INTER-AMERICAN COURT OF HUMAN RIGHTS

Case No 12.480

Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael Huggins
v.
Barbados

0000531

RESPONSE OF THE STATE TO THE SUPPLEMENTARY WRITTEN SUBMISSIONS OF THE ALLEGED VICTIMS AND THEIR NEXT OF KIN

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1. Barbados acknowledges receipt from the Honourable Court of two copies of the Supplementary Written Submissions of the Alleged Victims (the "**Supplementary Submissions**"), each attaching a different affidavit from the proposed expert Professor Roger Hood, which were received by the State on April 11, 2007.

I. OVERVIEW OF RESPONSE

2. Barbados submits that the Supplementary Submissions were unnecessary and inappropriate. The State's case was not new to the representatives of the alleged victims and their next of kin (the "**Representatives**"), who in fact relied upon, and quoted portions of submissions dating from 2003, in their pleadings. The Representatives had no basis to request Supplementary Submissions, nor did they have a basis to request additional expert witnesses. In the alternative, the expert witnesses proposed by the Representatives do not satisfy the requirements of impartiality imposed by the rules of the Inter-American system of human rights and, contrary to Article 19(1) of the *Statute of the Inter-American Court of Human Rights*, they "have a direct interest" in the present case. For these reasons the State respectfully requests that this Honourable Court disallow the Supplementary Submissions and strike them, and their attached affidavits, from the record.

3. In the alternative, if the Supplementary Submissions are deemed admissible, the State re-affirms its arguments about the lack of any customary rules of international law which might restrict the State's ability to impose its present system of capital punishment. The State also re-affirms its alternative position of being a persistent objector to any such rule.

4. Barbados also rejects the Representatives' submissions regarding the international legal rules on treaty interpretation and the purported effect of Article 62(1) of the *American Convention on Human Rights*. The State submits that international legal tribunals must consider and apply the international legal rules of treaty interpretation, including those codified in the *Vienna Convention on the Law of Treaties*. They must do so lawfully, *intra vires* and correctly.

5. Further, the State does not concede the limitations the Representatives seek to impose upon the effect of Barbados' reservations to the *American Convention*. By means of its reservation the State excluded consideration of its system of capital punishment and hanging as a method of execution, both of which existed at the time of, and were specifically mentioned in, the reservation. As established by this Honourable Court, the State's obligations under the *Convention* must be read subject to the terms of its reservation.

6. Regarding the two versions of the affidavit of Professor Roger Hood, the State submits that, for the reasons indicated above, both should be deemed inadmissible by this Honourable Court and struck from the record. In the alternative, should these affidavits be admitted, the State re-affirms its position that there is no customary international law prohibiting or restricting Barbados' form of capital punishment. The State submits that

the evidence proposed by Professor Hood does not contradict that position. Rather, the evidence provided in the affidavits is inconsistent and the state practice described is neither constant nor uniform. Nor is that state practice supported by the requisite *opinio juris sive necessitatis*.

7. Consequently the State respectfully requests that this Honourable Court strike both the Supplementary Submissions and their attached affidavits from the record and disallow the two new proposed expert witnesses, Professors Schabas and Hood. In the alternative, the State respectfully requests that the Court draw the necessary inferences and uphold the submissions of the State in the present case.

II. THE SUPPLEMENTARY WRITTEN SUBMISSIONS OF THE REPRESENTATIVES WERE BOTH UNNECESSARY AND INAPPROPRIATE

8. The State respectfully submits that the request to make Supplementary Submissions was both unnecessary and inappropriate.

A. Barbados' case was not "new" to the Representatives

9. The Representatives are on record as indicating in their initial correspondence of March 2, 2007, which requested the ability to submit additional written pleadings, and again in their letter of March 6, 2006, which requested the ability to present additional evidence, that Barbados had raised "a number of issues ... for the *very first time*" in the *Submissions of the State of Barbados to the Inter-American Court of Human Rights* in the present case, dated December 18, 2006 [Barbados' "***Submissions to the Court***"]. The Representatives re-state this point again in the first paragraph of the Supplementary Submissions. These statements are manifestly incorrect and have the potential to mislead the Honourable Court.

10. Contrary to the above contention of the Representatives, several years ago Barbados produced *two* detailed sets of submissions which were substantially similar to those submitted to the Court on December 18, 2006. Both of these sets of submissions responded to a formal complaint made to the Commission by the Representatives.[1] This complaint was addressed in two hearings before the Commission, one on October 18, 2002 and the other on October 20, 2003.

11. These two sets of submissions by Barbados are:

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[1] Please find attached as Appendix I a copy of the Letter of January 21, 2003, from the Inter-American Commission on Human Rights, attaching the Minutes of Hearing No 55, Death Penalty in Barbados, Monday, October 18, 2002.

a. Firstly, the extensive written Submissions of the State for the oral hearing before the Inter-American Commission on Human Rights of October 20, 2003 (the "**2003 Submissions to the Commission**");[2] and

b. Secondly, the extensive written Submissions of the State in response to the Commission's request for an advisory opinion on mandatory capital punishment (Advisory Opinion No. 20, filed on May 31, 2005) (the "**2005 Advisory Submissions**").[3]

12. These previous submissions directly responded to a complaint by the *same lawyers from Simons Muirhead & Burton* that are representing the alleged victims and their next of kin in the present case.[4]

13. In both the 2003 Submissions to the Commission and the 2005 Advisory Submissions Barbados set out in some detail (1) arguments related to treaty interpretation, including examinations of the drafting records of the American Declaration and the *American Convention*, (2) arguments showing that Barbados' criminal justice system could not be considered "arbitrary," and (3) arguments establishing Barbados' status as a persistent objector.

14. As a result, contrary to the statement in paragraph 1 of the Supplementary Submissions these issues were ***not*** "raised for the first time in the written submissions of the State party." Rather, they were argued extensively several years prior to the State's submissions in the present case.

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[2] Barbados, *Submissions of the State of Barbados in the Matter of the Death Penalty* for the hearing of October 20, 2003, before the Inter-American Commission on Human Rights. To this seventy (70) page document were appended two brief (2-page) addenda, the first entitled "The Rights of an Accused Under the Laws of Barbados," and the second entitled "Explanatory Note Regarding the Privy Council."

[3] Barbados, *Submissions of the State of Barbados on the Request by the Inter-American Commission on Human Rights for an Advisory Opinion from the Inter-American Court of Human Rights (Article 64(1) of the American Convention on Human Rights) on Legislative or Other Measures Denying Judicial or Other Effective Recourse to Challenge the Death Penalty (Articles 1(1), 2, 4, 5, 8, 25, 29 and 44 of the American Convention on Human Rights) [Advisory Opinion No 20]*, filed with the Court on May 31, 2005. The State's one hundred and eighty-three (183) page submissions were accompanied by one hundred and thirty three (133) authorities and documents, many of which were also annexed to the State's *Submissions to the Court* in the present case. The request for the advisory opinion was denied by the Court in its Order of June 24, 2005.

[4] See the cover page of the Minutes of Hearing No. 55, Death Penalty in Barbados, Monday, October 18, 2002 (attached in Appendix I), on which several members of the firm Simons Muirhead & Burton are listed: Mr. Nicholas Blake, QC, Mr Julian Knowles, Mr Saul Lehrfreund and Mr. Parnais [*sic*] Jabbar.

B. The Representatives in fact used the State's earlier submissions in another forum as well as in the present case

15. The Representatives cannot pretend ignorance of the State's previous submissions. Barbados draws the attention of this Honourable Court to the fact that the Representatives not only relied upon Barbados' 2003 Submissions to the Commission in hearings before the Judicial Committee of the Privy Council,[5] but also directly pled these very same submissions as part of their opening arguments in the current case and in their Submissions re Referral to the Inter-American Court of Human Rights of April 21, 2006. For example, in paragraph 35 of their original Communication of September 3, 2004 to the Inter-American Commission on Human Rights, the Representatives quote *directly* from Barbados' 2003 Submissions to the Commission in the following terms:

> 35. [...] The Applicants note that Barbados has not taken any step toward withdrawal from the ACHR or from the compulsory jurisdiction of the Inter-American Court following the publication of the Court's judgment in Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago (Judgment of June 21, 2002, Inter-Am. Ct H.R., (Ser. C) No 94 (2002)). On the contrary, as recently as 20th October 2003 Barbados emphasised its commitment to its international human rights obligations. In its submissions to the Inter-American Commission on Human Rights in "*In the matter of the Death Penalty*", which considered the compatibility of the recent amendments to the Constitution of Barbados with the ACHR, the Government of Barbados affirmed that
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> > "... Barbados is unique amongst Commonwealth Caribbean countries in its acceptance and promotion of Inter-American human rights obligations.
> >
> > 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.
> >
> > Barbados seeks to uphold all of 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, and its obligations related to certain human rights instruments on the other..."[6]

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[5] See paragraph 81(4) of the dissenting judgement of Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe in the case of *Boyce and Joseph v. The Queen* [2004] UKPC 32 [reproduced at Tab 36 of the *Annex to the Submissions of the State of Barbados (Authorities)*].

[6] Communication under the American Convention on Human Rights of September 3, 2004, Re Lennox Boyce, Jeffrey Joseph, Frederick Atkins, Michael Huggins and Barbados, para. 35

16. In the Applicants' Submissions re Referral to the Inter-American Court of Human Rights of April 21, 2006, the Representatives evidence clear knowledge of Barbados' arguments regarding treaty interpretation. They state in paragraph 19:

> 19. In its "Annex on the Status of International Law Before Municipal Tribunals", submitted in the proceedings before the JCPC, the State of Barbados confirms that *it has submitted to the Inter-American Court and the Inter-American Commission in the proceedings "In the Matter of the Death Penalty" that both the Commission and the Court have violated fundamental rules regarding treaty interpretation in their respective assessments of the legality of the mandatory death penalty* [see paragraph 16 p. 8]. Further the State party submitted:
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> > "Barbados has raised fundamental questions regarding the competence of these Inter-American organs to assess the legality of her system of capital punishment. Barbados has raised serious questions about the legal basis for past decisions of both the Commission and the Court in this area" [see para. 18 p. 9]"[7]

17. In the Written Submissions of the Alleged Victims [to the Court] of October 20, 2006, the Representatives twice more refer to Barbados' 2003 Submissions to the Commission. In paragraph 2(iii) they characterise the treaty interpretation arguments of Barbados in the following terms:

> (iii) The state party has sought to argue that this Court and the Inter-American Commission have acted outside their competence and illegally:
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> > The respondent has sought to argue that this Court and the Inter-American Commission "have applied an illegal standard ... acted outside of their competence (or ultra vires) [and] ... contrary to the rule of law" in so far as the Court and the Commission have found the mandatory death penalty to contravene articles 4, 5 and 8 of the American Convention on Human Rights in previous cases [3];[8]

18. In paragraph 15 of the same Submissions the Representatives refer to the portions of Barbados' arguments that describe the laws and procedures related to the death penalty and the Privy Council (mercy committee).

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[7] Applicants' Submissions re Referral to the Inter-American Court of Human Rights of April 21, 2006, para. 19 (emphasis added)

[8] Written Submissions of the Alleged Victims [to the Inter-American Court of Human Rights] of October 20, 2006, para 2 (iii) [Footnote 3 states: "Submissions of the State of Barbados in the Matter of the Death Penalty, 20 October 2003 at p. 29. Contained in CB Appendix E.2, but for ease of reference reproduced at AVB Appendix 3."]

19. In light of the multiplicity of references to the State's previous submissions, Barbados is surprised that the Representatives sought to make additional written submissions on the basis that such arguments were made "for the very first time."

20. The State is also puzzled by the acquiescence of the Commission in this matter. The Commission, for example, specifically quoted the Representatives' contention that Barbados' arguments were "raised for the very first time" in the final paragraph of the first page of its letter to the Court of March 21, 2007 in the following terms:

> The Commission notes that the representatives of the victims have also offered two new expert opinions by Professors William Schabas and Roger Hood in order to address the issues that the State of Barbados has *"raised for the very first time."* The *curriculum vitae* of such experts were attached. The Commission has no objection in relation to this new evidence.[9]

21. In light of the above, the State submits that the Supplementary Submissions should neither have been requested nor allowed in the present case. Accordingly, the State respectfully requests that this Honourable Court disallow the Supplementary Submissions and their appended affidavits of Professor Roger Hood, and strike them from the record.

22. Further, the State formally requests that the Court take note of, and draw the relevant inferences from, the above incorrect statements.

C. Consequently, there is no basis for additional expert witnesses

23. The State also formally objects to the need for, and appropriateness of the testimony of, the two additional expert witnesses named by the Representatives, namely, Professors William Schabas and Roger Hood. The Representatives knew the nature of the State's arguments before filing their original Communication of September 3, 2004, and they had ample opportunity to present the above two expert witnesses during earlier phases of the present pleadings.

24. Further, because the Representatives have not proven, and cannot prove, that new arguments were "raised for the very first time" in the present case, their original request for leave to add new expert witnesses was time barred.

25. This objection is made independently of, and is distinct from, the grounds for disqualification of experts listed in Article 19(1) of the *Statute of the Inter-American Court of Human Rights*, and as a result the State humbly submits that it is not time constrained by Article 50(2) of the *Rules of Procedure of the Inter-American Court of Human Rights*.

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[9] Letter of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights of March 21, 2007, p 1, as copied to Barbados as an attachment to the letter of the Court dated March 29, 2007 (Ref: CDH-12.480/044) (emphasis added)

D. In any event, the proposed experts must be disqualified because they have pursued an abolitionist agenda and have a "direct interest" in the matter 0000538

26. In the alternative, the State respectfully requests that in order to guarantee the due process rights of the State and the fair and proper procedure of the Court, the Court waive the 15 day time limitation imposed in Article 50(2) of the *Rules of Procedure of the Inter-American Court of Human Rights* because both of the above proposed experts are disqualified under Article 19(1) of the *Statute of the Inter-American Court of Human Rights*. Article 19(1) provides:

> 1. [Experts] may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity.

27. In this regard both Professor William Schabas and Professor Roger Hood have written extensively on, and to a large part based their careers upon, the need to *abolish* the death penalty. As abolitionists, they lack the independence, impartiality and objectivity required of experts. The following publications are illustrative:

a. Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3rd ed. (Oxford: Oxford University Press, 2002),

b. Roger Hood, "Introduction – The Importance of Abolishing the Death Penalty," in *The Death Penalty: Abolition in Europe* (Strasbourg: Council of Europe, 1999),

c. Roger Hood, *The Death Penalty: Beyond Abolition* (Strasbourg: Council of Europe, 2004),

d. William Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Boston: Northeastern University Press, 1996),

e. William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge: Cambridge University Press, 2002), and

f. Peter Hodgkinson and William A. Schabas, eds., *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004).

28. In fact the writings of Professors Schabas and Hood expressly advocate the abolition of the death penalty.

29. Professor Hood, for example, at pages 6-7 of his work *The Death Penalty: A Worldwide Perspective*, expressly acknowledges his views on the matter:

> As already mentioned, this book began life as an official report, and was not intended to present an argument, as such, for the abolition of capital

> punishment. It was oriented instead towards assessing the extent to which the policy objectives of the United Nations are being achieved, and what impediments there appear to be in bringing them to fruition, namely 'progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing the punishment.'
>
> Yet, one would be unlikely to embark on such a task without believing that this is a desirable goal. *And, certainly, my own involvement in researching this subject over the past quarter of a century has convinced me even more strongly of the case for abolition of judicial executions throughout the world.*[10]

30. In his introduction to *The Death Penalty: Abolition in Europe*, Roger Hood is even more explicit, stating at page 14:

> European countries can *congratulate themselves for banishing a barbaric punishment* [the death penalty] from their own soil and for using their political influence to get ride of it in countries which wish to be associated with the European Community. Nevertheless, *much needs to be done if third countries*, some of whom proclaim the need for capital punishment with vigour, *are to be influenced in the same direction.*[11]

31. William Schabas, in the third edition of his work *The Abolition of the Death Penalty in International Law*, describes the death penalty as barbaric and likens the achievement of its abolition to the "end of [a] dark tunnel." He writes, at p. 363:

> Victor Hugo described the death penalty as 'le signe spécial et éternel de la barbarie.' The archetypal form of State-authorized premeditated homicide, it is eternal in the sense that it has been with mankind since antiquity. Yet its abolition has been envisaged for at least two centuries, and with the accelerating progress of the movement for abolition, *the end of this dark tunnel is now in sight.* There are many ways to measure society's *progress away from barbarism* and towards a more humane condition. One is by the progressive development of legal norms.[12]

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[10] Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3rd ed (Oxford: Oxford University Press, 2002), pp. 6-7 (emphasis added, citations omitted).

[11] Roger Hood, "Introduction – The Importance of Abolishing the Death Penalty," in *The Death Penalty: Abolition in Europe* (Strasbourg: Council of Europe, 1999), p. 14 (emphasis added)

[12] William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge: Cambridge University Press, 2002), p. 363 (emphasis added, citation omitted). At p. 16 of the same work Schabas is condescending in his treatment of Islamic states for not abolishing capital punishment:

> The Islamic system of human rights, still very rudimentary in comparison with the other regional systems, does not even contemplate abolition of the death penalty

32. In his earlier work, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts*, at pages 203-4, Schabas is even more direct. He goes so far as to suggest that capital punishment is not even compatible with human rights law: 0000540

> It is, to be sure, too early to say that capital punishment is deemed contrary to customary international human rights law, although specialized treaties now exist to accommodate the growing number of abolitionist countries. *But no longer can one affirm that capital punishment is compatible with human rights law.*[13]

33. The State finds it difficult to comprehend how persons who believe that capital punishment *per se* is "not compatible with human rights law" or is "a barbaric punishment" could satisfy the strict rules for independence, impartiality and objectivity under Article 19(1) of the *Statute of the Inter-American Court of Human Rights*, as applicable to expert witnesses through Article 50(1) of the *Rules of Procedure of the Inter-American Court of Human Rights*.

34. In addition, given the fact that both of the above proposed witnesses have dedicated a large part of their careers to the publication of abolitionist texts, it seems inconceivable to the State that they would not have "... a direct interest" in the present proceedings, as prohibited under Article 19(1) of the *Statute*.

35. The State therefore respectfully requests that this Honourable Court deny the Representatives' request for additional expert witnesses for the above reasons, and further requests that the Court strike both versions of the Affidavit of Professor Roger Hood from the record.

III. CUSTOMARY INTERNATIONAL LAW AND THE PERSISTENT OBJECTOR

36. Although neither conceding the necessity or appropriateness of these Supplementary Submissions, because they are already before the Court and the Commission, and in light of the strict time constraints imposed upon the State's Response, the State responds to them in the following pages.

37. In doing so, however, the State does not concede the propriety of the Supplementary Submissions, nor does the State retract its request to have them, and their attached affidavits, struck from the record.

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[13] William Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Boston: Northeastern University Press, 1996), pp 203-4 (emphasis added)

A. Customary international law

38. The first issue raised by the Representatives, made in paragraph 4 of their Supplementary Submissions, is one regarding the relevance of customary international law and the doctrine of persistent objection. The Representatives argue that the submissions of Barbados in these areas "wholly miss the point of what this Court is being asked to decide."

39. Respectfully, however, it is not clear what the Representatives' position is on this matter. They deny the relevance of customary international law and the role of the persistent objector. But then in paragraph 8 of their Supplementary Submissions the Representatives go on to challenge the State's arguments in this area (the State's "arguments in respect of the status of the mandatory death penalty in customary international law are not accepted by the alleged victims"), and then offer further evidence attempting to refute the State's analysis of the customary international law position. The Representatives indicate in footnote 4 that "[a]n affidavit sworn by Professor Roger Hood is served with these submissions setting out evidence in *rebuttal* of the State party's claims in respect of global *state practice* concerning the death penalty."[14]

40. In other words, on the one hand the Petitioners *deny* the applicability of customary international law to the case and specify that they are *not seeking* a decision of the Court on this matter, and yet on the other they *rebut* arguments on customary international law with 'expert' affidavit evidence about one of the essential *components required for proof of customary international law*, namely, *state practice*.

41. The State discredits this affidavit evidence later.[15] But at this point the State expresses puzzlement as to why, if the Representatives were confining their arguments *entirely to the treaties and rules of the Inter-American system of human rights*, they felt compelled to make numerous, sweeping references to the jurisprudence of foreign domestic courts,[16] the organs of the *European Convention on Human Rights*,[17] and the UN Human Rights Committee.[18] The Representatives also referred throughout these arguments to

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[14] Emphasis added

[15] See page 17 *ff.* of the present Response, below.

[16] See, e.g., para. 43 of the Petition of September 3, 2004; paras 9-10 of the Applicants' Submissions re Referral to the Inter-American Court of Human Rights of April 21, 2006; paras 6, 9, 17, 20-21, 24 and 40 of the Written Submissions of the Alleged Victims [to the Inter-American Court of Human Rights] of October 20, 2006.

[17] See, e.g., paras 92-93 of the Petition of September 3, 2004; para. 8 of the Applicants' Submissions re Referral to the Inter-American Court of Human Rights of April 21, 2006; para. 66 of the Written Submissions of the Alleged Victims [to the Inter-American Court of Human Rights] of October 20, 2006.

[18] See, e.g., paras 44-46, 53, 61, 82 and 87-91 of the Petition of September 3, 2004; para. 8 of the Applicants' Submissions re Referral to the Inter-American Court of Human Rights of April 21, 2006; paras 9, 59, 65

unspecified "internationally recognised standards"[19] and to non-binding documents such as the UN Standard Minimum Rules for the Treatment of Prisoners.[20] 0000542

42. These references, which have been further supported by the Representatives' submission of an entire affidavit to rebut Barbados' arguments on customary international law and its status as a persistent objector, reinforce the State's impression that the case it faces involves customary international law.

43. In addition, the State notes that the Commission in its reports and submissions in the present case has referred to similar judgements or reports of foreign domestic courts,[21] the organs of the *European Convention on Human Rights*,[22] the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,[23] the UN Human Rights Committee,[24] and to non-binding documents such as the UN Standard

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and 71 of the Written Submissions of the Alleged Victims [to the Inter-American Court of Human Rights] of October 20, 2006

19 See, e g , paras 76 and 79(ii) of the Petition of September 3, 2004; paras 45, 47(iv) and 70 of the Written Submissions of the Alleged Victims [to the Inter-American Court of Human Rights] of October 20, 2006

20 See, e g , paras 82 and 94 of the Petition of September 3, 2004; para 64 of the Written Submissions of the Alleged Victims [to the Inter-American Court of Human Rights] of October 20, 2006

21 See, e g , paras 92 and 94 of the Commission's *Report No 3/06, Merits, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins, and Michael Huggins v Barbados*, OEA/Ser/L/V/II 124, Doc 10, February 28, 2006; paras 87 and 100 of the *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael Huggins (Boyce et al) v Barbados* of June 23, 2006, transmitted to the State on August 18, 2006 [and therefore referred to in the State's *Submissions to the Court* as the "Application of the Commission of August 18, 2006"]

22 See, e g , para 108 of the Commission's *Report No 3/06, Merits, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins, and Michael Huggins v Barbados*, OEA/Ser/L/V/II 124, Doc 10, February 28, 2006; paras 119 and 157 of the *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael Huggins (Boyce et al) v Barbados* of June 23, 2006

23 See, e g , para 110 of the Commission's *Report No 3/06, Merits, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins, and Michael Huggins v Barbados*, OEA/Ser/L/V/II 124, Doc 10, February 28, 2006; para 117 of the *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael Huggins (Boyce et al) v Barbados* of June 23, 2006

24 See, e g , paras 91, 94 and 108 of the Commission's *Report No 3/06, Merits, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins, and Michael Huggins v Barbados*, OEA/Ser/L/V/II 124, Doc 10, February 28, 2006; para 90 of the *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael Huggins (Boyce et al) v Barbados* of June 23, 2006

Minimum Rules for the Treatment of Prisoners.[25] Further the Commission has used phraseology such as "a common precept has developed"[26] or "a principle of law has developed"[27] in relation to the legal rules applicable to the death penalty, and has also referred to unspecified "internationally recognised standards"[28] in relation to the treatment of prisoners. Since these phrases are used in a context whereby they purport to describe binding legal obligations, rather than abstract or general principles of law, it is not unreasonable for the State to assume that the Commission may be indirectly referring to, or may intend to later refer to, customary rules of international law.

44. As a result, for the benefit of this Honourable Court, the State has offered full submissions on the general rules regarding proof of customary international law, and on the lack of existence of rules of customary international law which might prohibit or restrict the State's system of capital punishment.[29] The State also has fully rebutted the possibility of the United Nations' Standard Minimum Rules for the Treatment of Prisoners being in any way binding under the rules of international law.

45. In light of these wide-ranging references to cases, treaties and documents outside of the Inter-American system of human rights, which could only be binding upon the State by means of a parallel customary rule of international law – a point expressly denied by Barbados – the State is grateful for the clarification of the Representatives in paragraph 4 that neither they nor the Commission seek "any declaration or other relief from this Court in respect of breaches of customary international law."

46. The State respectfully requests that the Court note this clear, self-imposed restriction on the scope of the submissions of the Representatives.

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[25] See, e.g., para. 109 of the Commission's *Report No 3/06, Merits, Case 12.480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins, and Michael Huggins v. Barbados*, OEA/Ser/L/V/II 124, Doc. 10, February 28, 2006; para. 116 of the *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael Huggins (Boyce et al) v Barbados* of June 23, 2006.

[26] *Downer and Tracy v Jamaica* (Report No. 41/00; 13th April 2000), para. 212, as reproduced in para. 10 of the Written Submissions of the Alleged Victims [to the Inter-American Court of Human Rights] of October 20, 2006

[27] *Desmond McKenzie et al v Jamaica*, Case No. 12.023, Report No. 41/00, Annual Report of the IACHR 1999, para. 208. This passage is reproduced on page 2 of the Letter of the Commission of 21 January 2003, Re General Hearing on Constitutional Amendments, October 18, 2002 (attached to this document as Appendix A).

[28] See, e.g., para. 116 of the *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights, Case 12 480, Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael Huggins (Boyce et al) v. Barbados* of June 23, 2006.

[29] See Section IX of the Barbados' *Submissions to the Court*

IV. THE INTERNATIONAL LEGAL RULES REGARDING TREATY INTERPRETATION

47. Unfortunately, with respect, the Representatives appear to have wholly missed the point of the State's submissions on the rules of treaty interpretation. In paragraphs 12-23 of their Supplementary Submissions, when seeking to refute the State's arguments, they have in several cases further substantiated them.

48. In paragraph 12, for example, the Representatives agree with the State that if a judicial body "had failed to address itself to the requirements of the international legal rules of treaty interpretation that [an] argument could arise as to the vires of those decisions." The Representatives then go on to indicate that a judicial body not only has to *consider* the rules of treaty interpretation, but it has to expressly *apply* them. What they fail to appreciate, however, is that not only does an international tribunal have to apply the rules of treaty interpretation but it has to do so *correctly*, both in terms of form *and substance*. Substance requires *proper* application of the relevant provision.

49. This fundamental legal point can be readily demonstrated with an interpretive example using a provision of the *American Convention on Human Rights*. Article 4(5) of the *American Convention* states:

> 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.

50. Let us imagine a case in which a person who was 16 years old at the time of committing a crime has been executed. When adjudicating the subsequent human rights complaint a tribunal would be correct to *consider* Article 4(5) of the *American Convention*. It also would be right to *apply* Article 4(5) to the facts of the case. But it would be manifestly *incorrect* if, after applying Article 4(5) to the facts of the case, it held that the text *allowed* imposition of capital punishment in such circumstances. Such an interpretation clearly would not involve a *proper application* of the provision.

51. The State respectfully submits that its analysis of the jurisprudence of this Honourable Court and the Inter-American Commission on Human Rights in its *Submissions to the Court* is correct. The passages of the *Restrictions to the Death Penalty* Advisory Opinion cited by the Representatives in paragraphs 12-15 of their Supplementary Submissions are expressly contemplated by the State in paragraphs 63 and 161-65 of its *Submissions to the Court*. Contrary to the arguments of the Representatives, the State reaffirms its position, as summarised in paragraph 174 of its submissions,

> [that] 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.

52. Further, the State stands by the position it indicated in paragraphs 259-96 of its *Submissions to the Court*, namely, that in Barbados capital punishment is applied only to the most serious crimes, that a full range of statutory and common law defences and justifications are available to the accused to avoid the death penalty, that the Barbadian Privy Council (mercy committee) through fair and proper procedures provides full individualised consideration of the circumstances of the offender – including individualised consideration of the mitigating circumstances related to 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. The State therefore completely rejects the mischaracterisation of its arguments by the Representatives in paragraph 16 of their Supplementary Submissions.

53. The State also expressly rejects as misconceived the interpretation of Article 4(2) of the *American Convention* found in the same paragraph, as doing violence to the clear text of the provision. It cannot be disputed that the death penalty in Barbados is "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." Contrary to the wishes of the Representatives, the phrase "pursuant to a final judgment rendered by a competent court" cannot be read entirely out of context and in the manner they suggest. No matter how much the Representatives may *wish* Article 4(2) to say that capital punishment may only be applied to 'the most serious crimes ***as determined by*** a final judgment rendered by a competent court,' it does not do so. Such a revisionist view of the text is not compatible with the international legal rules regarding interpretation of treaties; it falls entirely outside of the textual, subjective and teleological forms of interpretation. Instead, to achieve such a radical alteration of the meaning of Article 4(2), the Representatives would need to formally amend the *American Convention*, which process is governed by Article 76.

54. Regarding the statement made by the Representatives in paragraph 17 of their Supplementary Submissions about the meaning of "arbitrary" as being "not in accordance with the law," the State is pleased that the Representatives have adopted its definitions of the meaning of the term. Since the death penalty in Barbados is punishment provided for and imposed in accordance with its laws it seems the Representatives agree that Barbados' system of capital punishment cannot be described as arbitrary. Similarly, the Representatives' arguments about Barbados' system of capital punishment as being cruel and inhuman must fail, since it is not arbitrary and is imposed in accordance with the law.

55. The State reiterates its submissions on the passage from the International Law Commission's commentary on the final draft articles to the *Vienna Convention on the Law of Treaties* quoted in paragraph 20 of the Supplementary Submissions of the Representatives, namely, that

> 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," nevertheless, as outlined above and further illustrated

> below, the article itself indicates a clear, logical interpretive order in which textual interpretation is primary [49][30]

56. As demonstrated in paragraphs 68-83 of Barbados' *Submissions to the Court*, and in both the commentary to, and the text of, the *Vienna Convention* all other forms of interpretation are secondary or supplemental to the textual method. Use of subsequent practice is greatly restricted and supplemental. The subjective method of interpretation, described in Article 32 of the *Vienna Convention*, is secondary in nature, being restricted either to confirming the meaning of an Article 31 interpretation or to ascertaining the meaning where an interpretation according to Article 31 is ambiguous, obscure, or leads to a result which is manifestly absurd or unreasonable. The teleological method is also secondary; it only comes into play in order to confirm the textual form of interpretation, or where both the textual and subjective forms of interpretation fail, as contemplated in Article 33(4) of the *Vienna Convention*. In sum, as stated in paragraph 81 of the State's Submissions,

> 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.[31]

57. In addition the State rejects the suggestion that Article 62(1) of the *American Convention* could somehow bind the State to accept the "*competence* of the Court on *all matters* related to the interpretation or application of the Convention."[32] Article 62(1) allows the State to recognise "as binding, ipso facto, and not requiring special agreement, the *jurisdiction* of the Court on all matters relating to the interpretation or application of this Convention."[33] The use of the term "jurisdiction" refers to the ability of the Court to exercise its powers within the bounds of the treaties of the Inter-American system of human rights and the general rules of international law, including the international legal rules of treaty interpretation. To the extent that the Representatives mean "competence" to refer to the same thing, there is no disagreement. But the State objects to the notion

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30 Barbados' *Submissions to the Court*, para. 66 [Footnote 49 cites: 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]]

31 Barbados' *Submissions to the Court*, para. 81 [Footnote 55 cites: T O Elias, *The Modern Law of Treaties* (1974), pp. 72-73 [Annex, Tab 95]]

32 Emphasis added.

33 Emphasis added.

that it could somehow be bound to *any* form of interpretation or application of the *Convention*, including one that is manifestly unlawful or *ultra vires*.

V. EFFECT OF BARBADOS' RESERVATIONS

58. The State does not concede that its reservation to Article 4(4) of the *American Convention* has the limited effect contemplated by Representatives. The reservation of the State is clear and its effect has been explained in paragraphs 307-308 of Barbados' *Submissions to the Court*. The State made an express reservation regarding its form of capital punishment as it existed on November 27, 1982 (the date of deposit of its ratification with the reservation), and as established by its criminal laws. This reservation was accepted without objection.

59. As this Honourable Court has established,[34] the State's obligations under the *Convention* must be read *subject to its reservations*. Because Barbados specifically alluded to the *precise form* of its capital punishment in its reservation – hanging – the penalty of death by hanging is excluded from scrutiny under the *American Convention* in relation to Barbados. Contrary to the submission of the Representatives, hanging *was* and *is* the *only* means of execution for murder and treason under the laws of Barbados. Moreover Barbados' general system of capital punishment, which the Commission and Representatives seek to characterise as "mandatory," was exactly the same at the date of the State's ratification of the *Convention* and therefore falls under the scope of its reservation.

60. Contrary to the suggestion of the Representatives in paragraphs 29-30 of their Supplementary Submissions, such an interpretation cannot offend Article 29 of the *American Convention* for the simple reason – as acknowledged by the Court in the Advisory Opinion on *Restrictions to the Death Penalty* – that the State's *obligations* under the *Convention* are subject to the terms of its reservation. Article 29 only applies to obligations existing under the *Convention* which are applicable to the State, not those excluded from application by the State's reservation. Any other interpretation of Article 29 would make Article 75 (the provision regarding reservations which refers expressly to the rules of the *Vienna Convention on the Law of Treaties*), redundant and otiose.

VI. AFFIDAVITS OF PROFESSOR HOOD

A. Inadmissibility

61. For the reasons articulated above in Part I.A. of this Response, the State submits that both of Professor Hood's Affidavits, the original and amended versions, must be disqualified

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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, para. 45 [reproduced in the *Annex* to Barbados' *Submissions to the Court*, at Tab 80].

and struck from the record. There were no "new" arguments on the part of Barbados that required either additional written submissions or additional expert witnesses. Professor Hood's writings are expressly abolitionist in their approach to the death penalty and have been instrumental to the success of his career, thus entailing "... a direct interest" in the present proceedings, as prohibited under Article 19(1) of the *Statute of the Inter-American Court of Human Rights*.

B. The affidavits do not support the existence of a customary international legal norm regarding capital punishment

62. In the alternative, if the Court admits Professor Hood's affidavit, the State respectfully submits that the collection of statistics it contains does not assist the Representatives to establish their case about the supposed existence of a customary norm prohibiting mandatory capital punishment or capital punishment more generally.

63. As the State established in Section IX of its *Submissions to the Court*, proof of custom requires evidence of (1) state practice and (2) recognition on the part of states that the practice is required by a rule of law (*opinio juris sive necessitatis*).

64. The second, amended Affidavit of Professor Hood of April 6, 2007 [the "**Amended Affidavit**"],[35] offers some evidence of state practice, but this evidence is inconsistent, neither constant nor uniform, and is not supported by the requisite belief regarding its obligatory nature.

(1) No consistent state practice

65. Regarding consistency, Professor Hood expressly acknowledges that several states have re-established capital punishment or started to carry out executions after periods of inactivity. Professor Hood states:

> As regards countries classified as de facto abolitionist, the United Nations Secretary General's quinquennial reports have, for the sake of continuity, kept to the criteria of no executions for at least 10 years. The reports have made it clear that *this is not satisfactory because states can, and have on occasions, revert to executions*.[36]

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[35] Affidavit of Professor Roger Hood of April 6, 2007 ["**Amended Affidavit**"]. The state received two versions of Professor Hood's affidavit, an undated one transmitted by the Representatives on April 4, 2007, and an amended version, dated and transmitted on April 6, 2007. Both affidavits are at present part of the record. For clarity, the first, undated, original affidavit will be called the "**Original Affidavit**"; the second, amended one, will be called the "Amended Affidavit" Neither affidavit received by the State was paginated, so the State will refer to pages counted sequentially from the first page (which is counted as page 1).

[36] Amended Affidavit, p. 3 (emphasis added)

66. In other words, the actual practice of states demonstrates that states which have not carried out executions for a period may, and in fact do, decide later to exercise their lawful right to resume executions. Such a practice is inconsistent with abolitionism.

67. Further, such evidence demonstrates the misleading nature of categorisations like "*de facto* abolitionist." The evidence is clear. Either a state abolishes capital punishment, as an exercise of sovereign discretion under its domestic laws, or it does not. If a state has not formally abolished capital punishment, it cannot rationally be considered to be 'abolitionist.'

68. Consequently, even on his own evidence Professor Hood cannot establish the existence of the constant and uniform practice required for the creation of a rule of customary international law.

69. The Amended Affidavit also fails in its attempt to show that Amnesty International uses "a more limited definition" than the UN Secretary General.[37] The Secretary General's criterion is specified as being "no executions for *at least* 10 years." But Amnesty International's criterion is specified as being "states that have not executed a person *within* the past 10 years *and/or* have made declarations or instituted a moratorium on executions...."[38] Logically the latter definition is more expansive, not more limited. Amnesty International's definition as set out by Professor Hood uses the coordinating conjunction "or." Consequently the two requirements specified in the definition are posed in the alternative; if *either* is satisfied then under the definition the state will be classified as "abolitionist." As a result, under Amnesty International's definition a state that executes someone within the past 5 years (thereby failing the UN test), but then makes a declaration of intention not to execute would fall under the abolitionist category.[39] Such a declaration, of course, need not be binding and may be revoked at any instant.

70. It is incomprehensible that any state that continues to sentence persons to death, that continues imprison them on death row awaiting execution, and that *may at any moment lawfully execute them* can be considered 'abolitionist.' The point, Barbados respectfully submits, is not that states do not always carry out their death sentences. Rather, the point is that *at any time they could do so*. For such reasons the State submits that the use of statistics in such a manner by Amnesty International and, with respect, Professor Hood, is highly misleading.

(2) <u>No evidence of *opinio juris*</u>

71. Regarding the requirement for *opinio juris*, the evidence of Professor Hood tells us nothing about *why* states might feel inclined to restrict the application of, or remove,

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[37] Amended Affidavit, p. 3 (emphasis added).

[38] Amended Affidavit, p. 3 (emphasis added)

[39] Amended Affidavit, p. 3.

capital punishment. This omission is crucial. Without *opinio juris* even the most consistent state practice cannot support a customary norm.

72. In fact, as already indicated to the Honourable Court in Part IX.A.(3) of Barbados' *Submissions to the Court*, the kind of evidence discussed by Professor Hood can be of no value for the purposes of proving the existence of a customary norm of international law for the simple reason that it merely amounts to evidence of the *domestic* practice of certain states. At most this evidence proves that these particular 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.

73. In sum, the practice cited by Professor Hood is irrelevant to the determination the existence of an international legal rule, since it is neither constant nor uniform, and is unsupported by *opinio juris sive necessitatis*.

C. The statistics and definitions change in the two affidavits

74. Regarding Professor Hood's second main point, namely, the relative number of countries that impose mandatory capital punishment, it is instructive to compare the original and subsequent drafts of his affidavit. Both are on the record at present and are therefore before this Honourable Court.

75. In his undated original Affidavit [the "**Original Affidavit**"], Professor Hood appears to require actual *execution* before classifying capital punishment as mandatory. Thus he notes on the penultimate page that "most countries that retain the death penalty *do not in practice enforce it mandatorily* for murder by requiring everyone charged and convicted of that crime *to be executed*."[40] He continues by providing examples of situations in which capital punishment ceases to be mandatory:

> Discretion as to who is "death worthy" passes to other actors in the criminal justice system: *prosecutors, in selecting the charge;* juries in deciding whether to convict or to convict for a lesser, non-capital offence, or *the executive in exercising powers of clemency*.[41]

76. What is striking about this passage is that in it Professor Hood vindicates Barbados' position.

77. Barbados has not executed everyone who has been sentenced to death. In fact since the early 1980s *no one* has been executed in Barbados. Under Professor Hood's test Barbados therefore cannot have a mandatory system of capital punishment. Further, the

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[40] Affidavit of Professor Roger Hood, undated ["**Original Affidavit**"], p. 5 (emphasis added). The version of the Affidavit received by the State was not paginated and so the State refers to pages counted sequentially from the first page, which is counted as page 1.

[41] Original Affidavit, p. 5 (emphasis added)

Barbadian criminal justice system allows prosecutors to select the charge and the executive to exercise powers of clemency. Again, under Professor Hood's test Barbados cannot have a mandatory death penalty system.

78. It is also startling to see the way the statistics about the number of states which possess a form of mandatory capital punishment change between the Original Affidavit and the Amended Affidavit. In the Original Affidavit, starting at page 3, a list is provided of 13 states that "do not have a mandatory death penalty for murder." By the time of submission of the Amended Affidavit this first list has changed so as to indicate that "*Twelve* of them do not have a *strict* mandatory death penalty for murder."[42] Yet the examples that follow include only *ten* states, not twelve. Moreover this list includes two examples of states similarly situated to Barbados (thereby again revealing that under Professor Hood's analysis Barbados should not be identified as a state possessing mandatory capital punishment):

a. Botswana – the law allows "extenuating circumstances" to be found, and

b. Zambia – "the death penalty need not be imposed where there are 'extenuating circumstances.'"

79. Without further information it is impossible to distinguish these two examples from Barbados. As the State demonstrates in its *Submissions to the Court*, only the most serious crimes are subject to capital punishment under its criminal justice system.[43] The State also describes at length how extenuating circumstances can be presented as part of the trial process, during which a full range of statutory and common law defences and justifications are available to the accused to avoid the death penalty, and then can be raised a second time before the Privy Council (mercy committee).[44]

80. Further, out of the remaining eight states presented in the diminished first list of the Amended Affidavit, several more reinforce Barbados' central proposition that "[g]lobally, a number of states impose, and assert the lawful right to impose, mandatory capital punishment for a wide range of criminal offences."[45] Professor Hood does not dispute that the following states impose mandatory capital punishment: (1) China, (2) the Cook Islands, (3) El Salvador, (4) Japan and (5) Pakistan.

81. The change in the information provided regarding Pakistan is also striking in the two different versions of the affidavit. In the Original Affidavit Professor Hood states:

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[42] Amended Affidavit, p. 4 (emphasis added)

[43] Barbados' *Submissions to the Court*, paras 260-63

[44] Barbados' *Submissions to the Court*, paras 264-96.

[45] Barbados' *Submissions to the Court*, para. 189.

> Pakistan has no mandatory death penalty for murder, *except a murder committed by a person serving a life sentence for murder*, and for certain other offenses, in particular blasphemy.[46]

82. In the Amended Affidavit this passage is changed to the following:

> Pakistan has no mandatory death penalty for murder. Furthermore, *the victim's family may pardon the murderer or accept 'blood money'* – as compensation (Diya). The death sentence is mandatory for blasphemy but no executions have taken place for this offence.[47]

83. Nowhere in the Amended Affidavit is an explanation provided regarding sentencing in Pakistan related to murder by those already serving a life sentence for murder. Nor is there an explanation of the relevance of "blood money" to Pakistan's system of capital punishment. The State notes that the Diya system would be relevant only if Pakistan's penalty were *mandatory*, and "blood money" payments could lead to, for example, a commutation.

84. As a result of such discrepancies and 'clarifications,' by the time of the submission of the Amended Affidavit, Professor Hood's list of 13 states which are supposed to contradict Barbados' submissions is reduced to 3 – Armenia, Turkey and Ukraine. Yet even here there is no indication that these states have formally abolished capital punishment as a matter of law; rather, they are simply described as "no longer hav[ing] the death penalty for any offence."

85. Similarly, Professor Hood's second list of four states agrees with the claim made by Barbados. The four states listed – Brunei, Kenya, Malawi and Rwanda – all have mandatory capital punishment.[48]

86. In the final list provided in the Amended Affidavit Professor Hood concedes that a further 17 countries have mandatory capital punishment.[49]

87. Unfortunately, however, Professor Hood's analysis does not include discussion of Morocco and Tanzania, two of the states listed in Barbados' *Submissions to the Court*. Paradoxically, Professor Hood nevertheless provides examples of two states purportedly

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[46] Original Affidavit, p. 4 (emphasis added)

[47] Amended Affidavit, p. 5 (emphasis added)

[48] Amended Affidavit, p. 6

[49] Amended Affidavit, pp. 6-7

contained in Barbados' list of "32 [*sic*] countries"[50] possessing mandatory capital punishment – Turkey and Ukraine – which were not in fact included.

88. Thus the only real rebuttal offered by Professor Hood's Amended Affidavit is the indication that one state – Armenia – no longer appears to have mandatory capital punishment.

89. Moreover, as indicated earlier, Professor Hood's various explanations of the meaning of the term "mandatory capital punishment" in fact would exclude Barbados from coverage under the term. Professor Hood makes distinctions between, on the one hand, states which (1) "do not have a strict mandatory death penalty for murder" and (2) those that have mandatory capital punishment for murder but who have not executed anyone and/or announced an intention to abolish the death penalty, and on the other hand, (3) those countries in which the "death penalty is mandatory for murder and has been carried out, or there is an intention to carry out executions."[51] Professor Hood suggests that the first two categories do not properly fall under the classification of mandatory capital punishment.

90. As established above, Barbados could satisfy either of the first two categories, thereby excluding the State from Professor Hood's definition of mandatory capital punishment. The death sentence in Barbados does not lead to the automatic carrying out of the penalty (the death penalty has not been carried out in over 20 years), prosecutors can select the charge, "extenuating circumstances" can be presented as part of the trial process (during which a full range of statutory and common law defences and justifications are available to the accused to avoid the death penalty), and such circumstances can be raised a second time before the Privy Council (mercy committee).

VII. SUMMARY OF SUBMISSIONS

91. In sum, Barbados submits that the Supplementary Submissions were unnecessary and inappropriate. The State's case was not new to the Representatives, who in fact relied upon and quoted portions of submissions dating from 2003 in their pleadings. As a result the Representatives had no basis to request Supplementary Submissions, nor did they have a basis to request additional expert witnesses. In the alternative, the expert witnesses proposed by the Representatives cannot satisfy the requirements of impartiality imposed by the rules of the Inter-American system of human rights and, contrary to Article 19(1) of the *Statute of the Inter-American Court of Human Rights*, they "have a direct interest" in the present case. For these reasons the State respectfully requests that this Honourable Court disallow the Supplementary Submissions and strike them, and their attached affidavits, from the record.

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[50] This number is incorrect, as is the number "33" indicated in the final paragraph of the Amended Affidavit (p. 7). In paragraph 189 of Barbados' *Submissions to the Court* only 31 countries are listed, not 32 or 33.

[51] Amended Affidavit, pp. 4-7.

92. In the alternative, if the Supplementary Submissions are admissible, the State re-affirms its arguments about the lack of any customary rules of international law which might restrict the State's ability to impose its present system of capital punishment. The State also re-affirms its alternative position of being a persistent objector to any such rule. Both the Representatives and the Commission have pled legal authorities that might suggest the emergence of a customary rule and as a result the State has fully rebutted such arguments in its *Submissions to the Court* of December 18, 2006.

93. Barbados also rejects the Representatives' submissions regarding the international legal rules on treaty interpretation and the purported effect of Article 62(1) of the *American Convention on Human Rights*. The State submits that international legal tribunals must consider and apply the international legal rules of treaty interpretation, including those codified in the *Vienna Convention on the Law of Treaties*, lawfully, correctly and *intra vires*. The State re-affirms its submission that both the commentary to, and the text of, the *Vienna Convention* manifestly prioritise the textual form of treaty interpretation. All other forms of interpretation are greatly restricted, secondary or supplemental.

94. Further, the State does not concede the limitations the Representatives seek to impose upon the effect of Barbados' reservations to the *American Convention*. By means of its reservation the State excluded consideration of its system of capital punishment and hanging as a method of execution, both of which existed at the time of, and were specifically mentioned in, the reservation. As established in the Court's Advisory Opinion on *Restrictions to the Death Penalty*, the State's obligations under the *Convention* must be read subject to the terms of its reservation.

95. Regarding the two versions of the affidavit of Professor Roger Hood, the State submits that, for the reasons indicated above, both should be deemed inadmissible by this Honourable Court and struck from the record.

96. In the alternative, should these affidavits be admitted, the State re-affirms its position that there is no customary international law prohibiting or restricting Barbados' form of capital punishment. The evidence proposed by Professor Hood does not contradict that position; it is inconsistent and the state practice he seeks to describe is neither constant nor uniform. Nor is that state practice supported by *opinio juris sive necessitatis*. Further, the statistics and definitions referred to by Professor Hood vary substantially from one version of the affidavit to the other. The definition of 'mandatory capital punishment,' for example, is set out in such a way as to support the State's case, since several of the descriptions offered by Professor Hood of states *not* possessing the mandatory death penalty equally apply to Barbados.

97. For these reasons the State respectfully requests that this Honourable Court strike both the Supplementary Submissions and their attached affidavits from the record and disallow the two new proposed expert witnesses, Professors Schabas and Hood. In the alternative, the State respectfully requests that the Court draw the necessary inferences and uphold the submissions of the State in the present case.

Respectfully submitted,

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Agent of Barbados