt v Attorney-General for Jamaica* [1994] 2 A.C. 1 **[Annex, Tab 76]**; applied to Barbados in *Bradshaw v. Attorney-General of Barbados* [1995] 1 W.L.R. 936 **[Annex, Tab 37]**.

Attorney-General of Barbados and the President of the Court of Appeal during the hearing of this case before that court:

> **ATTORNEY-GENERAL**: My Lords, the Government of Barbados does not disregard its international treaty obligations. The Executive of Barbados does not take lightly its international treaty obligations. But what confronts the State of Barbados and what confronts Your Lordships today is a dilemma that is one perhaps that can be described appropriately in other jurisdictions as Hobson's choice; in our colloquial terms as being between the devil and the deep blue sea. That is the truth of the matter. That, were we as an Executive, to willingly agree that we should wait until the Inter-American system deliberates, knowing full well that even now the State of Barbados is involved in a matter since October 2002 and only in March 2004 was it referred to the Inter-American Court.... Knowing full well that even a year later, not much more has happened, and I say to Your Lordships that what allowing them - - -
>
> **WILLIAMS, P. JA**: So the five years will run out.
>
> **ATTORNEY-GENERAL**: Thank you, My Lord. So that is the problem. That we face coming into breach, into collision with the very same Barbados Constitution that we are bound to uphold... [292]

367. This 'Catch-22' position can only be avoided if the Inter-American Commission on Human Rights acts expeditiously in processing petitions in death penalty cases for the states of the Commonwealth Caribbean.

368. To the extent that the Commission does not act expeditiously, it may be justly criticised, both by the States of the Caribbean and by the Caribbean Court of Justice itself. Mr. Justice Hayton, for example, in the same Caribbean Court of Justice decision, offers strong criticisms in his judgement, in paragraphs 10-11, regarding the delays caused by the Inter-American Commission on Human Rights:

> [10] Finally, I believe it appropriate to endorse the criticism of the learned President and Saunders J of the five year rule developed by *Pratt and Morgan*, which simply encouraged the IAHRC to

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[292] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006), Joint Judgement of President the Rt Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders (emphasis added) **[Annex, Tab 32]** See also *ibid*, para 117

> pursue its apparent anti-death penalty agenda by not producing its reports on condemned murderers in timely fashion. This ensured that the five year period was exceeded, so that all murderers sentenced to death could themselves commute their death sentences to life imprisonment simply by petitioning the IAHRC – and so wholly undermining the Constitutional death penalty.
>
> [11] Just as the poorest of countries have to organise themselves to produce timely justice for murderers, so should the IAHRC arrange for production of timely reports on anxious condemned murders on death row, rather than leave their hopes dangling for considerable periods that are in excess of eighteen months. "Justice delayed is justice denied", and the least that can be expected of an international body that cares for murderers on death row is that it should produce reports on them within eighteen months at the outermost limit. Court-imposed guidelines on bodies should encourage such bodies to perform their tasks in good faith with as much expedition as possible and not with the least expedition possible. Thus, there is much to be said for the local Court of Appeal to be expected to deliver judgment within twelve months of the accused's conviction for murder (giving priority to murder cases), the Caribbean Court of Justice to deliver judgment within twelve months of the Court of Appeal's judgment and the IAHRC to deliver its report within eighteen months of the CCJ's judgment (assuming no delay has been caused by the tardiness of a Government's response to a request from the IAHRC). If the IAHRC does then take more than eighteen months to produce a report for the benefit of the murderer, it and he ought to accept the burden of a longer than necessary sojourn on death row without this amounting to prohibited cruel and inhuman punishment which has to be remedied by commutation of the death sentence: no benefit without the concomitant burden. However, resolving particular time limits should await detailed inter partes argument with supporting evidence, so this is yet another issue peripheral to this case but of much significance which remains to be finally resolved another day.[293]

369. This position of being simultaneously subject to, on the one hand, the period of limitation provided in *Pratt v. Attorney General for Jamaica*,[294] and on the other,

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[293] *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce*, *ibid*., Judgement of Mr Justice D. Hayton (emphasis added).

[294] *Pratt v Attorney-General for Jamaica* [1994] 2 A C 1 **[Annex, Tab 76]**, *Bradshaw v Attorney-General of Barbados* [1995] 1 W L R. 936 **[Annex, Tab 37]**. Confirmed in *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil

the lengthy period of time which it may take the Commission to consider a petition, places the states of the Commonwealth Caribbean in an impossible position.

370. Barbados respectfully submits that it would be unreasonable for this Honourable Court to decide that a State must place its legal processes in a state of indefinite suspension while awaiting the determination of a Communication by the Commission. To require a state to await the conclusion of a petition in such circumstances, *regardless of how long that process might take*, in the State's respectful submission, must frustrate the very object and purpose of the Inter-American system of human rights protection.

371 Such an unlimited requirement to await the views of the Commission cannot be imposed upon the State under the Inter-American system of human rights for two reasons:

a Firstly, unlike the Court, as illustrated earlier, the Commission has no binding, mandatory power. Its procedures are not judicial, and thus are not protected under Articles 8 or 25 of the *American Convention*; and

b Secondly, any other interpretation contradicts one of the fundamental purposes of the Inter-American system of human rights – the need for organs of the Inter-American system to themselves act expeditiously, fairly, impartially and transparently in maintaining human rights protections. Without meritorious behaviour on the part of the organs of the Inter-American system it would be impossible for states to comply with either their own laws or their Inter-American human rights obligations. By suggesting what may be construed to be a right of the Commission to conduct its procedures for an indefinite period, the Petitioners arguments, if taken to their natural conclusion, would place Member States in the position where they would be forced to violate the rights of their own citizens as a direct result of waiting for a Commission decision. In the context of death penalty proceedings, inordinate delay of an execution itself is considered a form of cruel and inhuman treatment and punishment: *Pratt v. Attorney General for Jamaica*.[295]

Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) [**Annex, Tab 32**]

[295] *Pratt v. Attorney-General for Jamaica* [1994] 2 A C 1 [**Annex, Tab 76**], *Bradshaw v. Attorney-General of Barbados* [1995] 1 W.L.R 936 [**Annex, Tab 37**] Confirmed in *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) [**Annex, Tab 32**]

372. In short, it is submitted that there can be no right to hearings of unrestricted duration before the Inter-American Commission on Human Rights, nor any such consequential right of the Petitioners to require all legal processes to be put on hold for an indefinite period while their Communications are being analysed. In this regard Barbados submits that the *American Convention* itself shows that the Commission is required to act expeditiously in hearing cases brought before it. This can be seen in the several provisions of the *American Convention* which set out time limits for different aspects of the Commission proceedings: Articles 48(1)(a), 50(1) and 51. Further time limits are established, *inter alia*, in Article 23(2) of the Commission's *Statute* (1979),[296] and in Articles 30, 32, 38, 39, 43, 45 of its *Rules of Procedure* (2002).[297] These time limits show that the Commission itself must operate within a reasonable, and restricted, time frame. They also demonstrate that it is *manifestly unreasonable* for there to be read into the *American Convention* any requirement for a state to wait indefinitely for the Commission to draw its proceedings to a close. Such an interpretation of the *American Convention on Human Rights* is fundamentally unsound, since it would allow the Commission to delay a state's ability to implement its laws indefinitely.

373. In addition the rights of petitioners to have their communications processed by the Commission in a timely manner may be said to be protected by Article XXIV of the American Declaration, which provides:

Article XXIV.

> Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.[298]

374. Finally, it must be noted that a negative consequence of upholding the Petitioners' position would be to *allow the Commission by means of its own delays to cause a state to violate the rights of its citizens*, namely, (1) the right to have a criminal sentence carried out in a timely manner, and thereby (2) to prevent the time period awaiting the sentence of death from becoming so long as to itself amount to a form of cruel and inhuman treatment and punishment: *Pratt v. Attorney General for Jamaica*.[299] In other words, the interpretation of Article

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[296] **Annex, Tab 9**.

[297] **Annex, Tab 7**

[298] Emphasis added

[299] *Pratt v Attorney-General for Jamaica* [1994] 2 A.C. 1 **[Annex, Tab 76]**, *Bradshaw v. Attorney-General of Barbados* [1995] 1 W.L.R. 936 **[Annex, Tab 37]**. Confirmed in *Attorney General et al v Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil

44 urged upon this Honourable Court by the Petitioners would confer upon the Commission a power to violate individual human rights. Such a power, it is submitted, is so egregiously incompatible with the role of the Commission under the *OAS Charter* and the *American Convention* that it would defeat the very object and purpose of the latter treaty.

375. In conclusion, the State submits that there can be no legal right on the part of the Petitioners to require the Barbadian legal system to await the determination of any Communications before the Commission, as a matter of either domestic or international law, except as an indirect right arising out of legitimate expectations after November 8, 2006. As a consequence, Barbados respectfully submits that there is no ground for a finding that the reading of warrants of execution could constitute "inhumane treatment" under Article XXV of the American Declaration or "cruel, inhuman, or degrading punishment or treatment" under Article 5 of the *American Convention*.

376. In fact, Barbados respectfully submits that if this Honourable Court were to endorse the State's submissions and thereby ensure that all future petitioners wait no longer than the period required in *Pratt* for their sentence to be carried out, this decision would fully affirm and respect their inherent dignity and human rights under both Article XXV of the American Declaration and Article 5 of the *American Convention*.

D. Conditions of Imprisonment Do Not Violate Article 5 of the American Convention

377. The Petitioners have alleged that the prison conditions under which they have been detained violate Article 5 of the *American Convention* and constitute cruel, inhuman, or degrading punishment or treatment. Barbados denies these allegations and submits that its detention practices are in conformity with both national and international standards.

378. The State notes that the conditions of imprisonment of the four Petitioners changed as a result of a fire that destroyed Barbados' only prison, Her Majesty's Prison, Station Hill (otherwise known, and hereafter referred to, as "Her Majesty's Prison Glendairy"), on March 29, 2005 [300]. In this context, although the Government did not declare a state of emergency – primarily because of the fears this would have raised in the general population and the devastating effect

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Appeal No 29 of 2004 (November 8, 2006), Advance Copy, as available through http://www.caribbeancourtofjustice.org/judgments.html (accessed November 8, 2006) **[Annex, Tab 32]**

[300] Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006 **[Annex, Tab 172]**, para 7.

such a declaration would have had on a major sector of the economy, namely, the tourism industry – the situation was exceptionally difficult and the State was required to mobilise all of its security forces.

379. In light of these events, in order to fully rebut the submissions of the Petitioners the State will describe the laws and regulations generally applicable to prisoners, as well as the nature of the Barbadian prison system. The State will explain the conditions that existed in Her Majesty's Prison Glendairy prior to the fire of March 29, 2005. The State also will describe the conditions of imprisonment of the four petitioners subsequent to that fire, in the temporary facilities at St. Ann's Fort and the Harrison's Point Temporary Prison.[301] Finally, the State will provide a brief explanation of the nature of the improvements expected in the new prison, currently being constructed at Dodds Plantation, in St. Philip.

(1) General Prison Conditions at Her Majesty's Prison Glendairy

380. Prior to the fire of March 29, 2005, Barbados' prison system consisted of one adult facility – Her Majesty's Prison Glendairy which housed both male and female prisoners. The State also provided, and still provides, Government Industrial Schools for juveniles: Dodds for male and Summerville for female juvenile offenders. The total population of prisoners held in Barbados as of March 2005 was 994, of which 942 prisoners were male and 52 were female. At that time only 13% of prisoners were held in preventative detention.[302]

381. Her Majesty's Prison Glendairy was made up of three accommodation blocks, one for females and two for males. Of the two male blocks, one housed remand and low risk prisoners and the other housed minimum and maximum security prisoners. Persons on remand were separated from convicted inmates. Her Majesty's Prison Glendairy also contained an administration building, two workshop buildings, one kitchen and dining hall, one bakery, four classrooms, one medical and dental unit, two libraries, arts and craft rooms, a computer room, horticultural areas (including a farm and animal farm), a tailor shop, a mechanic shop (including construction and carpentry areas), counselling buildings and recreational areas.[303]

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[301] Two temporary prison facilities were used following the destruction of Her Majesty's Prison Her Majesty's Prison Glendairy, one at Six Roads and the other at St Ann's Fort. All prisoners subject to the death penalty were detained at the latter facility

[302] See the Affidavit of John Nurse, Superintendent of Prisons, of March 8, 2005, para. 5 **[Annex, Tab 171]**

[303] See the Affidavit of John Nurse, Superintendent of Prisons, of March 8, 2005, para. 3 **[Annex, Tab 171]**

382. The Barbadian prison system, while Her Majesty's Prison Glendairy was running, employed a total of 282 persons. Currently the Barbados Prison Service employs 311 persons.

(2) Events Subsequent to the Fire, and Conditions in Temporary Prisons

383. The fire of March 29, 2005, destroyed Her Majesty's Prison Glendairy. When the fire was detected prisoners subject to the death penalty, including the four Petitioners, were temporarily placed in holding cells away from the area affected by the fire.[304] Subsequently, they were transferred to the security exercise area, which was located outside of the main building but still within the prison compound. Before nightfall they were transferred to a holding bus and taken to St. Ann's Fort, which is the headquarters of the Barbados Defence Force located at the Garrison.[305]

384. During the immediate period following the fire at Her Majesty's Prison Glendairy, because of the exceptionally dangerous security situation, information was not provided to the general public regarding the specific location of individual prisoners. However the public was made aware that prisoners were being temporarily detained at facilities at Six Roads, St. Ann's Fort and Harrison's Point. As security concerns diminished the public was informed that maximum security prisoners were being detained at St. Ann's Fort. All maximum security prisoners at St. Ann's Fort, including the four Petitioners, were allowed visits by legal representatives and priests, but the facilities did not allow visits by family members.[306]

385. The four Petitioners were transferred from the temporary prison at St. Ann's Fort to the Harrison's Point Temporary Prison on June 18, 2005.[307] This prison was rapidly refurbished to deal with the events after the fire and is not a permanent facility. It will only be used until the new prison has been completed.[308]

386. In the Harrison's Point Temporary Prison, as in Her Majesty's Prison Glendairy, maximum security prisoners including the Petitioners have been placed in single cells. These cells are between seven and seven and a half feet long, six feet

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[304] Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006, para. 8 [**Annex, Tab 172**]

[305] Affidavit of John Nurse, *ibid*, para. 9 [**Annex, Tab 172**]

[306] Affidavit of John Nurse, *ibid*, para. 12 [**Annex, Tab 172**]

[307] Affidavit of John Nurse, *ibid*, para. 10 [**Annex, Tab 172**]

[308] Affidavit of John Nurse, *ibid*, para. 13 [**Annex, Tab 172**]

wide, and ten feet two inches high.[309] Cells are lit by fluorescent lights placed in the hallways and are well ventilated.[310] Lights are turned off at night in the maximum security building unless a disturbance necessitates continued lighting.

387. At the Harrison's Point Temporary Prison all prisoners are allowed written and electronic communication (including video conferencing and telephone calls) with family members.[311]

388. All blocks of the Harrison's Point Temporary Prison, with the exception of Block D, have lavatory and shower facilities, including in cell toilet facilities, sinks and showers either at the beginning or end of the block. In maximum security areas chamber pots are provided for use at night, but during the day inmates have access to the showers and toilets located in each building. An exercise area is located in each building and inmates are allowed one hour of exercise per day.

(3) Situation in the New Prison at Dodds Plantation, St. Philip

389. The new prison facility currently under construction is located at Dodds Plantation, St. Philip. It is scheduled for completion in August 2007.[312] The new complex will accommodate a population of 1250 inmates and will include:

a. two remand centres (male and female) for persons awaiting trial and sentencing, as well as appellants;

b. a female prison; and

c. a male prison.

390. The complex will feature three separate units to accommodate the remand centre and the male and female prisons. Within each unit there will be further separations for the three main categories of inmates, i.e. high, medium and low risk.

391. Every cell will have its own combination security lavatory/water closet and sink, except for a few purpose-built cells which are to be used for mentally disturbed prisoners or those involved in protests (temporary solitary confinement cells).[313]

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[309] Affidavit of John Nurse, *ibid*, para. 16 **[Annex, Tab 172]**

[310] Affidavit of John Nurse, *ibid*, para. 18 **[Annex, Tab 172]**

[311] Affidavit of John Nurse, *ibid*, para. 19 **[Annex, Tab 172]**

[312] Affidavit of John Nurse, *ibid*, para. 13 **[Annex, Tab 172]**

[313] Affidavit of John Nurse, *ibid*, para. 27 **[Annex, Tab 172]**

Showers and dayrooms will be available outside of the cells and each building will have an exercise area. Every single occupant cell will also have one shelf with garment hooks, one detention mirror, one bunk, one desk and stool. Appropriate provision has been made for physically challenged (handicapped) prisoners.

392. Additional facilities will include:

a. an admissions and discharge unit;

b. administrative offices/staff centre;

c. a visitors complex, where visitors can be screened prior to proceeding to the male or female prison facilities;

d. a visits complex (to facilitate contact, no contact and legal and consular visits);

e. a physical and recreational centre;

f. industries and training facilities;

g. educational services;

h. a chaplaincy centre;

i. rehabilitative and counselling facilities;

j. a hospital, which will include a dental unit, examination room and doctors office;

k. an execution chamber;

l. a solitary confinement unit catering for solitary confinement and suicide watches (this will contain 5 protective cells, 2 of which are to be padded);

m. a works department and stores;

n. the prison farm, a greenhouse and kitchen garden;

o. a laundry/stores;

p. general stores;

q. a kitchen and stores;

r. a shop/canteen;

s. a sewerage plant;

t. a standby generator;

u. water storage facilities;

v. a secure vehicle parking area;

w. an emergency control unit for the entire complex;

x. an armoury;

y. a dog handling unit;

z. disaster/emergency response capability.

aa. security systems – lighting, alarm and response, monitoring (visual and audio) and communications systems; and

bb. internal and external supporting infrastructure (exterior demarcation fencing, signage, bus lay-by, internal and external road network, fire points, sprinkler systems).

a) Remand Centres

393. Regarding the remand centres, the female remand centre is expected to accommodate 25 persons, primarily dormitory style with 5 single cells. The male remand centre is expected to accommodate 450 persons awaiting either trial and/or sentencing or as appellants. Accommodation should be provided as follows:

a. one third single cells;

b. two thirds double and triple occupancy.

394. It is anticipated that this remand centre will comprise two buildings. Each building will be fenced and include its own exercise area so as to ensure the separation of those on remand from the general prison population. Of the two buildings, one will provide for single, double and triple occupancy cells and the other will provide dormitory style accommodation for 50 persons in the lowest category for civil related offences.

b) Female Prison

395. The female prison is expected to accommodate a maximum of 75 inmates in the three main categories. It will comprise:

a. one accommodation block, designed as follows:

- 20 single cells, some of which will be designed as mother and baby units,
- 9 triple occupancy cells, and
- dormitory style cells with 54 beds;

b. a solitary confinement unit;

c. administrative offices; and

d. perimeter security fences

c) Male Prison

396. The male prison is expected to accommodate a maximum of 700 inmates again in the three main categories. It will comprise:

a. seven (7) accommodation blocks (in which no more than 100 persons are to be accommodated in any one block), of which

- one third will be single cell accommodation, and
- two thirds will be double and triple occupancy;

b. maximum security facilities to house 200 inmates (all single cells);

c. an entry building (which also will contain one detention room); and

d. perimeter security fencing.

397. The complex will be constructed either using prefabricated/preformed elements or in the traditional style of building. All buildings must be constructed with concrete roofs and be able to withstand a Category 5 hurricane.

398. During the occupational phase of the contract the services to be provided will include but will not necessarily limited to:

a. the maintenance of all mechanical and electrical plant facilities;

b. the maintenance of the external envelope of the buildings;

c. the maintenance of all external drainage pipe work and structures; and

d. the maintenance and upkeep of car park and external services.

399. As can be surmised from the above, the State is pleased to be able to inform this Honourable Court that the new prison facility will greatly improve the services available to, and living conditions of, prisoners in Barbados

(4) The Prison Rules and Regulations of Barbados

400. Barbados' prison system is administered under a comprehensive set of rules which conform to international standards. The State draws the attention of this Honourable Court to the *Prisons Act*, the *Prisons Rules, 1974*, the *Code of Discipline* of August 7, 2002 and *Orderly Room Procedure* of August 12, 2002.[314] These two statutes, two Directives of the Superintendent of Prisons, and the Affidavits of the Superintendent of Prisons of March 8, 2005,[315] and December 14, 2006,[316] reveal that Barbadian law fully conforms to international standards by, *inter alia*:

a. generally providing for a non-discriminatory system of penal incarceration – the combination of the above statutes, directives, and the practice of prison officials ensures a non-discriminatory penal system;

b. providing a rehabilitative goal for prisons – Rule 3 of the *Prisons Rules, 1974*,[317] provides that:

> **3.** The purposes of training and treatment of convicted prisoners shall be to establish in them the will to lead a good and useful life on discharge, and to fit them to do so.

Rule 76 of the of the *Prisons Rules, 1974*, also provides for Prison Welfare and After-Care Service to assist in the rehabilitation of prisoners, and as described in the Affidavit of the Superintendent of Prisons of March 8, 2005,[318] paragraphs 16-20, a structured rehabilitation process is employed;

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[314] *Prisons Act*, Cap 168 **[Annex, Tab 25]**; *Prisons Rules, 1974* **[Annex, Tab 26]**; *Code of Discipline* of August 7, 2002 **[Annex, Tab 16]**; *Orderly Room Procedure* of August 12, 2002 **[Annex, Tab 24]**

[315] Affidavit of John Nurse, Superintendent of Prisons, of March 8, 2005 **[Annex, Tab 171]**

[316] Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006 **[Annex, Tab 172]**

[317] *Prisons Rules, 1974* **[Annex, Tab 26]**

[318] Affidavit of John Nurse, Superintendent of Prisons, of March 8, 2005, paras 16-20 **[Annex, Tab 171]**

c. providing for properly trained prison officers – staff are required to pass a recruit course before being engaged as prison officers and must undergo both Public Service and Prison Service training, including annual proficiency tests. The Superintendent of Prisons was specially selected for his administrative capacity and competence. All prison officers are civilian public servants and are employed by, and are subject to the rules of, the prison service;[319]

d. providing for the proper reception, classification and registration of prisoners – specific provisions govern the reception of prisoners, and include rules regarding the time of admission, the provision of a committal form, searches, retention of prisoner property, medical examinations, bathing, and recording of particulars: Rules 13-21 of the *Prisons Rules, 1974*.[320] Prisoners are interviewed by the Officer-in-Charge upon arrival in the prison regarding work and training arrangements and are classified with respect to their age, character and previous history: Rules 4-5 of the *Prisons Rules, 1974*. The details of prisoners, including name, age, height, weight, particular marks and such other measurements and particulars as may be required in regard to a prisoner, are recorded in an official registry: Rule 19 of the *Prisons Rules, 1974*. The prisoner's religion, the nature of the offence, the length of sentence and a possible early release date is also recorded in the register, which is kept both manually and electronically. In addition a personal file is kept on each inmate that contains information on educational background and medical conditions. Special provision is also made for women prisoners with babies during the normal period of lactation (or longer if recommended by the medical officer), in Rule 21 of the *Prisons Rules, 1974*;

e. providing for separation and treatment of particular classes of prisoners, including those sentenced to death – Part III of the *Prisons Rules, 1974*, provides for separation of, and special treatment of, untried prisoners, appellant prisoners, young prisoners (those under the age of 21), civil prisoners and prisoners under the sentence of death. These provisions respect the special circumstances of such prisoners and, for the first four categories of prisoners, ameliorate prison conditions as suitable. Classes and categories of prisoners are separated by being placed in different buildings or wings of buildings. Separation of prisoners is enforced

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[319] *Cf* Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006, paras 1-5 **[Annex, Tab 172]**, Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006, paras 1-5 **[Annex, Tab 173]**

[320] *Prisons Rules, 1974* **[Annex, Tab 26]**

during recreation and ablution times.[321] Prisoners on remand are kept separate from convicted inmates. Regarding prisoners sentenced to death, special precautions are taken to prevent any harm or injury to such persons, and they are kept under supervision of prison officers at all times. Prisoners sentenced to death are kept in separate cells apart from other prisoners, and are given special visitation privileges for friends, relatives, legal advisers and the Chaplain.[322] Diet and exercise for persons sentenced to death are directed by the Officer-in-Charge and the medical officer;

f. providing for separation of prisoners by sex – section 37 of the *Prisons Act* requires separation of male and female prisoners. Rule 12 of the *Prisons Rules, 1974* also ensures that premises allocated to female prisoners are kept separate, including by the use of different locks than used in the sections of the prison occupied by male prisoners. See also Rules 36-37 of the *Prisons Rules, 1974*. In a related manner, Section 33 of the *Prisons Act* provisions for care and superintendence of women prisoners by women prison officers;[323]

g. providing information to prisoners – as set out in Rule 22 of the *Prisons Rules, 1974*, prisoners are to be provided with information related to the rules governing their treatment while in detention as well as regarding other matters such as privileges and mechanisms for submitting petitions;

h. generally ensuring proper prison conditions – section 36(1) of the *Prisons Act* requires the Minister to satisfy himself from time to time that sufficient accommodation is provided for all prisoners in every prison. Section 36(1) of the *Prisons Act* requires the Officer-in-Charge and medical officer to certify that the size, lighting, ventilation and fittings of any cell to be used for the confinement of a prisoner be adequate for health and that it allows the prisoner to communicate at any time with a prison officer;

i. providing proper prison accommodation – as specified in Rule 9(1) of the *Prisons Rules, 1974*, where sleeping accommodation is in separate cells, subject to Rule 9(2), only one prisoner may occupy a cell. Rule 9(2) provides that if necessary for special reasons and when authorised by the medical officer, more than one, but not more than three prisoners may

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[321] See also the Affidavit of John Nurse, Superintendent of Prisons, of March 8, 2005, paras 3 and 7 **[Annex, Tab 171]**

[322] See the Affidavit of John Nurse, *ibid*., paras 10, 22 and 23 **[Annex, Tab 171]**

[323] See also the Affidavit of John Nurse, *ibid*., paras 3 and 7 **[Annex, Tab 171]**

sleep in a cell. In Her Majesty's Prison Glendairy no more than three persons (either convicted or remand) was held in a cell at any point in time. Maximum security prisoners, such as the Petitioners, have been kept in single cells. Rule 10 ensures that prisoners are provided with separate beds and separate and sufficient bedding. Rule 11 requires every cell to be provided adequate lighting so as to permit reading or work up to a reasonable hour. The cells of prisoners subject to the death penalty are lit by natural light through both the windows and doors, as well as benefit from additional fluorescent lighting, both in the cells and through lights in the corridors. In practice, prison officials accommodate inmate requests for either a dimmer or brighter light bulb if the inmate has eye problems. Lights are turned off for sleeping. A normal cell size in Her Majesty's Prison Glendairy (which may house up to three prisoners), was approximately 20 feet in length and 5 and ½ feet wide, with a ceiling height of nearly 10 and ½ feet. Maximum security cells in Her Majesty's Prison Glendairy, such as those used for prisoners sentenced to death are approximately 10 and ½ feet long, 5 feet wide, and a little over 10 feet high. Maximum security cells are used to house one person only and are ventilated naturally;[324]

j. ensuring the physical welfare of prisoners – the *Prisons Rules, 1974*, include a number of provisions related to ensuring the physical welfare of prisoners, including those regarding

- hygiene – Rules 87-98 ensure appropriate hygiene. Rule 87 provides:

> **87.** Arrangements shall be made for every prisoner to wash with soap daily at all proper times and for male prisoners (unless excused or prohibited on medical or other grounds) to shave regularly and to have their hair cut as required. The hair of a male prisoner may be cut as short as is necessary for good appearance but save as provided by section 76 of the Offences against the Person Act, the hair of a female prisoner shall not be cut without her consent except by direction of the medical officer in his journal, for the eradication of vermin, dirt or disease.

In Her Majesty's Prison Glendairy, cells of female prisoners had sinks and toilets. Male prisoners were required to use chamber pots, which were emptied twice daily, in the mornings and

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[324] See the Affidavit of John Nurse, *ibid*, paras 9, 10, 11 and 12 **[Annex, Tab 171]**

afternoons.[325] As maximum security prisoners the four Petitioners also have been required to use chamber pots at the St. Ann's Temporary Prison and Harrison's Point Temporary Prison.[326] However all prisoners had access to showers and toilets in the main bathrooms and these could be used as required during the day. Female prisoners also had access to a laundry machine. Male prisoners cleaned their laundry when they took their showers or during recreation time,[327]

- exercise – Rule 90 provides for one hour of daily exercise in open air, weather permitting, unless the Officer-in-Charge in special circumstances reduces the daily period to half an hour. In practice, the number of hours of exercise ranges from one to four hours daily, depending upon the category of prisoner. Those in maximum security, including those under a sentence of death, are allowed between one to three hours of exercise daily and have been provided with at least one hour of exercise per day. Due to their larger numbers, minimum security prisoners usually get between one to two hours of exercise daily,[328]

- food – Rules 91-93 ensure that prisoners are provided with food of appropriate nutritional value. In this regard Rule 91 provides:

> **91.** The food provided for prisoners shall be of a nutritional value adequate for health and strength and of wholesome quality, well prepared and served, and reasonably varied in accordance with the dietary scales provided by the Minister. Such scales may be revised from time to time as the Minister directs.

In practice prisoners are fed three times a day: breakfast, lunch and a snack at five o'clock, just before the prison is shut down for the night. The nutritional value of prison food is checked periodically by staff from the Queen Elizabeth Hospital and a

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[325] This twice daily emptying of slop buckets is confirmed in the Affidavits of Lennox Boyce, Jeffrey Joseph, Frederick Atkins and Michael Huggins of August 17, 2004 (in Appendix 16 of the original petition).

[326] Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006 [**Annex, Tab 172**], para. 21

[327] See the Affidavit of John Nurse, Superintendent of Prisons, of March 8, 2005, para. 11 [**Annex, Tab 171**].

[328] See the Affidavit of John Nurse, *ibid*., para. 14 [**Annex, Tab 171**]

dietician is employed on the prison staff (although not in this capacity), who is able to provide further advice. Prisoners can be subjected to restricted diets under Rules 49 and 50 of the *Prisons Rules, 1974*, and as described in the Schedule to the *Rules*. Such diets, however, are strictly time-limited in order to ensure that the health of the prisoner is not affected. At no time have the petitioners been denied food. The prison policy is to provide food in every case, even if the prisoner is on a hunger strike, and to let it be refused,[329]

- clothing – Rules 94-96 ensure that each prisoner is provided with clothing adequate for warmth and health, and

- weight – Rule 97 requires prisoners to be weighed upon reception and once monthly thereafter;

k. providing for proper medical care of prisoners – sections 10 and 16 of the *Prisons Act* specify that each prison shall have a medical officer who shall visit the prisons daily to care for prisoners, as well as shall inspect the whole prison at least once a month for sanitary conditions. Specific provision is made in sections 42(3) and 45 of the *Prisons Act* for the removal of prisoners to a hospital or other suitable place for treatment, when necessary. Rule 86 of the *Prisons Rules, 1974*, requires an infirmary in the prison where the care and reception of sick prisoners is to be provided, as well as specifies the duties of the medical health officer. In practice there are two doctors and one dentist contracted to provide services to the prisons. If there is a need to visit an eye doctor the prisoner is sent off site, escorted by prison officers. Special counselling services are provided in certain areas, such as to deal with HIV and AIDS infected prisoners, and to deal with substance abuse problems. Prisoners attend these programmes and then are provided with follow-up counselling, both pre- and post-release. The drug treatment programme is run by the National Council on Substance Abuse and each course lasts from four to six weeks. Weekly visits are also made by staff of the psychiatric hospital. If a prisoner is classified as insane by a properly qualified medical officer, then provision will be made for his or her removal to the psychiatric hospital. Following successful treatment the prisoner will be returned to prison. In an emergency situation a prisoner is taken to the Queen Elizabeth Hospital or to a polyclinic, under the escort of prison officers. Prisoners are given physicals on entry into prison and just before release;[330]

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[329] See the Affidavit of John Nurse, *ibid.*, para. 13 **[Annex, Tab 171]**

[330] See the Affidavit of John Nurse, *ibid*, paras 15 and 16 **[Annex, Tab 171]**

l. providing for proper satisfaction of religious requirements of prisoners – sections 14 and 15 of the *Prisons Act* make provision for the appointment of a prison chaplain if the number of prisons belonging to a particular denomination merits it. Furthermore, prisons of different denominations are allowed visits by chaplains of their choice, and all chaplains are given lists of prisoners of their denomination. Rules 67-72 of the *Prisons Rules, 1974*, further provide for the satisfaction of religious needs of prisoners;

m. providing letter writing and visiting facilities – Rules 77-85 of the *Prisons Rules, 1974*, ensure that prisoners are provided with proper letter writing facilities, as well as set out visiting privileges (including special visits). Special visits with lawyers or police officers are treated confidentially, meaning that they are held in the sight of, but out of the hearing of, prison officials: Rule 84. Special visits requests are usually granted by prison officials;

n. providing for the education of prisoners and their use of libraries – Rules 73-75 provide for educational facilities for prisoners as well as allow access to, and borrowing privileges from, the prison library. Suitable books or periodicals from outside the prison are also permitted. While Her Majesty's Prison Glendairy existed, remedial classes were offered during the day for the Caribbean Examinations Council (CXC) certificates, which is the equivalent of GCE 'O' level examination;[331]

o. providing work for prisoners, with remuneration – Rules 64-66 of the *Prisons Rules, 1974*, provides that from the beginning of his sentence every prisoner is to be employed, subject to medical fitness, on useful work. In practice prisoners earn income from work or from the sale of arts and crafts items;[332]

p. providing for proper disciplinary rules and procedures for Prison Officers – staff disciplinary matters are governed by the *Prisons Act*[333] (see in particular sections 22-24), the *Prisons Rules, 1974*[334] (see in particular

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[331] See the Affidavit of John Nurse, *ibid*., para. 19 **[Annex, Tab 171]**.

[332] See the Affidavit of John Nurse, *ibid*, para. 18 **[Annex, Tab 171]**

[333] *Prisons Act*, Cap. 168 **[Annex, Tab 25]**.

[334] *Prisons Rules, 1974* **[Annex, Tab 26]**.

Part IV), the *Code of Discipline* of August 7, 2002[335] and *Orderly Room Procedure* of August 12, 2002;[336]

q. ensuring fair discipline of prisoners – Rules 43-53 of the *Prisons Rules, 1974*, set out the offences against discipline that may be committed by prisoners and mandate hearings before the Visiting Justice or the Officer-in-Charge before punishments or privations can be awarded against him. In these hearings the prisoner has the right to hear the charges against him and to make his defence. Discipline involving cellular confinement, corporal punishment or restriction of diet is limited and cannot be awarded unless the medical officer has certified that the prisoner is in a fit condition of health to sustain it: Rule 46. All punishments for serious offences are determined by the Visiting Justice: Rule 50;

r. restricting the level of, and use of, force against prisoners – Rule 33 of the *Prisons Rules, 1974* sets out the principles related to disciplining prisoners, which encourage self-respect and personal responsibility on the part of prisoners, and provides that "discipline and order shall be maintained with firmness, but with no more restriction than is required for safe custody and well-ordered community life." In relation to use of force, section 20 of the *Prisons Act* strictly limits the use of physical force by prison officers against prisoners and, in the case of use of force, requires the officer to ensure that the prisoner is examined by the medical officer. The prison officer is also required to immediately report the incident to the Officer-in-Charge. Rule 38 of the *Prisons Rules, 1974* further specifies that a prison officer may not use force unnecessarily, and if force is used, it must be limited to no more force than is necessary. Rule 39 also provides that prisoners are not to be employed in any disciplinary capacity;

s. limiting use of isolation – prisoners are only kept in special isolation cells, for very limited periods, in order to allow them to calm down after having been involved in an altercation. The room used is devoid of furnishings and the maximum length of time a prisoner may be kept in such confinement is three hours. None of the petitioners has been kept in isolation;[337]

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[335] *Code of Discipline* of August 7, 2002 **[Annex, Tab 16]**.

[336] *Orderly Room Procedure* of August 12, 2002 **[Annex, Tab 24]**.

[337] See the Affidavit of John Nurse, Superintendent of Prisons, of March 8, 2005, para. 21 **[Annex, Tab 171]**

t. ensuring the propriety of all prison conditions through a special Visiting [Supervisory] Committee – Part V of the *Prisons Rules, 1974*, establishes a Visiting Committee which is to consist of not more than five members, of which at least one is to be a Magistrate. This Visiting Committee is required to visit the prisons frequently (not less than once in three months) and to inspect the prison facilities and to investigate allegations of abuses, unsatisfactory conditions, and other complaints. Members of the Visiting Committee are provided with free access to all parts of the prisons and to all prisoners, either in their cells or in a room out of sight and hearing of prison officers, if desired. The Visiting Committee reports directly to the Governor-General, to whom it provides advice and suggestions.

401. Furthermore, the conditions of prisons in Barbados, the welfare of the prisoners and the conducts and standards of discipline of prison officers are subject to scrutiny by the Advisory Board described in Sections 8-8A of the *Prisons Act*.[338] The Board advises both the Minister and the Superintendent of Prisons, and must include a magistrate in its membership. This magistrate is *ex officio* the Visiting Justice of Prisons: *Prisons Act*, Section 9. The Advisory Board, it is submitted, provides a neutral third party to review prison conditions.

402. Regarding specific allegations that were raised in the Petition of September 3, 2004, and in the Application of August 18, 2006, the State does not contest the claims of the Petitioners that, in the prior arrangement at Her Majesty's Prison Glendairy, in-cell toilet facilities were not available to male prisoners, who instead were required to use slop buckets. These arrangements were also necessitated at the St. Ann's Fort Temporary Prison and Harrison's Point Temporary Prison.[339] Nevertheless these buckets were filled with a chemical compound which eliminates odours and bacteria and were emptied a minimum of twice a day.[340] Flush toilets and baths also are available to maximum security prisoners in the Harrison's Point Temporary Prison.[341]

403. The State notes that this arrangement was necessitated by the building structure of Her Majesty's Prison Glendairy, a colonial-era building which the State inherited from the UK following independence. The buildings at Her Majesty's Prison Glendairy were constructed of rubble filled walls to which pipes and

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[338] *Prisons Act*, Cap. 168 **[Annex, Tab 25]**.

[339] Affidavit of John Nurse, Superintendent of Prisons, of December 14, 2006 **[Annex, Tab 172]**, paras 21 and 26.

[340] Affidavit of John Nurse, *ibid*, para. 22 **[Annex, Tab 172]**

[341] Affidavit of John Nurse, *ibid*, para. 25 **[Annex, Tab 172]**

toilets could not be properly bolted or affixed in the manner required for high security prisons without undermining the structural integrity of the building.[342] Engineers determined that modern plumbing simply could not be installed without weakening the building structure.[343]

404. In the temporary facilities at St. Ann's Fort to the Harrison's Point Temporary Prison it was also necessary to use slop buckets for cells containing maximum security prisoners, such as the four Petitioners. The State was urgently required to construct the Harrison's Point Temporary Prison facility after Her Majesty's Prison Glendairy, the only major prison facility of the State, was destroyed by fire. The exceptional urgency of the situation prevented the State from outfitting Harrison's Point Temporary Prison with the kinds of facilities that might be possible in other circumstances. In this regard it should be noted that prisons must be constructed to very specific standards which do not allow for the installation of normal plumbing facilities. Rather, as this Honourable Court will be aware, in order to fulfil safety requirements all items placed in a prison room must be firmly affixed to the building structure in order to ensure that they cannot be moved, damaged, or used in a manner to harm prisoners or prison guards.

405. Although the State admits that slop bucket arrangements are not optimal, it does not concede that they violate any rule of international law concerning treatment of prisoners. In particular, the State does not concede that the use of slop buckets violates Rule 12 of the UN Standard Minimum Rules for the Treatment of Prisoners.[344] This rule provides that "sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner." Slop buckets containing odour-removing and disinfecting chemicals used in conjunction with normal toilet facilities allow a prisoner to comply with the needs of nature in a clean and decent manner. These buckets were emptied twice a day, and more frequently if required. In this regard, prison officers complied with reasonable requests to empty these buckets during sleeping hours and during normal daylight periods prisoners were able to access toilets outside of their cells.

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[342] Affidavit of John Nurse, *ibid*, paras 23-24 [**Annex, Tab 172**]

[343] Affidavit of John Nurse, *ibid*, paras 23-24 [**Annex, Tab 172**]

[344] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955, and approved by the Economic and Social Council in Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, as available through http://www.ohchr.org/english/law/treatmentprisoners.htm (accessed 10 December 2006) [**Annex, Tab 141**]

406. The State again wishes to highlight, however, that the new prison that is being built will contain flush toilets in every cell (except for the one to two purpose-built isolation cells used to temporarily hold prisoners). Thus, although the State firmly denies that its sanitary installations violate international law, it recognises that improvement can be made in this area, and is in fact doing so.

(5) Barbados' Prison Conditions Do Not Violate International Legal or Inter-American Standards

407. The above conditions experienced by the four Petitioners do not violate the rules of either general international law or the specific human rights regime of the Inter-American system.

a) Standard Minimum Rules are Political or Moral Recommendations, Not Binding

408. The international standards contained the United Nations' Standard Minimum Rules for the Treatment of Prisoners,[345] which are said to be applicable to prisoners in paragraph 82 of the Petition of September 3, 2004, and which are suggested to be "benchmarks" by the Commission in paragraph 116 of the Application to this Honourable Court, are not binding. Moreover, they may be implemented gradually, in accordance with the State's level of economic development.

409. The Standard Minimum Rules for the Treatment of Prisoners are not contained in a treaty or other binding international legal document; rather, they are set out in a resolution by the Economic and Social Council.[346] They reflect aspirations rather than binding norms. As noted by Nigel S. Rodley, in his work *The Treatment of Prisoners Under International Law*, at page 303,[347] "[t]he Standard Minimum Rules for the Treatment of Prisoners (SMR), an instrument which is not *per se* legally binding, is the main repository of international aspirations in this field...." The same author points out, in *ibid.*, at page 280, that the Standard Minimum Rules set out no more than moral or political recommendations for states:

> The SMR [Standard Minimum Rules for Treatment of Prisoners] is not *per se* a legal instrument, since Ecosoc has no power to

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[345] Standard Minimum Rules for the Treatment of Prisoners, *ibid.*

[346] Standard Minimum Rules for the Treatment of Prisoners, *ibid*

[347] Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, 2nd ed (1999), at p 303 **[Annex, Tab 104]**.

> legislate. Even when the General Assembly urges the implementation of the SMR, it does not do so in such a way as to suggest that its pertinent resolutions are anything more than political or moral recommendations. This is hardly surprising: rule 2, referring to 'the great variety of legal, social, economic and geographical conditions of the world', admits that 'not all of the rules are capable of application in all places and at all times'. It is no detraction from the political importance of the SMR to acknowledge their lack of inherent legal status, since they constitute an important platform for the activities worldwide of prison reformers.[348]

410. Subsequent General Assembly resolutions and resolutions of the Economic and Social Council have not affected the non-binding status of these Standard Minimum Rules. This is recognised in the subsequent Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners,[349] in which it is noted in the Commentary to Procedure 1 that

> The General Assembly, in its resolution 2858 (XXVI) of 20 December 1971, invited the attention of Member States to the Standard Minimum Rules and recommended that they should be effectively implemented in the administration of penal and correctional institutions and that favourable consideration should be given to their incorporation in national legislation. Some States may have standards that are more advanced than the Rules, and the adoption of the Rules, is therefore not requested on the part of such States. Where States feel that the Rules need to be harmonized with their legal system and adapted to their culture, the emphasis is placed on the substance rather than the letter of the Rules.[350]

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[348] Citations omitted

[349] Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, Economic and Social Council Resolution 1984/47, Doc. E/RES/1984/47 (May 25, 1984), as available through http://documents.un.org/mother.asp (accessed 10 December 2006) **[Annex, Tab 134]** These Procedures also are not binding, as seen paragraph 2 of the ECOSOC Resolution which adopts them, which merely "2. Invites Member States to take the procedures annexed hereto into consideration in the process of implementing the Rules and in their periodic reports to the United Nations"

[350] Emphasis added. See also Principle 4 of the Basic Principles for the Treatment of Prisoners, adopted by the General Assembly in its resolution 45/111 of 14 December 1990, as available through http://www.ohchr.org/english/law/basicprinciples.htm (accessed 10 December 2006) **[Annex, Tab 127]**, which provides:

> 4. The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society. [Emphasis added].

411. In sum, the Standard Minimum Rules are not binding. They represent at most moral or political suggestions on the part of the United Nations.

b) Standard Minimum Rules Only as Appropriate in the State's Socioeconomic Context

412. Further, the prison standards of any country must be appreciated in the context of its overall development and system of values. In the "Introduction" to the Report by the Secretariat on the Standard Minimum Rules for the Treatment of Prisoners to the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders,[351] specific emphasis is given to the need to apply the Minimum Standards flexibly, in their regional contexts. Rather than classifying the Minimum Rules into several groups – universal, technical, and regional/local – the Secretariat recommended flexible drafting which could take into account these diverse characteristics. The Secretariat thus reports in paragraphs 15-16:

> 15. On the contrary, the Minimum Rules can be adapted to given national or regional conditions if, in accordance with the Preliminary Observations of the draft, they are rendered sufficiently flexible; the proper application of such flexible rules will make it superfluous to draft intermediate rules coordinating the minimum rules of universal application and those rules which are applicable regionally or locally.
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> 16. With these considerations in mind, the Secretariat has in each case endeavoured to draft a flexible provision allowing for regional characteristics in so far as they are accounted for by *de facto* conditions of climate, the general standard of living, etc. (hygiene, number of meals daily, etc.).[352]

413. This need to *contextualise* prison conditions is stated expressly in the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New Economic Order,[353] as follows:

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[351] Report by the Secretariat on the Standard Minimum Rules for the Treatment of Prisoners to the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Doc. A/CONF.6/C.1/L.1 (14 February 1955) **[Annex, Tab 102]**

[352] Emphasis added.

[353] Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New Economic Order, adopted by the Seventh Crime Congress, Milan, 26 August-6 September 1985, and endorsed by the General Assembly in Resolution 40/32, as available at http://www.uncjin.org/Standards/Rules/r06/r06.html (accessed June 20, 2005) **[Annex, Tab 131]**

> Crime prevention strategies should be formulated in relation to the socioeconomic context, the society's developmental stage and its traditions and customs.[354]

414. As a result, because the UN Standard Minimum Rules for the Treatment of Prisoners are guidelines rather than firm rules they are flexible enough to embrace the different customs and traditions of states across the globe. They also provide guidance for States regarding how to improve their prison conditions as economic circumstances permit. But they are neither binding nor absolute, and instead are contextually sensitive and may be implemented in accordance with the State's socioeconomic conditions.

415. This is not to say that all prison standards are context sensitive. The State fully accepts that certain standards for prison conditions must be upheld and that all persons deprived of their liberty must be treated with respect for their dignity. As articulated by this Honourable Court in the *Case of Neira-Alegría et al v Perú*,[355] at paragraph 60:

> 60. In the terms of Article 5(2) of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.

416. Barbados submits that its prison system fully respects the rights of those imprisoned to live in conditions of detention compatible with their personal dignity, in conformity with the State's obligations under the Inter-American system of human rights.

417. In addition, the State upholds the standards of the UN Standard Minimum Rules for the Treatment of Prisoners to the maximum extent permitted by its level of economic development. It is submitted that the above-noted provisions of Barbadian law, combined with the State's prison administrative and disciplinary procedures, amply satisfy the requirements of the vast majority of the UN Standard Minimum Rules for the Treatment of Prisoners. As a result the State specifically denies that its prison conditions violate any of the rules of the UN Standard Minimum Rules for the Treatment of Prisoners alleged by the Commission in paragraph 116 of the Application of August 18, 2006, namely, Rule 10 (accommodation to meet requirements of health and lighting), Rule 11

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[354] Emphasis added

[355] *Case of Neira-Alegría et al v Perú*, Judgement of January 19, 1995, I/A Court H.R., Series C No 20 **[Annex, Tab 47]**

(lighting), Rule 12 (sanitary installations), Rule 15 (personal hygiene), and Rule 21 (one hour of outdoor exercise, weather permitting).

418. Further, although Barbados notes that the following criticisms have not been endorsed by the Commission, and therefore for the sake of completeness only, the State specifically denies that its prison system and the conditions experienced by the Petitioners violate any of the additional rules of the UN Standard Minimum Rules for the Treatment of Prisoners alleged by the Petitioners in paragraph 94 of their Petition of September 3, 2004, namely, Rule 13 (bathing facilities), Rule 19 (separate bed with clean bedding), Rule 20 (food and water), Rule 22 (medical services), Rule 24 (medical examination upon entry), Rule 25 (medical officer to see daily sick prisoners and to report to director), Rule 26 (medical officer to carry out inspections of food, hygiene and cleanliness, sanitation, bedding, rules regarding sports, etc., and advise director), Rule 35 (prisoners provided with written information about regulations upon admission), Rule 36 (requests or complaints to Director possible every week day, promptly dealt with), Rule 57 (prohibition against aggravating effects of cutting prisoner off from outside world), Rule 71 (work), Rule 72 (work conditions to approximate those of outside world, institution to focus upon vocational training rather than financial profits), and Rule 77 (provision for further education including religious instruction, similar to that normally provided in Barbados).

419. In sum, the UN Standard Minimum Rules for the Treatment of Prisoners are not binding. They are guidelines to be implemented as permitted by the economic and other circumstances of the state. Within the limitations imposed by its circumstances, Barbados fully respects all of the UN Standard Minimum Rules for the Treatment of Prisoners in administering and implementing its prison system.

(6) <u>The Examples Used In the Application of the Commission are not Comparable with the Situation in Barbados</u>

420. Further, the State emphatically denies that the conditions of detention and other human rights violations referred to in the cases listed in the Application of the Commission of August 18, 2006, can be compared to the conditions existing in the Barbadian penal system. Nor can the conditions set out in cases referred to in the Petition of September 3, 2004. Each of the cases referred to in these documents was determined on its particular facts, involved extreme conditions of imprisonment (often involving torture or death) in no way analogous to the conditions experienced by the four Petitioners, and did not establish general principles of law that could be applicable to the present case. In fact Barbados submits that these cases will be of little or no assistance to this Honourable Court and the State is surprised that they have been relied upon in written pleadings. Consequently, and in order to save time for this Honourable Court, the State will respond to these cases in brief. Should the representatives of the Petitioners or

the Commission wish to argue these cases in full before the Court, the State will illustrate their irrelevance in detail.

421. Very briefly, the State rejects outright the relevance of cases such as *Ambrosini v. Uruguay*, *Carballa v. Uruguay*, *De Voituret v Uruguay*, *Wight v Madagascar* and *Pinto v. Trinidad and Tobago*, all referred to in paragraph 90 of the Petition of September 3, 2004, since none of the Petitioners has been held in solitary confinement (isolation cells) for any period, let alone the periods of three months suggested in the examples. Nor have the Petitioners been denied adequate medical treatment, kept in *incommunicado* detention, or been chained to bedsprings on the floor with minimal clothing and severe rationing of food. The Petitioners themselves have expressly conceded that they have not been subject to any form of *incommunicado* detention in paragraph 85 of their Petition of September 3, 1004. The State also rejects outright the relevance of cases such as *Cyprus v Turkey* and the *Greek Case*, as referred to in paragraph 93 of the Petition of September 3, 2004, since the Petitioners were never deprived of food or water for periods of days at a time (nor does the state concede that they were ever denied food or water), nor were they tortured using *falanga* techniques, nor were they kept in severe conditions of overcrowding, nor did they have to sleep on floors outside of their cells, nor were they kept in facilities described by the International Committee of the Red Cross as "totally unfit to live in, even for a short period ... [a] veritable pit, it is covered with an almost opaque glass roof and has no ventilation," nor were they kept in 'strict solitary confinement' for periods of several days without food or access to elementary sanitary facilities, nor were they denied medical treatment.[356] These cases involve extreme factual circumstances in no way analogous to the conditions experienced by the Petitioners.

422. Further, *Miguel Angel Estrella v. Uruguay*, as discussed in paragraph 91 of the Petition of September 3, 2004, is equally unhelpful to the Petitioners, unless it is used to support the self-evident proposition that systematic inhuman treatment can violate one's right not to be subject to cruel and inhuman treatment. If the case of *Miguel Angel Estrella v. Uruguay* is used for another purpose, namely, to demonstrate cruel and inhuman treatment supposedly analogous to the treatment experienced by the four Petitioners, the case is entirely distinguishable and provides no support to the Petitioners.[357] In the case of *Miguel Angel Estrella v. Uruguay* the Human Rights Committee determined that Mr. Estrella had been, *inter alia*, "subjected to severe physical and psychological torture, including the

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[356] See, e.g., the summary of the *Greek Case* in Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, 2nd ed. (1999) [Annex, Tab 104], at pp. 281-285.

[357] *Miguel Angel Estrella v Uruguay*, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 (1990), as available at http://www1.umn.edu/humanrts/undocs/newscans/74-1980.html (accessed 13 December 2006) **[Annex, Tab 71]**

threat that the author's hands would be cut off by an electric saw, in an effort to force him to admit subversive activities. This ill-treatment had lasting effects, particularly to his arms and hands."[358] He was also denied medical attention despite serious medical problems, and was kept for "10 days in solitary confinement in a cell which was a kind of cage in a section known as 'La Isla'."[359] He was also subjected to "30 days in solitary confinement in a punishment cell and seven months without mail or recreation and subjected to harassment and searches. His correspondence was subjected to severe censorship (see paragraph 1.13 above)."[360] These conditions and this treatment are in no way similar to the conditions experienced by the four Petitioners in the present case. Thus it is submitted that the case of *Estrella v. Uruguay*, as with the others mentioned above, can be of no assistance to this Honourable Court.

423. To provide a further example of the kind of extreme factual matrix found in the cases referred to by the Petitioners and the Commission in their respective pleadings, the State briefly draws the attention of this Honourable Court to the UN Human Rights Committee case of *Mukong v. Cameroon*,[361] a case in no way analogous to the circumstances identified in the Petition. In this case the applicant Mr. Mukong was deprived of food and water for several days, tortured and threatened with torture and death, deprived of his clothing, forced to sleep on concrete floors, locked for 24 hours in a cell in 40 degree temperatures, and denied access to family and lawyers. These kinds of extreme deprivations and acts of torture, cruel and inhuman treatment are set out clearly in paragraphs 2.2-2.5:

> 2.2 On 16 June 1988, the author was arrested, after an interview given to a correspondent of the British Broadcasting Corporation (BBC), in which he had criticized both the President of Cameroon and the Government. He claims that in detention, he was not only interrogated about this interview but also subjected to cruel and inhuman treatment. He indicates that from 18 June to 12 July, he was continuously held in a cell, at the First Police District of Yaoundé, measuring approximately 25 square metres, together with 25 to 30 other detainees. The cell did not have sanitary facilities. As the authorities refused to feed him initially, the author

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[358] *Miguel Angel Estrella v. Uruguay, ibid*, para. 8.3

[359] *Miguel Angel Estrella v. Uruguay, ibid*, para. 8.4

[360] *Miguel Angel Estrella v. Uruguay, ibid*, para. 8.5

[361] *Mukong v Cameroon*, Communication No. 458/1991, CCPR/C/51/D/458/1991 (10 August 1994), as available through http://www.unhchr.ch/tbs/doc.nsf (accessed 10 December 2006) **[Annex, Tab 72]**. This case is relied upon by the Petitioners in paragraph 82 of the Petition of September 3, 2004.

was without food for several days, until his friends and family managed to locate him.

2.3 From 13 July to 10 August 1988, Mr. Mukong was detained in a cell at the headquarters of the Police Judiciaire in Yaoundé, together with common criminals. He claims that he was not allowed to keep his clothes, and that he was forced to sleep on a concrete floor. Within two weeks of detention under these conditions, he fell ill with a chest infection (bronchitis). Thereafter, he was allowed to wear his clothes and to use old cartons as a sleeping mat.

2.4 On 5 May 1989, the author was released, but on 26 February 1990, he was again arrested, following a meeting on 23 January 1990 during which several people, including the author, had (publicly) discussed ways and means of introducing multi-party democracy in Cameroon.

2.5 Between 26 February and 23 March 1990, Mr. Mukong was detained at the Mbope Camp of the Brigade mobile mixte in Douala, where he allegedly was not allowed to see either his lawyer, his wife or his friends. He claims that he was subjected to intimidation and mental torture, in that he was threatened that he would be taken to the torture chamber or shot, should any unrest among the population develop. He took these threats seriously, as two of his opposition colleagues, who were detained with him, had in fact been tortured. On one day, he allegedly was locked in his cell for twenty-four hours, suffering from the heat (temperatures above 40°C). On another day, he allegedly was beaten by a prison warder when he refused to eat.

424. Further, as noted by the Human Rights Committee in paragraph 9.4, Mr. Mukong had been specifically *singled out* for exceptionally harsh and degrading treatment.[362] Nowhere in the Petition, Application or Written Submission of the Alleged Victims is there disclosed any comparable allegations of torture or cruelty or discriminatory treatment. This case was determined by its particular facts and is irrelevant to the case at hand.

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[362] In *Mukong, ibid.*, in para. 9.4 the Human Rights Committee states:

9.4 The Committee further notes that quite apart from the general conditions of detention, the author has been singled out for exceptionally harsh and degrading treatment. Thus, he was kept detained incommunicado, was threatened with torture and death and intimidated, deprived of food, and kept locked in his cell for several days on end without the possibility of recreation. In this context, the Committee recalls its general comment 20 (44) which recommends that States parties should make provision against incommunicado detention and notes that total isolation of a detained or imprisoned person may amount to acts prohibited by article 7. d/ In view of the above, the Committee finds that Mr. Mukong has been subjected to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant. [Citations omitted.]

425. Further, the only minimum standards governing conditions of detention suggested by the Human Rights Committee in paragraph 9.3 of the *Mukong* case (regarding prison room size, sanitary facilities and the provision of nutritional food) are not relevant to the present application.[363] Before turning to the standards as suggested in *Mukong*, however, Barbados expressly denies that they are mandatory under international law regardless of the level of socioeconomic development of the state. This position has already been fully elaborated above. But the State also notes here that the passage from the Human Rights Committee's General Comment No. 9 (dealing with Article 10(1) of the *Covenant*), which is quoted in paragraph 89 of the Petition of September 3, 2004, *supports Barbados' position* that prison conditions can lawfully vary depending upon the material resources available to the State. The relevant portion of paragraph 1 of General Comment No. 9 states:

> The humane treatment and the 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 that 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).[364]

426. This passage shows that humane treatment and respect for the dignity of persons can depend to some extent on material resources but that in all cases conditions of detention must be applied without discrimination. Unlike in the case of *Mukong*, there has been no allegation of discrimination against the State in this regard and so the reference to this passage by the Petitioners does not assist them.

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[363] The Human Rights Committee in *Mukong*, *ibid.*, at para 9.3, states:

> 9.3 As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with rules 10, 12, 17, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoners, c/ minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult. It transpires from the file that these requirements were not met during the author's detention in the summer of 1988 and in February/March 1990.

[364] Human Rights Committee, General Comment No. 09: Humane treatment of persons deprived of liberty (Art. 10): 30/07/82, Sixteenth session, 1982, as available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a4f543b9dadd08a7c12563ed00487ed8?Opendocument (accessed December 13, 2006), para. 1 (emphasis added) **[Annex, Tab 132]**

427. In the alternative, even if the standards indicated in the *Mukong* case were mandatory regardless of level of socioeconomic development, the State submits that it already satisfies those standards regarding prison room size, sanitary facilities and the provision of nutritional food. There are no allegations that the Petitioners have been required to wear degrading or humiliating clothing or that they have not been provided with separate beds.

428. To provide another example, the case of *Soering v. United Kingdom*[365] is of no assistance to the Petitioners because it is based on its own particular facts, involves complicated extradition questions not raised in the present proceedings, and was decided within the context of the European system of human rights (a system inapplicable to Barbados, and which by then included a prohibition on capital punishment, through *Protocol No. 6*). The result in the Soering case was entirely dependent upon (1) the general acceptance of a European-wide condemnation of the death penalty (in any form), and (2) a deeply negative European view of the US system of incarceration for those subject to capital punishment (the 'death row phenomenon'). Since the Inter-American system *expressly allows the death penalty* and since there is no similar death row phenomenon in Barbados, this case is in no way analogous and cannot be of any assistance to this Honourable Court.

429. To explain the first point in brief, the *Soering* case was based upon a request by the United States to the United Kingdom for extradition of Soering to the Commonwealth of Virginia for trial for murder. At the time of the case capital punishment had been abolished in the United Kingdom.[366] In contrast, capital punishment was available in Virginia, the state seeking the extradition of Soering; further, the UK was unable to obtain appropriate assurances from the US that the death penalty would not be sought in the Virginia courts.[367] English courts could not take jurisdiction over his crimes committed abroad,[368] but an alternative forum for trial existed in Germany,[369] a country which had also abolished the death penalty.[370] Further, it was established that in cases of

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[365] *Soering v. United Kingdom*, ECHR, Series A, No. 161, Application No. 14038/88 (7 July 1989), as available through http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (accessed December 10, 2006) [**Annex, Tab 82**]

[366] *Soering, ibid*, para. 15.

[367] *Soering, ibid*, paras 22 and 98. Evidence was presented that Germany would not have extradited Soering to the US under similar circumstances: para. 75

[368] *Soering, ibid*, para. 28.

[369] *Soering, ibid*, para. 16.

[370] *Soering, ibid*, para. 72.

concurrent extradition requests the UK could choose the appropriate state,[371] thus allowing extradition to Germany. This is the *precise context* within which Barbados submits that the *Soering* must be understood, and to which *ratio* of the case is limited: the *Soering* decision hinged upon the question of whether extradition should be granted to a state which would very likely impose the death penalty, in circumstances where the alternative extradition forum (Germany) could guarantee non-application of capital punishment. In sum, this was an extradition case in circumstances in which there was a clear, European-wide, condemnation of extradition to venues where capital punishment applied. No such circumstances, or even analogous circumstances, exist in the present case.

430 Regarding the second point, the *Soering* case also can be distinguished from the case before this Honourable Court in that the actual human rights violation determined to exist – a violation of Article 3 of the *European Convention on Human Rights* – was solely as a result of the US 'death row phenomenon.'[372] The State notes again that there is *no comparable phenomenon in the Barbadian penal system*. In this regard the State must reemphasise that there is a clear time limit for detention upon death row under the laws of Barbados, as established in *Pratt v. Attorney-General for Jamaica* and applied to Barbados in *Bradshaw v. Attorney-General of Barbados*.[373] As a result the detention period in Barbados could *never* reach the length considered by the European Court of Human Rights to be cruel and inhuman. The *Soering* case is entirely distinguishable, on this and all other grounds.

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[371] *Soering, ibid*, para. 38

[372] *Soering, ibid*, paras 105-111. This is made clear in para. 11, in which the European Court of Justice states:

> [I]n the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3). A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.
>
> Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3 (art. 3).

See also para. 1 of the *dispositif* of the *Soering* case, *ibid* (following para. 128)

[373] *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1 **[Annex, Tab 76]**; *Bradshaw v. Attorney-General of Barbados* [1995] 1 W.L.R. 936 **[Annex, Tab 37]**.

431. Further, the *Case of Suárez-Rosero v. Ecuador*,[374] which is described in paragraph 111 of the Application of the Commission of August 18, 2006, reveals completely different prison conditions to any experienced by the four Petitioners in the present case. Mr. Suárez-Rosero was arbitrary arrested in violation of Ecuadorian law,[375] was detained *incommunicado*,[376] in a small, overcrowded, damp cell (seventeen persons held in a cell measuring five metres by three metres),[377] and at no time was he brought before a competent judicial authority to be informed of the charges brought against him.[378] Moreover Mr. Suárez-Rosero was held in preventative detention for a period amounting to almost *double* the maximum sentence available for the offence he was accused of.[379] Finally, the brief summary of the facts referred to by the Commission in the Application of August 18, 2006, as set out in paragraph 91 of the judgement (incorrectly labelled paragraph 98 in footnote 110 of Application), clearly and unequivocally reinforces the extreme differences in conditions of detention and treatment experienced by Mr. Suárez-Rosero in comparison with any allegedly experienced by the four Petitioners in the present case:

> 91. The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suárez-Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his incommunicado detention was arbitrary and carried out in violation of Ecuador's domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspaper; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suárez-Rosero was subjected may be described as cruel, inhuman and degrading.

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[374] *Case of Suárez-Rosero v Ecuador*, I-A Ct H R., Judgement of November 12, 1997, Series C, No 35 **[Annex, Tab 48]**

[375] *Case of Suárez-Rosero v Ecuador*, *ibid*, paras 34(b) and 40.

[376] *Case of Suárez-Rosero v Ecuador*, *ibid*, para. 34(d) and (f)-(g), 48-52, 83, 91, 102

[377] *Case of Suárez-Rosero v Ecuador*, *ibid*, para. 34(d).

[378] *Case of Suárez-Rosero v Ecuador*, *ibid*, paras 34(y) and 56.

[379] *Case of Suárez-Rosero v Ecuador*, *ibid*, para. 74

432. The State is astonished that the Commission would suggest that the facts in the *Case of Suárez-Rosero v. Ecuador* reveal "conditions of detention similar to those in the present matter" (paragraph 111 of the Application of August 18, 2006). The State unequivocally denies this allegation. The conditions of detention and forms of cruel and inhuman treatment discussed in the *Case of Suárez-Rosero v. Ecuador* are in no way analogous to anything experienced by the four Petitioners. The case is completely distinguishable and can be of no assistance to this Honourable Court.

433. Equally, the conditions of imprisonment and forms of treatment experienced by the applicants in the *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*,[380] referred to in paragraph 112 of the Application reveal no similarities to those experienced by any of the four Petitioners. The individuals in the *Hilaire* case, according to the testimony of an expert witness, suffered from extreme overcrowding, inadequate toilet facilities (one slop bucket per 14 person cell), poor quality of food, lack of ventilation and such poor lighting as to lead to eye injury. The Court summarises this evidence in paragraph 77(c) of the judgement as follows:

> **c)** Barrister **Gaietry Pargass** spoke of the conditions of detention in the prisons of Trinidad and Tobago, reforms which should be made to the procedure for requesting legal aid and the conditions surrounding the execution of convicted persons in Trinidad in Tobago.
>
> With respect to the conditions of detention in the remand prison of *Port of Spain* in Trinidad and Tobago, there is extreme overcrowding with up to fourteen prisoners per cell, measuring ten by nine feet. In certain cases there is not enough space to lie down to sleep, thus forcing some prisoners to sleep sitting or standing up. They remain in these conditions for a period of two to six years, which is the average time spent in pre-trial detention.
>
> In addition, she stated that in that particular prison, instead of proper toilet facilities, there is a single bucket (slop pail) for an entire cell, which is emptied twice a day. Moreover, prisoners spend twenty-three hours in their cells except for a few minutes when they leave to eat. They are only allowed to go outside for exercise approximately three times a week due to the shortage of prison officers to supervise.
>
> The expert witness clarified that the situation for those sentenced to death is somewhat different since they are assigned one cell per person. According to the rules of the prison, these prisoners

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[380] *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, I-A Ct H.R., Judgement of June 21, 2002, Series C, No. 94 **[Annex, Tab 57]**.

> should be allowed out of their cells to get fresh air and exercise for one hour a day; however, in practice this never happens. Also, there have been complaints regarding the poor quality of food and the lack of ventilation in the cells, as well as a lack of light that leads to vision complications, eye pain, and a general deterioration in the prisoners' vision.[381]

434. This evidence was accepted by the Court in paragraph 81 of the Hilaire judgement and was briefly summarised in paragraphs 84(m)-(o).

435. The State submits that these conditions are in no way similar to those experienced by the four Petitioners, who have not suffered from overcrowding, have had adequate toilet facilities, proper food, and adequate ventilation and lighting. As a result the State submits that the *Hilaire* case is clearly distinguishable and can be of no assistance to the Petitioners, the Commission or this Honourable Court.

436. Although the State is at a significant disadvantage because two of the cases cited by the Commission – the cases of *Lori Berenson-Mejia v. Perú*[382] and *García-Asto and Ramírez-Rojas v. Perú*[383] – ***have not been reported in English***, the official language of Barbados and an official language of this Honourable Court, the State submits that the facts revealed in both cases are not comparable to those in the present case. Unlike the applicants in these two Peruvian cases, the Petitioners have not been held in prolonged confinement in small isolation cells, without ventilation, without any access to natural lighting and without heating. The Petitioners in the present case also have not been detained in remote and isolated locations, at elevations of 3,800 metres above sea level, and without the possibility of visits by, or communication with, family and friends. The Petitioners have not suffered from lack of food or malnutrition, nor have they suffered from inadequate medical treatment. In sum, neither of these cases presents conditions in any way analogous to those experienced by the four Petitioners. They are confined to their facts, do not generate principles of law, are irrelevant and can be of no assistance to the Petitioners, the Commission or this Honourable Court.

437. The State also wishes to note that the Commission's reference to sections of the Second General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, in paragraph 117 (note

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[381] *Hilaire*, *ibid*., para. 47(c) (emphasis added and footnote omitted)

[382] *Case of Lori Berenson-Mejia v. Perú*, Judgment of November 25, 2004, Series C, No. 119 (Only in Spanish) [**Annex, Tab 46**].

[383] *Case of García-Asto and Ramírez-Rojas v. Perú*, I-A Ct. H.R., Judgment of November 25, 2005, Series C, No. 137 (Only in Spanish) [**Annex, Tab 44**].

115) of its Application of August 18, 2006, may be misleading. The State formally denies violating any of the stipulations of the Second General Report, but it also wishes to correct any misapprehensions that this Honourable Court may have about the nature or value of the Report. Firstly, the report is not an authoritative set of conclusions of the Committee, but rather, as expressly stated in paragraph 4 of the Report itself: "a clear *advance indication* to national authorities of *its views* on different matters falling within its mandate and more generally *to stimulate discussion on issues* concerning the treatment of persons deprived of their liberty."[384] It merely sets out the Committee's views of the kinds of prison conditions that might be most beneficial to prisoners. It does not set clear and binding standards. Secondly, the Committee itself does not in any event have the competence to make binding determinations. At most the Committee may recommend improvements to States Parties and if these recommendations are not followed, it may make a public statement on the matter.[385] Thus the Committee does not have a quasi-judicial, let alone adjudicative nature, nor can it make binding determinations; rather, it is limited solely providing recommendations.[386] Finally, the Committee's scope and focus is *European*. It does not examine, nor could it examine, the very different conditions that are experienced in the Caribbean and the rest of the Americas as a result of our dramatically different fiscal and material resources. As a result, the

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[384] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Second General Report on the CPT's Activities Covering the Period 1 January to 31 December 1991*, CPT/Inf (92) 3 (13 April 1992), as available at http://www.cpt.coe.int/en/annual/rep-02.htm#III.b (accessed December 6, 2006), para 4 (emphasis added) **[Annex, Tab 96]**

[385] Article 10 of the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf/C (2002) 1 [EN] (Part 1), Strasbourg, 26 XI 1987, ETS No. 126 (as amended), as available at http://www.cpt.coe.int/en/documents/ecpt.htm (accessed December 6, 2006) **[Annex, Tab 4]**, states:

Article 10

1 After each visit, the Committee shall draw up a report on the facts found during the visit, taking account of any observations which may have been submitted by the Party concerned. It shall transmit to the latter its report containing any recommendations it considers necessary. The Committee may consult with the Party with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty.

2 If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter.

[386] See e.g., the brief comments of Nigel S. Rodley, in *The Treatment of Prisoners Under International Law*, 2nd ed. (1999), at p. 285 **[Annex, Tab 104]**, where he states that the European Committee for the Prevention of Torture "was not conceived of as having a condemnatory function, but rather to act preventatively."

State submits that the work of the Committee, including its reports, is of little or no value to this Honourable Court.

438. In further response to the allegations of the Commission regarding prison conditions, the State protests the *inconsistent allegations* of the Commission in its Application of August 18, 2006. The Commission has suggested that the four Petitioners have been simultaneously held (1) in overcrowded conditions yet also held (2) alone, in a normal, single cell. The Commission correctly identifies the single cell incarceration (one person per cell) of the four Petitioners in paragraph 70, when referring to the 1994 Report of Baroness Vivien Stern, but in other places, such as in the paragraph 114, the Commission alleges that they were held in "over-crowded conditions" similar to those experienced by the petitioners in *Suárez-Rosero* and *Hilaire*. The State finds it extremely difficult to respond to the allegation that one person being held in a normal sized cell is somehow equivalent to conditions of overcrowding where 16 or more persons are held in a small, single cell. The State also notes in this regard that none of the Petitioners has been held in isolation or "solitary confinement" (in the technical sense of the term) as mistakenly alleged by the Commission in paragraph 114 of its Application.[387]

439. Finally, in the alternative, it should be noted that even if it were the case that the prison conditions faced by the four Petitioners violated their human rights under the laws of Barbados – a matter which the state expressly denies – such violations would neither (1) amount to cruel and inhuman treatment and punishment *per se*, nor (2) would they justify commutation of their death sentences. This position has been established as a matter of law in the Commonwealth Caribbean jurisdictions in the judgement of Lord Millett in the case of *Thomas and Another v Baptiste and Others*.[388] After describing the conditions of imprisonment experienced by the applicants in that case Lord Millett, at pages 27-28, held that such conditions neither amounted to cruel and inhuman treatment *per se*, nor justified commutation:

> The applicants were detained in cramped and foul-smelling cells and were deprived of exercise or access to the open air for long periods of time. When they were allowed to exercise in the fresh air they were handcuffed. The conditions in which they were kept were in breach of the Prison Rules and thus unlawful. It does not follow that they amounted to cruel and unusual treatment. (It is rightly accepted that they did not amount to additional punishment.) In a careful judgment de la Bastide C.J. found that

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[387] See the description of, and limited uses for, isolation facilities noted in paragraph 400 s, above None of the Petitioners was held in isolation: Affidavit of John Nurse, Superintendent of Prisons, of March 8, 2005 **[Annex, Tab 171]**, para 21.

[388] *Thomas and Another v Baptiste and Others* [2000] 2 A C. 1 **[Annex, Tab 86]**.

they did not. The expression is a compendious one which does not gain by being broken up into its component parts. In their Lordships view, the question for consideration is whether the conditions in which the applicants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual. Prison conditions in third world countries often fall lamentably short of the minimum which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the applicants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison. Their Lordships do not wish to seem to minimise the appalling conditions which the applicants endured. As the Court of Appeal emphasised, they were and are completely unacceptable in a civilised society. But their Lordships would be slow to depart from the careful assessment of the Court of Appeal that they did not amount to cruel and unusual treatment.

Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the applicants' constitutional rights, commutation of the sentence would not be the appropriate remedy. Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1 did not establish the principle that prolonged detention prior to execution constitutes cruel and unusual treatment. It is the carrying out of the death sentence after such detention which constitutes cruel and unusual punishment. This is because of the additional cruelty, over and above that inherent in the death penalty itself, involved in carrying it out after having exposed the condemned man to a long period of alternating hope and despair. It is the circumstances in which it is proposed to carry out the sentence, not the fact that it has been preceded by a long period of imprisonment, which renders it cruel and unusual. The fact that the conditions in which the condemned man has been kept prior to execution infringe his constitutional rights does not make a lawful sentence unconstitutional. It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say: "Enough is enough." A state which imposes such punishments forfeits its right to carry out the death sentence in addition. But the present cases fall a long way short of this. Their Lordships are unwilling to adopt the approach of the I.A.C.H.R., which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death. In their Lordships' view this fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. They would also

> be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be adopted even if it is inappropriate and disproportionate. The proposition would have little to commend it even in the absence of section 14(2) of the Constitution, but it is clearly precluded by that section.[389]

440. It is respectfully submitted that Lord Millett's final comment about the inappropriate and disproportionate nature of commutation of death sentences in such cases is correct. Lord Millett was supported in this regard by all but one of the Members of the Board: Lord Browne-Wilkinson, Lord Goff of Chieveley and Lord Hobhouse of Woodborough concurred. Only Lord Steyn dissented.

441. In sum, the State respectfully submits that the jurisprudence relied upon by the Petitioners and the Commission is entirely irrelevant, unhelpful or clearly distinguishable. The cases uniformly deal with extreme situations such as torture, *incommunicado* detention, or flagrant violation of the state's own laws. These cases were determined by their particular facts, no similar factual circumstances arise in the present case, and no general principles of law can be inferred from them.

XI. CONTEXT OF BARBADIAN LEGAL POSITION: UPHOLDING REPRESENTATIVE DEMOCRACY

442. As a final substantive submission, Barbados respectfully draws the attention of this Honourable Court to the fact that the State's criminal justice system as a whole, including its system of capital punishment, should be understood within the context of its well established democratic constitutional order, founded upon respect for fundamental human rights and the rule of law. It is respectfully submitted that only by locating Barbados' system of capital punishment in its *overall context of democratic constitutional support* can this Honourable Court fully appreciate and properly evaluate the legality of, and necessity for, that system.

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[389] Emphasis added.

A. Longstanding Democratic Constitutional System

443. Barbados is one of the oldest states in the Western hemisphere, possessing a continuous parliamentary constitutional system dating back to 1639.[390] According to international indicators Barbados is highly ranked for its respect for political rights and civil liberties. For example, according to Freedom House surveys Barbados has consistently ranked at the highest levels in its respect for political rights and civil liberties. Barbados has achieved a score of 1 out of 7 in this regard (with 1 being understood to be the best, and 7 the worst), and has been ranked as a "free" state overall, for the years 1999 to 2006.[391] Moreover, historically Barbados has *not* been subject to military or dictatorial rule, nor has it suffered from the outrageous human rights atrocities regularly perpetuated under such systems of rule. It has consistently upheld its traditional, constitutional democratic system, with its well-entrenched mechanisms for protecting human rights and promoting democracy. It remains committed to continuing and building upon its longstanding and successful tradition in this regard.

B. Strong Adherence to Inter-American System of Human Rights

444. Barbados has been party to the *Charter of the Organization of American States* and thereby a Member of the OAS since November 15, 1967. As such, it has accepted the human rights norms of the *Charter*, as interpreted by the American Declaration of the Rights and Duties of Man. Barbados has been a party to the *American Convention on Human Rights* since November 27, 1982. It accepted the compulsory jurisdiction of the Inter-American Court of Human Rights on June 4, 2000.

445. In this regard, Barbados is unique amongst Commonwealth Caribbean countries in its acceptance and promotion of Inter-American human rights obligations. Even though Commonwealth Caribbean states make up a sizeable minority in the Inter-American system – representing over a third of the parties to the *Charter of the Organization of American States* – only five of the twelve Commonwealth Caribbean Member States, including Barbados, have become parties to the *American Convention*. Following the notification of its denunciation of the *American Convention* by Trinidad and Tobago on May 26, 1998, only four Commonwealth Caribbean states remain parties: Barbados, Dominica, Grenada

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[390] *Cf* Hilary Beckles, *A History of Barbados* (1990), pp. 11-12 **[Annex, Tab 92]**

[391] Freedom House, *Freedom in the World Country Ratings* (tables for 2006, 2005, 2004, 2003, 2001-2002, 2000-2001 and 1999-2000), as available through http://www.freedomhouse.org/template.cfm?page=15&year=2006 (accessed 2 December 2004 and 8 December 2006) **[Annex, Tab 158]**

and Jamaica. Of those four *only Barbados* has accepted the jurisdiction of the Inter-American Court of Human Rights.[392]

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C. *The Need for Barbados to Balance its Respect for Democracy With Other Human Rights*

446. Barbados recognises and values the binding international legal obligations it has accepted under international and regional treaties, including those of the Inter-American system. It affirms its obligations to uphold its representative democratic system as well as to respect the fundamental rights of the individual.

(1) Respect for Democracy a Central Tenet of the Inter-American System

447. The duty of each state to respect and uphold its representative democratic constitutional system is a central tenet of the Inter-American system. This is evidenced by the prominence placed upon representative democracy in the *Charter of the Organization of American States*, the American Declaration of the Rights and Duties of Man, the *American Convention on Human Rights*, and the resolutions and jurisprudence of the various Inter-American organs. Commentators on the Inter-American system of human rights protections have made pointed reference to the strong support for representative democracy in the Inter-American system.[393]

448. Democracy is both a central purpose and principle in the *Charter of the Organization of American States*.[394] It is alluded to in the Preamble to the *Charter* and in Articles 2(b) and 3, and balanced against other relevant principles, such as that of state sovereignty and non-intervention. These articles provide:

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[392] Statistics available on the Multilateral Treaties website of the Office of International Law of the Organization of American States, which has been updated to at least February 6, 2006, confirm that Barbados remains the only Commonwealth Caribbean state to have accepted this Court's jurisdiction: http://www.oas.org/juridico/english/sigs/b-32.html (as available at December 8, 2006) See also, "American Convention on Human Rights, 'Pact of San José, Costa Rica' (Signatures and Current Status of Ratifications)," as reproduced in *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 2004)*, OEA, Ser L/V/I 4 rev 10 (31 May 2004) **[Annex, Tab 13]**.

[393] See, e.g., Dinah Shelton, "Representative Democracy and Human Rights in the Western Hemisphere" (1991) 12 H R L J 353-59 **[Annex, Tab 107]**

[394] *Charter of the Organization of American States* **[Annex, Tab 2]**

CHARTER OF THE ORGANIZATION OF AMERICAN STATES 0000344

IN THE NAME OF THEIR PEOPLES, THE STATES REPRESENTED AT THE NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES,

[...]

Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region;

Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man;

[...]

Article 2

The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes:

[...]

b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention;

Article 3

The American States reaffirm the following principles:

[...]

b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law;

[...]

d) The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy;

e) Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems; [...]

449. This respect for representative democracy in the *OAS Charter* is so strong that a special provision has been added to allow suspension from participation in the activities of OAS organs where the Member's "democratically constituted government has been overthrown by force." Article 9 provides:

Article 9

A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful;

b) The decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States;

c) The suspension shall take effect immediately following its approval by the General Assembly;

d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State;

e) The Member which has been subject to suspension shall continue to fulfill its obligations to the Organization;

f) The General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of the Member States;

g) The powers referred to in this article shall be exercised in accordance with this Charter.

450. In addition, several provisions in the *American Convention on Human Rights* are directly relevant to democracy and the rights and freedoms necessary for democratic governance, including Articles 13, 15, 16 and 23. Similarly, several provisions in the American Declaration of the Rights and Duties of Man make reference to and are directly relevant to democracy and democratic rights and freedoms, including Articles IV, XX, XXI, XXVIII and XXXII. The OAS General Assembly has actively supported representative democracy, as evidenced by several of its landmark resolutions, including the "Santiago Commitment to Democracy and the Renewal of the Inter-American System" (1991), "Representative Democracy" (1991), the "Declaration of Nassau" (1992), "Promotion of Democracy" (2001), "Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas" (2003), and "Promotion and Strengthening of Democracy" (2004) [395]

451. In recognition of the importance of democracy to its Member States, the Organization of American States also established a special Unit for the Promotion of Democracy, which provides wide-ranging electoral assistance and generally promotes democracy in the region. Several past reports of the Inter-American Commission on Human Rights also have commented upon the centrality of democracy.[396]

452. The creation of the Inter-American Democratic Charter on the 11th of September 2001 further established the centrality of democratic values to the states of the Americas.[397] Several paragraphs in the preamble to, and articles of, the Democratic Charter highlight the importance of democracy to the region:

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[395] "Santiago Commitment to Democracy and the Renewal of the Inter-American System" (1991), O.A.S. AG/RES (XXI-O/91) (June 4, 1991) **[Annex, Tab 139]**, "Representative Democracy" (1991), O.A.S. AG/RES. 1080 (XXI-O/91) (June 5, 1991) **[Annex, Tab 137]**, the "Declaration of Nassau" (1992), O.A.S. AG/DEC.1 (XXII-O/92) (19 May 1992) **[Annex, Tab 128]**, "Promotion of Democracy" (2001), O.A.S. AG/RES. 1782 (XXXI-O/01) (5 June 2001) **[Annex, Tab 136]**, "Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas" (2003), O.A.S. AG/DEC. 31 (XXXIII-O/03) (June 10, 2003) **[Annex, Tab 129]**, and "Promotion and Strengthening of Democracy" (2004), O.A.S. AG/RES 2044 (XXXIV-O/04) (8 June 2004) **[Annex, Tab 135]**

[396] E.g., "Final Report on Cases 9768, 9780, and 9828 of Mexico," I-A C.H.R., *Annual Report of the Inter-American Commission on Human Rights 1989-90* (1990), at p. 98 *ff* **[Annex, Tab 55]**; "Human Rights, Political Rights and Representative Democracy in the Inter-American System," I-A C.H.R., *Annual Report of the Inter-American Commission on Human Rights 1990-91*, OEA/Ser.L/V/II.79 rev. 1, doc. 12, 1991, pp. 514-37 **[Annex, Tab 98]**.

[397] Inter-American Democratic Charter, OAS General Assembly, 28th Special Session (11 September 2001) **[Annex, Tab 133]**.

THE GENERAL ASSEMBLY,

CONSIDERING that the Charter of the Organization of American States recognizes that representative democracy is indispensable for the stability, peace, and development of the region, and that one of the purposes of the OAS is to promote and consolidate representative democracy, with due respect for the principle of nonintervention;

RECOGNIZING the contributions of the OAS and other regional and sub-regional mechanisms to the promotion and consolidation of democracy in the Americas;

[...]

BEARING IN MIND that the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy;

REAFFIRMING that the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society, and recognizing the importance of the continuous development and strengthening of the inter-American human rights system for the consolidation of democracy;

[...]

TAKING INTO ACCOUNT that, in the Santiago Commitment to Democracy and the Renewal of the Inter-American System, the ministers of foreign affairs expressed their determination to adopt a series of effective, timely, and expeditious procedures to ensure the promotion and defense of representative democracy, with due respect for the principle of nonintervention; and that resolution AG/RES. 1080 (XXI-O/91) therefore established a mechanism for collective action in the case of a sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically-elected government in any of the Organization's member states, thereby fulfilling a long-standing aspiration of the Hemisphere to be able to respond rapidly and collectively in defense of democracy;

RECALLING that, in the Declaration of Nassau [AG/DEC. 1 (XXII-O/92)], it was agreed to develop mechanisms to provide assistance, when requested by a member state, to promote, preserve, and strengthen representative democracy, in order to complement and give effect to the provisions of resolution AG/RES. 1080 (XXI-O/91);

BEARING IN MIND that, in the Declaration of Managua for the Promotion of Democracy and Development [AG/DEC. 4 (XXIII-O/93)], the member states expressed their firm belief that democracy, peace, and development are inseparable and indivisible parts of a renewed and integral vision of solidarity in the Americas; and that the ability of the Organization to help preserve and strengthen democratic structures in the region will depend on the implementation of a strategy based on the interdependence and complementarity of those values;

CONSIDERING that, in the Declaration of Managua for the Promotion of Democracy and Development, the member states expressed their conviction that the Organization's mission is not limited to the defense of democracy wherever its fundamental values and principles have collapsed, but also calls for ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government;

[...]

RESOLVES:

To adopt the following:

I

Democracy and the Inter-American System

Article 1

The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.

Democracy is essential for the social, political, and economic development of the peoples of the Americas.

Article 2

The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.

Article 3

Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access

> to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.
>
> [...]
>
> ***Article 6***
>
> It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.
>
> **II**
>
> **Democracy and Human Rights**
>
> ***Article 7***
>
> Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.

453. As illustrated by these provisions of the Inter-American Democratic Charter, democracy is a *precondition* for the effective exercise of fundamental freedoms and human rights. The Charter provides that democracy must be implemented and upheld in the Inter-American system in a manner that respects and affirms the rule of law, the separation of powers and the independence of the branches of government. Further, it must be implemented by the organs of the Organization of American States in a manner that shows due respect for the principle of non-intervention. Finally, as provided in Article 1, the Inter-American system provides a "right to democracy" and OAS Member States, including the Government of Barbados, have "an obligation to promote and defend it."

454. Barbados seeks to uphold the international legal obligations it has accepted under the Inter-American system. However in doing so, it must balance its obligations to uphold democratic constitutional processes, on the one hand, with the obligations it has accepted in the texts of human rights instruments on the other. This need to strike a balance is not illusory, as seen in the very text of Article 29(c) of the *American Convention on Human Rights*, which provides that "No provision of this *Convention* shall be interpreted as ... precluding other rights or

guarantees that are inherent in the human personality or *derived from representative democracy as a form of government*."[398]

(2) Barbados' Present Form of Capital Punishment Was Democratically Chosen by the People

455. In this regard it must be noted that the current governing party in Barbados, the Barbados Labour Party (BLP), was elected by an overwhelming majority in 1994, and recently re-elected with a substantial majority, on the basis of a platform that included strict enforcement of the laws related to capital punishment. In the Barbados Labour Party's *1994 Manifesto*, in the section dealing with "Law, Order and Public Safety,"[399] at page 34, it is clearly stated:

> **Enforcing the Law**
>
> We will carry out the death penalty in accordance with the law.

456. Enforcement of capital punishment in accordance with the law is thus in full compliance with the democratically expressed will of the people of Barbados. Further, the matter of capital punishment is a fundamental aspect of Barbados' legal order, and has been subject to widespread debate. A Constitutional Review Commission has examined it and the topic has come up in debates before Parliament. It is clear that at present the public overwhelmingly approves the use of the death penalty. The current government of Barbados was elected twice by an overwhelming majority on the basis of a platform which included a promise to uphold its current form of capital punishment.

(3) Democratic Choice Upholds the Right of Self-Determination of Peoples

457. In this regard, the application of capital punishment, if such a punishment has been democratically chosen by the people, *upholds the democratic choice of the people*. Importantly, it upholds the right of the people to decide, through their elected representatives, on the most fundamental aspects of their legal and moral order. The provision of the death penalty has been held to be a fundamental component of a state's social order, one properly left to Parliament, the body directly elected by and responsible to the people. For example, in the case of *R. v. Clegg*[400] Lord Lloyd of Berwick held at pages 345-6:

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[398] Emphasis added.

[399] Barbados Labour Party, *1994 Manifesto* **[Annex, Tab 174]**.

[400] *R v Clegg* [1995] 1 All E.R. 334 (H.L.) **[Annex, Tab 78]**.

> The reduction of what would otherwise be murder to manslaughter in a particular class of case seems to me essentially a matter for decision by the legislature, and not by this House in its judicial capacity. For the point in issue is, in truth, part of the wider issue whether the mandatory life sentence for murder should still be maintained. That wider issue can only be decided by Parliament.[401]

458. Likewise, in paragraph 6 of the decision of the Judicial Committee of the Privy Council in the *Boyce and Joseph* case of 2004,[402] the majority of the Board expressly states that "the decision as to whether to abolish the mandatory death penalty must be, as the Constitution intended it to be, a matter for the Parliament of Barbados."

459. The State's respect for the democratic wishes of the people also affirms one of the most important rights available under international law, the right of a people to self-determination. This right is enshrined in the *Charter of the United Nations*, numerous General Assembly Resolutions, the two *International Covenants*, and in the jurisprudence of the International Court of Justice.

460. Article 1(2) of the *UN Charter*[403] describes one of the "Purposes of the United Nations" as being "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Article 55 of the *Charter* also uses the phrase "self-determination," and its meaning is fleshed out by Articles 73 and 76, which describe the responsibilities of Member States regarding Non-Self-Governing Territories and the International Trusteeship System, respectively. Examples of General Assembly resolutions on the topic include the Right of Peoples and Nations to Self-Determination (1952), Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), and the related 1961 resolution on the Situation With Regard to Implementation of Declaration on Granting of Independence to Colonial Countries and Peoples (1961).[404]

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401 Emphasis added

402 *Boyce and Joseph v The Queen* [2004] UKPC 32 **[Annex, Tab 36]**

403 *Charter of the United Nations* **[Annex, Tab 3]**

404 Right of Peoples and Nations to Self-Determination (1952), U.N.G.A. Res. 637, G.A.O.R., 7th Sess., Supp. No. 20, U.N. Doc. A/2361 **[Annex, Tab 138]**; Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), U.N.G.A. Res. 1514, G.A.O.R., 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960) **[Annex, Tab 130]**; Situation With Regard to Implementation of Declaration on Granting of Independence to Colonial Countries and Peoples (1961), U.N.G.A. Res. 1654, G.A.O.R., 16th Sess., Supp. No. 17, U.N. Doc. A/L.366, Adden. 1-3 **[Annex, Tab 140]**

461. Both the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social, and Cultural Rights* share the following identical first article:

Article 1

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[405]

462. The International Court of Justice has elaborated and applied the right of self-determination in the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Advisory Opinion on *Western Sahara*, and the *Case Concerning East Timor*.[406] The International Court of Justice, in the latter case at page 102 (paragraph 29), recognised that the right of self-determination has an *erga omnes* character:

> In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*

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[405] *International Covenant on Civil and Political Rights* (1966), U.N.G.A. Res. 2200 (XXI), G.A.O.R., 21st Sess., Supp. 16, p. 49, U.K.T.S. 6 (1977), Cmnd. 6702, 6 I.L.M. 368, Art. 1 **[Annex, Tab 5]**; *International Covenant on Economic, Social, and Cultural Rights* (1966), U.N.G.A. Res. 2200 (XXI), G.A.O.R., 21 Sess., Supp. 16, p. 49, U.K.T.S. 6 (1977), Cmnd. 6702, 6 I.L.M. 360, Art. 1 **[Annex, Tab 6]**

[406] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16 **[Annex, Tab 64]**; *Western Sahara*, I.C.J. Reports 1975, p. 12 **[Annex, Tab 89]**; *Case Concerning East Timor* (Portugal v. Australia), I.C.J. Reports 1995, p. 90 **[Annex, Tab 39]**

(1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law.

463. Self-determination, as a right *erga omnes*, must be accorded the highest level of respect, globally, regionally and nationally. It is a right opposable to all.

464. Barbados, in exercising its right to self-determine under international law has chosen a particular form of capital punishment as part of its criminal justice system. As the State has argued fully above, this democratically supported form of capital punishment is entirely compatible with Barbados' obligations under its *Constitution* and laws, as well as with its obligations under the *Charter of the Organization of American States* (as interpreted by the American Declaration), the *American Convention on Human Rights* and customary international law. In light of the above, it is submitted that this Honourable Court should favour an interpretation of Inter-American human rights standards that *respects* the right of self-determination of the people of Barbados, namely, one that recognises the right of Barbados to apply its current system of capital punishment.

(4) Democratic Choice Must Take Priority Over Unfounded Interpretations of Inter-American Human Rights Treaties

465. As a result, in striking this balance between different human rights, and human rights and democracy more generally, Barbados submits that the State need not, and cannot, accept any purportedly treaty-derived obligations to which it has not consented. As a sovereign, independent state Barbados has the fundamental right to insist that it freely consent to treaty obligations before being bound by them. This position is in accordance with both the general rules of international law and the more specific rules of the law of treaties. As has been illustrated above, Barbados' position is also *necessary* if, as provided in the Inter-American Democratic Charter, it is to respect the "right and responsibility of all citizens to participate in decisions relating to their own development."

XII. SUBMISSIONS ON THE INAPPROPRIATENESS OF REPARATIONS

466. Regarding the issue of reparations, Barbados respectfully submits to this Honourable Court that *any* form of reparation is manifestly inappropriate, since the state has fully respected the rights of the four Petitioners. As established in great detail in the present Submissions, the State has not violated any right of the Petitioners protected by the laws of Barbados or the Inter-American system of human rights, including rights protected by the *OAS Charter* (as interpreted by the American Declaration), the *American Convention*, or general and/or regional customary international law.

467. In the alternative, if this Honourable Court determines that any of the Petitioners' rights have been violated – a matter which the State expressly denies – then it is respectfully submitted that the only suitable form of reparation that could be provided is the commutation of the death sentence of the Petitioners. This is the form of reparation expressly requested by the Commission in paragraph 150 of the Application of August 18, 2006. The State has already commuted the sentences of Lennox Boyce and Jeffrey Joseph and commutation is no longer relevant to Frederick Atkins. The State notes in this regard that international and regional human rights organs in similar cases have held that commutation of the death sentence is an appropriate and sufficient form of reparation. The Caribbean Court of Justice in the case of *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce*[407] followed this approach by deciding to sustain the commutation of the sentences of the two Petitioners and by not providing them with any additional compensation or other remedies. In the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* this Honourable Court found the commutation of death penalties sufficient and ordered no additional compensation to those persons who had not already been executed.[408]

468. Regarding the need for legislative and other measures to rectify violations of human rights, as requested in paragraph 151 of the Commission's Application, the State denies that its laws or practices violate the Petitioners' rights and thus submits that no legislative or other measures are necessary or appropriate. However, in the alternative, if this Honourable Court decides to order the State to undertake legislative or other measures then the State submits that any such

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[407] **Annex, Tab 32.**

[408] *Hilaire, Constantine and Benjamin et al. v Trinidad and Tobago*, I-A Ct H R , Judgement of June 21, 2002, Series C, No 94 [**Annex, Tab 57**], paras 211-216.

measures *in and of themselves would fully satisfy* the obligations of the state to correct any existing violations as well as to guarantee that the particular human rights obligations will be respected in the future.

469. With respect to the possibility of compensation, the State expressly denies that compensation is required by law or that it is either necessary or appropriate in this case. In this regard the State draws the attention of this Honourable Court to the fact that compensation *has been expressly waived and is precluded* by the Petitioners' own formal submissions: Applicants' Submissions Re Referral to the Inter-American Court of Human Rights of 21 April 2006, paragraph 36(iv); Written Submissions of the Alleged Victims of 18 October 2006, paragraph 88. In paragraph 152 of the Application of August 18, 2006, the Commission also explicitly acknowledges that the Petitioners do not seek compensation. The State submits that in such cases the Court must accord the greatest respect to the will of the Petitioners themselves regarding such matters. According priority to the wishes of applicants regarding non-compensation is the accepted practice in international and regional human rights tribunals. This Honourable Court, for example, has held in cases involving violations of human rights by states that if the claimant does not ask for financial compensation the Court need not, and in fact has not, provided it.[409] It is submitted that in such cases and in the present case a judgement of the Court *per se* would amount to full and complete satisfaction of any wrong and no compensation is required.[410]

470. Further, on an issue related to compensation, the State also draws the attention of this Honourable Court to the fact that any legal costs or expenses incurred by the lawyers for the Petitioners *have been waived and are expressly precluded* by their own formal statement about not requesting such costs: Applicants' Submissions Re Referral to the Inter-American Court of Human Rights of 21 April 2006, paragraph 36(v); Written Submissions of the Alleged Victims of 18 October 2006, paragraph 89. This statement is also highlighted in paragraph 159 of the Application of August 18, 2006. Because the lawyers for the Petitioners have acted *pro bono* the Petitioners themselves have not incurred any costs or expenses which have not already been compensated in domestic proceedings.[411]

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[409] See, e.g., *Case of the Girls Jean and Bosico v República Dominicana*, I-A Ct H.R., Judgment of September 8, 2005, Series C, No. 130 [**Annex, Tab 49**], in which this Court stated in para. 221:

221. This Court will not rule on pecuniary damage in favor of the victims or their next of kin, since neither the Commission nor the representatives requested compensation for this concept.

[410] See, e.g., *Case of the Girls Jean and Bosico v República Dominicana*, I-A Ct H.R., Judgment of September 8, 2005, Series C, No. 130 [**Annex, Tab 49**], para. 223, which this Honourable Court stated that "International case law has established repeatedly that the judgment constitutes, *per se*, a form of reparation."

[411] Costs were awarded to the Jeffrey Joseph and Lennox Boyce at the Court of Appeal and the Caribbean Court of Justice. See *Boyce and Joseph v The Attorney General et al* (Unreported),

As a result it is submitted that no additional costs should be awarded. In addition, the State notes that the Commission itself expressly urges the Court to look at *the submissions of the victims' representatives* regarding costs and expenses, and as has been already stated, *their express submissions were that they did not require costs*. As a result, the State submits that this Honourable Court should rule accordingly and award no costs, as it did in the case of *Case of Caesar v. Trinidad and Tobago* [412]

471. In the alternative, if costs are to be awarded, the State should not be required to pay the kinds of disproportionate costs incurred by expensive London counsel. As established in the *Aloeboetoe et al. v. Suriname, Reparations*,[413] the Commission and Court are financed out of the budget of the OAS, and if the Commission prefers to fulfil its functions by contracting outside professionals then it should bear those costs. As the Court surmised in paragraph 14 of the *Aloeboetoe* case:

> 114. In the instant case, the Commission has preferred to fulfill the functions assigned to it under the American Convention by contracting outside professionals instead of using its own staff. The Commission's operational arrangements are a matter of its own internal organization and not subject to the intervention of the Court. However, the Commission cannot demand that expenses incurred as a result of its own internal work structure be reimbursed through the assessment of costs. The operation of the human rights organs of the American system is funded by the Member States by means of their annual contributions.[414]

This is all the more important given that the lawyers for the Petitioners are seeking to bring no less than five expert witnesses to the hearings of this Honourable Court in Costa Rica and seek to recover, presumably for all five

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Barbados Court of Appeal, Civil Suit No. 29 of 2004 (May 31, 2005), para. 90 **[Annex, Tab 35]**; *Attorney General et al v. Jeffrey Joseph and Lennox Ricardo Boyce* (2006) CCJ Appeal No CV 2 of 2006, BB Civil Appeal No 29 of 2004 (November 8, 2006), para. 144 of the Joint Judgement of President Mr. Justice M. de la Bastide and the Hon. Mr. Justice A. Saunders **[Annex, Tab 32]**

[412] *Case of Caesar v. Trinidad and Tobago*, I-A Ct. H.R., Judgment of March 11, 2005, Series C, No. 123 **[Annex, Tab 42]**, para. 135:

135. Since the representatives claimed no costs or expenses before the Court, as they are acting *pro bono*, and the Commission did not submit any observations on this point, the Court makes no award with regard to costs and expenses in the present case.

[413] *Aloeboetoe et al. v. Suriname, Reparations (Art. 63(1) American Convention on Human Rights)*, I-A Ct. H.R., Judgment of September 10, 1993, Series C, No. 15 **[Annex, Tab 30]**.

[414] Emphasis added

expert witnesses as well as for their sizeable legal team of at least seven[415] attorneys: (i) travel allowances, (ii) per diem allowances, (iii) courier costs, (iv) photocopy costs and (v) affidavit fees. See the Applicants' Submissions Re Referral to the Inter-American Court of Human Rights of 21 April 2006, paragraph 36(v), and its attached Annex 2 – Information/Documentation in Relation to Experts.[416] The costs associated with such a disproportionately large legal team would be completely unreasonable and the State submits that this Honourable Court should not allow their recovery against Barbados.

472. In the further alternative, if costs are to be assessed, at most a nominal award of costs should be made, one reflecting the economic and social conditions obtaining in Barbados and the other states in the Inter-American system of human rights, rather than those obtaining in developed countries with prohibitive legal fees, such as the United Kingdom or United States.

473. In the further alternative, if this Honourable Court is minded to award compensation or costs, the State submits that such factors can only be assessed after it has received full and detailed submissions by the Commission and the Petitioners on such matters. Neither has done so, and in fact the Commission has suggested that the Petitioner's legal representatives will be making submissions on such matters in paragraph 159 of its Application. As a result the State respectfully submits that such matters are premature and the State should not be required to make any formal submissions in such circumstances. Further, if such matters are later articulated by the Petitioners' legal representatives or the Commission, the State hereby expressly reserves the right to respond in full and formally requests the opportunity to do so. The State notes in this regard that in accordance with Article 57(1) of the *Rules of Procedure of the Inter-American Court of Human Rights* the Court can set a time and determine the procedure for a deferred decision on reparations. In addition under Article 57(2) of the same *Rules* this Honourable Court can allow the parties to the case to reach an agreement on the execution of the judgement on the merits and may thereafter adopt that agreement. In the event that this Honourable Court wishes to make a determination on either compensation or costs, under this latter rule Barbados hereby expressly requests that it be allowed to reach a friendly settlement on such matters with the Commission.

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[415] The State notes that on the final page of the Written Submissions of the Alleged Victims of 18 October 2006, seven legal representatives are listed.

[416] The State is unaware of any visits to Barbados' prisons by the lawyers for the Petitioners or their expert witnesses in relation to this case after the Commission's Application of August 18, 2006, and thus it is assumed that no travel expenses will be sought for such visits, as per para. 36(v) of the Applicants' Submissions Re Referral to the Inter-American Court of Human Rights of 21 April 2006. In any event Barbados resists the idea that such costs could reasonably be imposed upon the State, and requests that this Honourable Court dismiss outright any such request.

XIII. EVIDENCE

474. In support of its Submissions, Barbados offers the following supporting evidence:

A. Documentary Evidence (List of Appendices)

475. The following documents are relied upon by the State in support of its Submissions, and are bound sequentially in the several Volumes of its Annexes:

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476. For the convenience of this Honourable Court, in addition to these Submissions and the bound Annexes, the State submits a separate document containing the above *Table of Contents to the Annex to the Submissions of the State of Barbados (Authorities)*.

B. Testimonial and Expert Witness Evidence

477. The State offers the following expert witnesses for the benefit of this Honourable Court:

a. Mr. Charles Leacock, Q.C., and/or his nominee – Mr. Leacock is the Director of Public Prosecutions and is an expert on the Barbadian criminal justice system, including Barbados' death penalty legislation and procedure. Mr. Leacock will give evidence on the procedure followed in murder prosecutions as well as on the exercise of the Prerogative of Mercy.

b. Mr. John Nurse and/or his nominee – Mr. Nurse is the Superintendent of Prisons and an expert on prison conditions in Barbados, both at the pre-trial and post-conviction stages.

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XIV. CONCLUSIONS AND PRAYER FOR RELIEF

478. Barbados submits that its present system of capital punishment is lawful under the provisions of the *Charter of the Organization of American States* and the *American Convention on Human Rights*. Barbados reaffirms its commitment to the obligations set out in these treaties, but again respectfully reminds this Honourable Court that it only has accepted the obligations specifically set out in the texts of these treaties, subject to its reservations to the *American Convention*. In setting out its understanding of its obligations under the *OAS Charter* and *American Convention* Barbados has employed the primary method of treaty interpretation, namely, the textual method of interpretation. The State has demonstrated that the ordinary meanings of the texts of both the *OAS Charter* (as interpreted by the American Declaration of the Rights and Duties of Man), and the *American Convention* fully support the legality of Barbados' system of capital punishment in the Inter-American system. Further, and as has been comprehensively established, these treaty texts do not in any way prohibit the use of mandatory capital punishment. In addition, Barbados submits that an application of either of the other, subsidiary forms of treaty interpretation – the subjective and teleological forms of interpretation – must yield the same result.

479. Barbados also has demonstrated that there is no evidence of a customary rule of general international law, or even of a regional or local customary rule, that purports to prohibit mandatory capital punishment. It is respectfully submitted that neither the Petitioners nor the Inter-American Commission on Human Rights has fulfilled, nor could they fulfil, the burden of proof required to establish the existence of such a rule. Moreover, even if such a rule could be proved in the future Barbados will not be bound by it because of the State's status of a persistent objector to such a rule. In this regard the State respectfully reminds this Honourable Court that the persistent objector rule is so fundamental that it may be used to exempt a state from the application of *any* customary rule of international law, even a customary rule that later achieves the character of *jus cogens*. In sum, Barbados denies that either a customary, treaty-based, or *jus cogens* rule prohibits its system of capital punishment.

480. Barbados also has demonstrated that its laws and practices do not violate any rules of the Inter-American system, including the rules established by the *OAS Charter* or *American Convention on Human Rights*, and in particular, Articles 1, 2, 4, 5 and 8 of the *American Convention* and the similar articles of the American Declaration. Regarding its system of capital punishment, Barbados firmly rejects

the submissions of the Commission and the Petitioners that its application of the death penalty is in any way arbitrary or cruel and inhuman. Under the laws of Barbados it is extremely difficult to obtain a conviction that will be subject to capital punishment. Moreover, only the crimes of treason and murder – crimes of an exceptionally serious nature – are subject to the death penalty. For each of these crimes a number of defences and other mechanisms are available prior to the trial, during the course of a trial and pre-conviction, which prevent the application of the death penalty. Finally, even after being sentenced to death an accused has the right to appeal for mercy to the Barbados Privy Council and during this appeal the accused may avail himself of all of the relevant due process rights available under the common law and the *Constitution* of Barbados, including those established in the cases of *Lewis* and *Pratt*. This Barbados Privy Council process provides full and proper, individualised consideration of the various mitigating factors and circumstances related to the person that are relevant to punishment, including the character and record of the offender, the subjective factors that might have influenced the offender's conduct, and the possibility of reform and social re-adaptation of the offender.

481. Regarding its method of capital punishment, hanging *per se* cannot be considered cruel and inhuman and is in no manner prohibited by the State's domestic or Inter-American human rights obligations. Rather, hanging is a globally accepted method of execution, one that does not create materially greater suffering than other forms of execution. Further, under the laws and practices of Barbados execution by hanging is administered in a manner so as to ensure that the individual is treated with respect and humanity, and to provide a speedy execution process.

482. With respect to the allegations that the State read warrants of execution to any of the Petitioners after an appeal had been filed to the Judicial Committee of the Privy Council, these allegations have been demonstrated to be manifestly inaccurate. No warrants were read after the formal commencement of the Judicial Committee of the Privy Council Appeal processes with respect to any of the four Petitioners. Regarding the reading of warrants of execution *prior to* the commencement of an appeal, the State is required by law to carry out its legal processes, including penalties, in a timely manner. In addition, an *intention* to appeal does not constitute an appeal. As a result no rights have been violated in relation to the reading of warrants of execution, either under the laws of Barbados or the rules of Inter-American system of human rights.

483. With respect to the State's reading of the warrants of execution while the Petitioners Communication was being considered by the Commission, Barbados submits that there is no legal requirement under either its domestic law or Inter-American human rights law that the State must await the conclusion of Commission procedures and thus there has been no injury to any of the Petitioners' human rights.

484. Regarding conditions of imprisonment, Barbados submits that the conditions experienced by the Petitioners do not violate Article 5 of the *American Convention*. As the State has fully elaborated, Barbados' prison conditions do not violate the rules of general international law or the norms of the Inter-American system. The State's prison system respects the rights of those imprisoned to live in conditions of detention compatible with their personal dignity, in conformity with the State's obligations under the Inter-American system of human rights, and to the maximum extent permitted by its level of economic development.

485. Finally, the Government of Barbados is of the view that any review of the desirability of capital punishment must take place within its democratic, constitutional framework. Barbados has a longstanding tradition of constitutional democracy, respect for fundamental human rights and respect for the rule of law. Representative democracy, and the human rights and values underpinning it, are central to the legal norms of the Organization of American States and its Inter-American human rights subsystem.

486. The matter of capital punishment is a fundamental aspect of Barbados' legal order, and has been subject to widespread debate. A Constitutional Review Commission has examined it and the topic has come up in debates before Parliament. It is clear that at present the public overwhelmingly approves the use of the death penalty. The current government of Barbados was elected twice by an overwhelming majority on the basis of a platform which included a promise to uphold its current form of capital punishment.

487. As a result, Barbados emphasises that it must balance its obligations under the Inter-American system to uphold and respect its democratic traditions and the *Constitution* of Barbados, on the one hand, with its obligations to protect the fundamental human rights of the people on the other. As the State has comprehensively demonstrated in its Submissions, Barbados has struck the appropriate balance by simultaneously upholding the democratic choices of the people and fully respecting the human rights that are set out in the texts of the *OAS Charter* (as interpreted by the American Declaration) and the *American Convention*. The Government of Barbados respectfully submits that any review of the desirability of a particular form of capital punishment can only take place within its democratic, constitutional framework, since such matters are not governed by the rules of the Inter-American system of human rights.

488. In consideration of the above, Barbados respectfully requests that this Honourable Court deny all of the claims and requests of the Petitioners in their Petition of September 3, 2004, and all of the claims and requests of the Commission in its Application of August 18, 2006, and in doing so,

a. affirm that the proper interpretations of the human rights provisions of the *Charter of the Organization of American States* (as interpreted by the

American Declaration on Rights and Duties of Man) and of the *American Convention on Human Rights* cannot and do not prohibit the form of capital punishment traditionally employed by Barbados,

b. affirm that Barbados' application of the death penalty in the context of its entire system of laws and human rights protections does not violate either the *OAS Charter* or *American Convention on Human Rights*, and in particular, Articles 1, 2, 4, 5 and 8 of the *American Convention* and the similar articles of the American Declaration, and specifically,

- affirm that the mandatory nature of Barbados' capital punishment, when considered in the context of its entire criminal justice system, does not violate any of Articles 4(1), 4(2), 5(1), 5(2) and 8(1) of the *American Convention*,
- affirm that the conditions of detention experienced by the Petitioners and the reading of warrants of execution to them have not violated their rights under Articles 5(1) and 5(2) of the *American Convention*,
- affirm that the reading of warrants of execution to the Petitioners while their complaints were pending before the Inter-American Commission on Human Rights did not in any manner violate their rights under Article 1(1) of the *American Convention*, and
- affirm that the laws of Barbados, including the *Offences Against the Person Act 1994* and the *Constitution* are in full compliance with the *American Convention* and therefore do not in any way violate the rights and freedoms protected under the *American Convention*, including under Article 2 of that *Convention*, and

c. deny all of the demands of both the Petitioners and the Commission, including those set out in paragraph 161 of the Application of the Commission of August 18, 2006, in relation to reparations, namely,

- the request for restitution,
- the requests for remedies, including any form of compensation, for any of the four Petitioners and their relatives,
- the request for commutation of the death sentence of Mr. Huggins,
- the requests contained in subparagraphs (4)-(6) of the same paragraph of the Application for adoption of legislative measures to, *inter alia*, change the nature of Barbados' form of

capital punishment, its laws related to capital punishment, its rules related to existing laws, or its prison standards.

489. Further, and for the sake of completeness, the State respectfully requests that this Honourable Court dismiss all of the claims for reparations, including costs, as set out in paragraphs 145-159 of the Application of the Commission of August 18, 2006, and as fully rebutted in the State's present Submissions.

Respectfully submitted,

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Jennifer Edwards
Solicitor General of Barbados

Agent of Barbados