INTER-AMERICAN COURT OF HUMAN RIGHTS
SAN JOSÉ, COSTA RICA

FINAL WRITTEN SUBMISSIONS OF THE STATE OF BARBADOS IN CASE 12.645, *Tyrone DaCosta Cadogan v. Barbados*

Office of the Attorney-General
Cedar Court
Wildey, St. Michael
Barbados

August 3, 2009

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1 INTRODUCTION

1. Barbados is pleased to offer its Final Written Submissions in relation to Case 12.645, *Tyrone DaCosta Cadogan v. Barbados*. Unless otherwise specified in the present Submissions, the State hereby adopts, and refers this Honourable Court to, the submissions made in Barbados' Response of March 17, 2009.[1]

2 CONSEQUENCES OF THE BINDING DECISION IN *BOYCE ET AL. V. BARBADOS*

2. The State reaffirms its acceptance of the binding nature of the decision of the Inter-American Court of Human Rights in the case of *Boyce et al. v. Barbados*.[2] Under the principle of *res judicata* the State is bound by the Orders of this Honourable Court in relation to the legal issues raised in that case. Consequently the State does not contest any allegations of identical human rights violations in the present case.

[1] Response of the State of Barbados in the *Case of Tyrone DaCosta Cadogan v. Barbados*, Case No 12.645, filed with the Inter-American Court of Human Rights on March 17, 2009 [hereafter "**Barbados' Response of March 17, 2009**"]. The State also refers the Honourable Court to its earlier submissions in the matter, including (in reverse chronological order):

- Barbados' Submissions at the Oral Hearing of the Inter-American Court of Human Rights, held in San José, Costa Rica, on July 1, 2009 [hereafter "**Barbados' Oral Submissions**"];
- the "Response of Barbados to the Affidavits of Dr. Timothy Green, Professor Nigel Eastman and Mr. Edward Fitzgerald, CBE, QC, in *Case 12.645, Tyrone DaCosta Cadogan v. Barbados*," transmitted to the Court on June 24, 2009 [hereafter "**Barbados' Response to Affidavits of Green, Eastman and Fitzgerald**"];
- the Letter to the Court of June 22, 2009, from the Acting Minister of Foreign Affairs entitled "Response of the State of Barbados to the Affidavit Mr. Tyrone DaCosta Cadogan in *Case 12.645, Tyrone DaCosta Cadogan v. Barbados*" [hereafter, "**Barbados' Response to Affidavit of Cadogan**"]; and
- the "Response of Barbados to the Further Observations of the Petitioner on the Merits of the Case Under the American Convention on Human Rights," filed with the Inter-American Commission on Human Rights on July 9, 2008 [hereafter "**Barbados' Response to the Commission**"].

For the sake of efficiency and economy, the State refers this Honourable Court directly to the Commission's Application of 31 October 2008 (the "**Application**") and the documents and appendices attached to it. References to appendices to the Application will be referred to as "**Application, Appendix [No.]**." The Written Submissions of the Alleged Victim (undated, although a partly legible date stamp appears to indicate 21 January 2009), which was provided to the State in the same core bundle containing the Application, will be referred to as "**Petitioner's Written Submissions**," and its appendices as "**Petitioner's Written Submissions, Appendix [No.]**."

[2] *Boyce et al. v. Barbados* (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Judgment of November 20, 2007, Series C, No 169.

3. As indicated in Barbados' Response of March 17, 2009, the State has already taken a number of actions to comply with the Court's Orders in the case of *Boyce et al. v. Barbados*, several of which profoundly impact upon the present case. The State reminds the Honourable Court of its Compliance Report of 30 January 2009,[3] which contained a number of clarifications and commitments by the State, including:

> 3. The State intends to comply with the ... Order of the Court in full.
>
> [...]
>
> 5. The State ... has taken the following actions in compliance with the above judgment:
>
>> i) The death sentence of Mr. Michael McDonald Huggins was commuted to life imprisonment on June 17, 2008 as required by paragraph 127(a) of the Court's Judgment. ...
>>
>> iii) ... Following extensive inter-Ministerial consultation and full deliberation by Cabinet, the State has decided that the mandatory aspect of the death penalty should be abolished. ...
>>
>> iv) ... Following extensive inter-Ministerial consultation and full deliberation by Cabinet, the State has decided that section 26 of the Constitution should be repealed. ...

4. The above statements are solemn commitments to this Honourable Court.

5. In relation to the first action, Barbados draws to the attention of the Honourable Court the fact that Mr. Huggins' sentence was commuted to life imprisonment,[4] as expressly ordered by this Honourable Court, by means of the Warrant of Commutation of the Governor-General of June 13, 2008.[5]

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[3] The Report of Barbados on Measures Adopted to Comply with Judgment of the Inter-American Court of Human Rights in the Case of Boyce et al v. Barbados, Preliminary Objection, Merits, Reparations and Cost, Series C No. 169, Judgment of November 20, 2007, and its appendices, were attached to the letter of the Hon. Senator Irene Sandiford-Garner, Acting Minister of Foreign Affairs and Foreign Trade, of 30 January 2009. These documents are all attached as **Exhibit 1** to **Barbados' Response of March 17, 2009**.

[4] Life imprisonment means imprisonment for life subject to judicial review by the courts of Barbados every four years or shorter periods, if deemed advisable. See further, paragraph 71.c), below.

[5] Appended as **Exhibit 1** to **Barbados' Response of March 17, 2009**.

6. The Privy Council first met in relation to Mr. Huggins' case in 2002 and, as per the requirements in *Lewis*,[6] provided him with copies of the reports and documents that were to be considered and invited him to make written submissions. Mr. Huggins chose not to make any written submissions. In January 2008, subsequent to the judgment of this Honourable Court in the case of *Boyce et al. v. Barbados*, the Privy Council convened a second time, considered this Court's judgment, and commuted Mr. Huggins' sentence.

7. Regarding the latter two obligations described in Barbados' Compliance Report of 30 January 2009, the State will notify the Court when the necessary legislative reforms to (a) remove mandatory capital punishment from its laws, and (b) repeal s. 26 of the Constitution have been effected.

8. As submitted by the Agent during the Oral Hearing, these measures require full legislative scrutiny and consideration. In relation to s. 26 of the Constitution, for example, the legislative amendments must consider all of the ramifications arising from the repeal of the savings law clause, including the effect of such repeal on emergency powers, prison and police legislation, civil service legislation, among others. A large number of laws may be

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[6] *Lewis v. The Attorney General of Jamaica* [2001] 2 AC 50 [attached as **Appendix A** to the present Final Written Submissions]. In this case, at pp. 75, 79-80, and 85, the Judicial Committee of the Privy Council held that the Privy Council (mercy committee) is subject to judicial review, and must accord a condemned person the following procedural rights and benefits:

a) the condemned man must be given notice of the date when the Privy Council will consider his case, and this period of notice must be adequate for him to prepare representations;

b) the condemned man has the right to see all of the documents that will be considered by the Privy Council;

c) the Privy Council is mandated to consider these documents;

d) the condemned man has a right to make written representations, which the Privy Council is bound to consider;

e) the condemned man is entitled under the doctrine of legitimate expectation [following the decision of the Caribbean Court of Justice], to complete international human rights petition procedures and to obtain the reports of those international human rights bodies, which the Privy Council is bound to consider and, if it does not agree with them, must explain why; and

f) finally, the condemned man has the right to have his execution stayed until this entire process has been completed.

The *Lewis* requirements were extended to Barbados and supplemented by the Caribbean Court of Justice 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) [reproduced in **Application, Appendix A15**].

affected and all of the likely implications and consequences must be appropriately addressed. In relation to the amendment of s. 2 of the Offences Against the Person Act, although the section itself could be readily amended, such amendment can only be made after careful consideration of the other, consequential legislative changes which may be required. For example, and as raised by Counsel for the Petitioner during the Oral Hearing, one must consider the implications of such a change upon all of the persons who had been mandatorily sentenced to death and who remain subject to the death penalty. Although the State is unable to accept at present the need for re-sentencing hearings for the reasons specified later in the present Submissions,[7] nevertheless all such issues clearly require full and proper legislative consideration.

9. In relation to Mr. Cadogan's death sentence, the State draws the attention of the Court to the fact that no warrant of execution has been read against Tyrone DaCosta Cadogan.[8] Nor could any such warrant be read to him while his case is before an organ of the inter-American system. Under Barbadian law, as a result of the doctrine of legitimate expectation, no warrant of execution can be issued against an individual while either the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights is processing his petition. In other words, once a petition has been filed with the Inter-American Commission on Human Rights, under the law of Barbados, as finally interpreted by the Caribbean Court of Justice in the case of *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce*,[9] the Barbados Privy Council ought not advise the Governor-General to proceed with execution until it has received and has been able to consider (a) the final decision of the Inter-American Commission on Human Rights and, if seized of the matter, (b) the final decision of the Inter-American Court of Human Rights.[10]

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[7] See para. 71, below.

[8] As erroneously implied by the legal representatives of the Petitioner: **Petitioner's Written Submissions**, para. 70(iii).

[9] *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) [reproduced in **Application, Appendix A15**].

[10] See e.g., *ibid.*, Joint Judgment of the President the Right Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders, paras 125, 128 and 143; Judgment of the Honourable Mr. Justice Nelson, para. 31; Judgment of

10. Similarly Barbados re-emphasises that under its laws the Privy Council may be convened by the Governor-General to consider the exercise of the prerogative of mercy if the particular circumstances of the individual give rise to the possibility of a strong case for commutation. Although other organs of the Barbados Government, including the Attorney General, cannot mandate the Governor-General to commute a death sentence (such matters falling within the prerogative of mercy and being expressly governed by the Constitution), nevertheless the Petitioner himself can request consideration of the prerogative of mercy in his own case at any time and can make written representations, including on matters such as mental incapacity. To date he has not done so.

11. Further, the State confirms to this Honourable Court that it transmitted to the Governor-General for His Excellency's information a number of documents related to Mr. Cadogan's case on April 1, 2009:

    a) the judgment of the Court in the case of *Boyce et al. v. Barbados*,[11]

    b) the Report on the Merits of the Commission (Report No. 60/08),[12] and

    c) the Report of Barbados on Measures Adopted to Comply with Judgment of the Inter-American Court of Human Rights in the Case of Boyce et al v. Barbados, Preliminary Objection, Merits, Reparations and Cost, Series C No. 169, Judgment of November 20, 2007, and its appendices.[13]

12. Mr. Cadogan has not requested consideration of the prerogative of mercy in his case by the Barbados Privy Council, and the Governor-General has not done so on his own initiative. However this is in conformity with the decision of the Caribbean Court of Justice in the

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the Honourable Mr. Justice Pollard, para. 50; Judgment of the Honourable Mr. Justice Wit, para. 47; *cf.* Judgment of the Honourable Mr. Justice Hayton, paras 1(c) and 9.

[11] *Boyce et al. v. Barbados* (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Judgment of November 20, 2007, Series C, No 169.

[12] Report No. 60/08, Case 12.645, Merits, Tyrone DaCosta Cadogan v. Barbados, OEA/Ser/L/V/II.132, Doc. 36, 25 July 2008 [**Application, Appendix D1**].

[13] Attached as **Exhibit 1** to **Barbados' Response of March 17, 2009**.

case of *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce*.[14] In that case the President the Right Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders indicated that the Barbados Privy Council should in general meet to consider the exercise of the prerogative of mercy only once, at the conclusion of all of the applicant's legal processes, including international legal petitions such as the present one before this Honourable Court.[15]

13. In answer to President Cecilia Medina Quiroga's question during the Oral Hearing, and as established in *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce*, the Privy Council is empowered to meet prior to the conclusion of all Inter-American processes. It could be called by the Governor-General, acting under s. 77(1) of the Constitution. However the ordinary process, as clearly established in *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce*, is for it to await the conclusion of all Inter-American processes so as to be able to fully consider the impact of reports by the Commission and the judgment of this Honourable Court on the exercise of the prerogative of mercy. As stated by the President the Right Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders in that case, at paragraph 143:

> [143] Notwithstanding these apparent advantages [of the Privy Council meeting several times to consider the same case], we do not support this approach. It will often be quite unnecessary and unproductive for the BPC to sit on three separate occasions on the same case. Moreover, there is always a risk that if members of the BPC form an initial view against commutation, it may be more difficult to persuade them subsequently to change that stance when ultimately an opportunity is provided to the condemned man to make written representations. We would recommend that the BPC should meet only once and that they should do so at the very end of all the domestic and international processes. At that stage they should make available to the condemned man all the material upon which they propose to make their decision, give him reasonable notice of the date of the meeting and invite him to submit written representations. This does not of course preclude the Governor-General in his or her discretion from convening at any time a meeting of the BPC with a view to achieving a consensus on commutation if the Governor-General considers there is a strong case for a

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[14] *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) [reproduced in **Application, Appendix A15**].

[15] *Ibid.*, Joint Judgment of the President the Right Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders, para. 143.

commutation. If there is no decision in favour of commutation, then further deliberation would have to be adjourned.[16]

14. In the ordinary case if the Privy Council met early it would not be able to receive the full and considered views of international human rights bodies on the matter, including the views of this Honourable Court.

15. Further, it is submitted that there is reason for the Privy Council to wait even in a case where commutation would appear to be a foregone conclusion, because the question of which of several remedies is to be granted by the Governor-General still must be considered. Under Section 78(1) of the Constitution the following powers are provided to the Governor-General in relation to the exercise of the prerogative of mercy:

> **78.** (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf—
>
> *(a)* grant to any person convicted of any offence against the law of Barbados a pardon, either free or subject to lawful conditions;
>
> *(b)* grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
>
> *(c)* substitute a less severe form of punishment for that imposed on any person for such an offence; or
>
> *(d)* remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

16. All of these powers were, and remain, available to the Governor-General in relation to the case of Mr. Cadogan, and the information received from any international human rights body on his case, including information from this Honourable Court, must be considered in the exercise of the prerogative of mercy.[17]

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[16] *Ibid.*

[17] It should be noted that the prerogative of mercy, which includes the power of commutation, is exercisable only by the Governor General on the advice of the Privy Council. A court of law cannot exercise the prerogative of mercy, but can only modify or substitute a sentence.

17. Finally, the State wishes to draw to the attention of the Honourable Court that the case of *Ford v. Wainwright*,[18] decided in 1986, is authority for the proposition that the common law precludes execution of the mentally ill. Insanity arising in the post-conviction state is therefore a bar to execution.

2.1 Satisfaction of Commission's Case

18. The State therefore submits that the effect of the State's commitments and understandings is that all of the grounds of complaint advanced in the Application of the Commission, except for the relief requested in that Application (commutation) will be satisfied upon completion of the necessary legislative changes.[19]

19. As a result, the only remaining substantive issues confronting Barbados are those raised by the Petitioner in his various submissions throughout the present case which are not related to either the mandatory imposition of capital punishment, or the immunizing effect of s. 26 of the Constitution.[20]

20. Therefore, in addition to the arguments made in Barbados' Response of March 17, 2009, to which the State again refers this Honourable Court, the State rebuts the remaining issues raised by the Petitioner, namely, the complaints related to:

    a) Ground 1 – diminished responsibility,

    b) Ground 2 – adequate psychiatric expertise,

    c) Ground 3 – adequacy of legal aid, and

    d) Ground 4 – effectiveness of (actual) legal representation.

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[18] *Ford v. Wainwright* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335, 54 USLW 4799 (1986), at 406-408 (per Justice Marshall).

[19] See paragraphs 7-8 of the Commission's Application, in which it sets out the purpose of the application and the relief requested. See also, **Application**, paras 112 and 119-120.

[20] Substantial portions of the Petitioner's various submissions are thereby irrelevant to the present proceedings. See, e.g., **Petitioner's Written Submissions**, paras 2, 7-12 and 15-70.

21. The State firmly rejects all of these complaints as misconceived, groundless and meritless at law.

3 OBJECTIONS TO JURISDICTION

22. Before doing so, however, the State draws the attention of this Honourable Court to its most fundamental ground for objection to jurisdiction, namely, non-exhaustion of domestic remedies.[21] Barbados submits that this Honourable Court should reject Mr. Cadogan's Application as inadmissible for failure to exhaust domestic remedies.[22]

23. The issue of exhaustion of domestic remedies was raised by the Acting Minister of Foreign Affairs, Foreign Trade and International Business in his letter to the Commission of 4 July 2008,[23] and raised again by the State in the Response of Barbados to the Further Observations of the Petitioner on the Merits of the Case Under the American Convention on Human Rights, dated 9 July 2008, in paragraphs 15-20.[24] Both of Barbados' notifications to the Commission regarding domestic remedies were filed subsequent to the initial report on admissibility of March 24, 2008, but before the final report, dated July 25, 2008. As such they were transmitted in a timely manner, while the matter was still before the Inter-American Commission on Human Rights, and Barbados has not waived its right to object, nor has it acquiesced in any manner.[25]

24. The remedies available to the Petitioner, and not utilised, were those of Constitutional motions before the courts of Barbados under s. 24 of the Constitution. Thus the State must

[21] The other grounds are set out in **Barbados' Response of March 17, 2009**.

[22] Exhaustion of domestic remedies is formally required under Articles 46(1) (a) and 47(a) of the *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 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM (UPDATED TO JANUARY 2007).

[23] **Application, Appendix E12.**

[24] **Application, Appendix E13.**

[25] In the *Case of Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs*, Judgment of July 2, 2004, Series C No. 107, in para. 83, this Honourable Court establishes that the relevant time period during which a State must allege exhaustion of domestic is "during the proceedings before the Inter-American Commission." In the present case, unlike Costa Rica in the above-noted case, Barbados raised non-exhaustion at the appropriate time.

make clear to this Honourable Court that although the Petitioner pursued similar claims in Barbados' domestic courts, and thus may at first glance appear to have exhausted domestic remedies, his appeals were against conviction alone and were therefore inadequate. He did not make any Constitutional challenges. The Petitioner did not raise the potential violation of his right to a fair trial before any of Barbados' courts, which is protected by Section 18 of the Constitution and is the central claim in the present case.[26] Although it is true that Mr. Cadogan no longer could have his *conviction* quashed under a Constitutional motion, in light of the decision in *Hinds* he was, and remains, able to fully vindicate his Section 18 rights through a Constitutional challenge.[27]

[26] Section 18 of the Constitution is reproduced in **Appendix A1** of the **Application**.

[27] The case of *Hinds v. Attorney General of Barbados and Another* [2002] 1 A.C. 854, [2001] UKPC 56, is relied upon by the Petitioner in the "Alleged Victim's Written Submissions to the Preliminary Objections by the State," filed with the Court on April 29, 2009. However the State submits that the Petitioner's reading of the *Hinds* case in relation to the need to prevent the duplication of appeals on conviction and Constitutional motions is incorrect. Although it is true that *Hinds* establishes that a person may not raise a Constitutional motion during the conviction appeal and then, when he loses, raise it again as a separate Constitutional motion for the purposes of overturning the conviction, *Hinds* does not preclude a subsequent, separate Constitutional motion for grant of other relief. As stated by the Board in *Hinds*, at p. 870 (para. 24):

> **24** On the facts of this case there is, in the opinion of the Board, no answer to Mr Guthrie's submissions. It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The applicant's complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on section 24. [Emphasis added.]

In the context of the *Hinds* case the applicant launched a Constitutional challenge during an appeal against conviction, lost, then re-launched it before the High Court with the aim of continuing his challenge against his conviction. But this is not the only remedy available under s. 24 of the Constitution. As highlighted below, s. 24 provides the High Court with a number of remedies, not only that of quashing a conviction:

> **24.** (1) Subject to the provisions of subsection (6), if any person alleges that any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.
>
> (2) The High Court shall have original jurisdiction–
>
> *(a)* to hear and determine any application made by any person in pursuance of subsection (1); and

25. The Petitioner therefore had and still has available to him the right to pursue a Constitutional motion to challenge all of the alleged violations of his human rights, including his rights to a fair trial or due process of law, particularly in relation to Grounds 2 and 3 of the Petition, which complain about the adequacy of psychiatric expertise and legal aid available in Barbados.[28]

26. Further, because legal aid is in fact available in Barbados for Constitutional challenges,[29] as fully established later, this domestic remedy remains to be exhausted. The State provides financial assistance for litigants either by way of legal aid for appearances in the High Court and Court of Appeal, or approved administrative payment for appeals to the Caribbean Court of Justice. As a result a constitutional challenge under the laws of Barbados is effective, it is not unduly burdensome, nor is it exceptional.

27. Accordingly, the State submits that the Honourable Court should declare the Petition inadmissible as a result of failure to exhaust domestic remedies. In the alternative, the Court should strike out claims related to Grounds 2-3 as inadmissible on this basis. Grounds 1 and 4, as previously submitted in Barbados' Response of March 17, 2009, are inadmissible as being in violation of the fourth instance rule.

> *(b)* to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),
>
> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 12 to 23:
>
> Provided that the High Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

As a result, although in Cadogan's case a Constitutional motion would not be available as a mechanism to overturn his conviction, it remains available for the purposes of vindicating his constitutional rights and this is a valid and effective domestic remedy requiring exhaustion.

[28] See the submissions commencing in paragraph 44, below.

[29] Community Legal Services Act, CAP 112A, First Schedule, Part II (c) [**Application, Appendix A14**].

4 DIMINISHED RESPONSIBILITY

28. The State submits that because the Petitioner has dropped arguments related to diminished responsibility in its written submissions[30] this matter is no longer before the Honourable Court.

29. Nevertheless, out of an abundance of caution, the State draws the attention of the Court to the submissions in Barbados' Response of March 17, 2009, which it hereby affirms, and offers six further observations in response to more recent arguments made by the Petitioner and questions posed by this Honourable Court.

30. The first is regarding the test for defence of diminished responsibility and its related burden of proof. The defence arises under Section 4 of the Offences Against the Person Act.[31] Section 4 provides for the defence of diminished responsibility to apply to:

a) an abnormality of mind,
b) whether arising from
    i. a condition of arrested or retarded development of mind, or
    ii. any inherent cause, or
    iii. induced by disease or injury,
c) [which] substantially impaired his mental responsibility for his acts and omissions in
    i. doing, or
    ii. being party to

    the killing.

31. Thus, contrary to the submissions of the Petitioner, diminished responsibility applies to abnormalities of mind which arise from inherent causes, including severe mental handicap,

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[30] **Petitioner's Written Submissions.**

[31] Section 4 of the Offences Against the Person Act [reproduced in the **Application, Appendix A4**] provides:

> Where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent cause, or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing. On a charge of murder it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

disease or injury. Diminished responsibility also excuses responsibility on the part of those who kill another, and those who are a party to the killing. Thus the Petitioner's arguments related to the need to protect the severely mentally handicapped are misconceived because these very persons are covered by diminished responsibility.[32] Likewise, the doctrine of joint enterprise would fall under the definition of diminished responsibility in Section 4.[33]

32. Regarding the burden of proof, Section 4 provides that it is for the defence to prove diminished responsibility in order to preclude a conviction for murder. However, contrary to the submissions of the Petitioner, the burden of proof associated with diminished responsibility is not onerous. In order to be properly understood, it must be assessed in the overall context of the Barbadian criminal justice system.

a) Firstly, it must be emphasised that at all times the burden rests upon the Crown (the prosecutor) to prove beyond a reasonable doubt that an accused has committed murder. This burden remains constant throughout the proceedings.

b) Secondly, the limited burden of proof that rests with the defendant is assessed on the balance of probabilities, not on the scale of beyond a reasonable doubt.

c) Thirdly, proof of diminished responsibility is merely evidential. The jury does not have to make an explicit or formal finding on the matter, but merely must return a verdict of "guilty" or "not guilty." In other words, the jury simply must believe that on the balance of probabilities a situation of diminished responsibility existed at the time of commission of the offence. Or to put it another way, the jury must be unable to arrive at a determination of guilt beyond a reasonable doubt.

d) Fourthly, the defence of diminished responsibility can be raised both by defence counsel and independently by the judge. Therefore even if the defendant does not raise the defence, if evidence before the Court suggests diminished responsibility the judge has a duty to put the defence forward to the jury. If the judge does not put the defence

[32] E.g., **Petitioner's Written Submissions**, paras 98, 103, 106, 108, and 110-111.

[33] E.g., **Petitioner's Written Submissions**, para. 71(iv).

of diminished responsibility to the jury and evidence before the Court gives rise to it, this inaction will provide a ground for appeal. However, if there is no evidence to support a defence of diminished responsibility there is no obligation upon the judge, prosecution or defence counsel to raise it.

e) Fifthly, during Mr. Cadogan's trial the judge instructed the jury on intention and specifically alerted them to the potential effect of alcohol and drugs on intention.[34] These instructions to the jury, which are similar to those made any time alcohol or drugs are relevant to an offence, were endorsed by the Court of Appeal and the Caribbean Court of Justice. In this regard the State will attempt to answer the query of President Cecilia Medina Quiroga during the Oral Hearing related to the judge's direction:

i. The State submits that the judge's direction was not out of the ordinary and was the kind made in all cases raising any issues of intoxication or impairment. It is submitted that, based upon the trial transcript, the trial judge found no evidence that would lead him to raise the defence of diminished responsibility on his own accord; nor did the trial judge find any evidence of mental impairment or incapacity. If any question had arisen in the judge's mind on either issue, the defence of diminished responsibility would have been raised and/or a full psychiatric assessment would have been obtained. Neither was done.

ii. In addition, the State should make clear that the jury's role in such circumstances is not to make subtle medical determinations, but rather to decide, based upon its own understanding of the effects of alcohol and drugs upon an ordinary person, whether the evidence gives rise to the possibility that the accused's intention might have been affected. In such circumstances it must also be pointed out that any doubt will benefit the accused: only if the jury is

[34] See paragraph 15 of the Petitioner's Amended Notice of Application to the Caribbean Court of Justice, CCJ Application No. AL 6 of 2006 [**Application, Appendix B3**], which sets out the jury instructions at length.

unanimously convinced beyond a reasonable doubt that the accused had the necessary intention to commit murder, can a conviction arise.

33. As a consequence Barbados submits that the limited burden of proof in relation to diminished responsibility is fully compatible with its obligations under the Inter-American system of human rights. Such a defence can be raised by the defendant, defence counsel, and judge.

34. Second, it is uncontradicted that the unanimous judgment of the Court of Appeal, per Chief Justice Sir David Simmons, upheld the Petitioner's conviction and dismissed arguments challenging the trial judge's directions to the jury on intent,[35] and the unanimous judgment of the Caribbean Court of Justice, per Mr. Justice David Hayton, upheld the Petitioner's conviction and dismissed all of his arguments including those raising the defence of diminished responsibility.[36] Furthermore, in the course of its judgment the Caribbean Court of Justice specifically dealt with the questions in the Petition related to psychiatric evidence in the context of an appeal against conviction. The Court even allowed counsel to pursue new grounds of appeal, including that of diminished responsibility, and the Respondent did not object.[37] The Court examined what appears to have been the very same letter by Dr. Mahy that is relied upon by the Petitioner in the present case,[38] fully considered the

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[35] After thoroughly reviewing the evidence and the law related to intent for murder, the Chief Justice, in *Tyrone DaCosta Cadogan v. The Queen*, Criminal Appeal No. 16 of 2005, Judgment of 31 May 2006 (C.A.) [**Application, Appendix B2**], at para. 49, concluded that there was no merit in the appeal:

> [49] In our judgment, there is no merit in the ground of appeal argued. There was ample evidence to support a finding by the jury that the appellant intended to kill the deceased or cause her serious bodily harm. By their verdict they were clearly satisfied that the Crown had proven the requirement of intention beyond reasonable doubt. The conviction is, in our opinion, safe. In the result, the appeal is dismissed; the conviction and sentence are affirmed.

[36] The Caribbean Court of Justice, in *Tyrone DaCosta Cadogan v. The Queen* [2006] CCJ 4 (AJ), CCJ Appeal No. AL 6 of 2006, Judgment of 4 December 2006 (C.C.J.) [**Application, Appendix B4**], upheld the decision of the Court of Appeal, expressly agreeing with the analysis of Chief Justice Sir David Simmons on the requirements for direction of the jury on the question of intent. When touching upon evidence of intent on the part of the Petitioner, in *ibid.*, at para. 4, the Court stated that "[e]vidence in his statement and in the witness box revealed cunning, coherent actions both just before and just after the robbery."

[37] *Ibid.*, para. 6.

[38] The letter by Dr. Mahy of June 27, 2006, appended to the Petition, is headed "RE: Tyrone DaCosta Cadogan – Leave to Appeal to CCJ/Appeal to CCJ" [**Application, Appendix E1**].

relevance of the defence of diminished responsibility with respect to the safety of the conviction, weighed the evidential value of the letter, and held that the Applicant's submission in this area was baseless.[39]

35. As a third, related, point Barbados notes that the submissions of the Petitioner regarding diminished responsibility in several places appear to challenge the correctness of the decision of the Caribbean Court of Justice not to stay the appeal until a further definitive psychiatric report could be obtained.[40] Such arguments are inappropriate and clearly amount to an attempt to use this Honourable Court as a fourth instance of appeal. The Petitioner had ample opportunity to obtain a full expert psychiatric report, at no cost to himself, at any time up until the actual hearing of his appeal before the Caribbean Court of Justice – as fully demonstrated by the Court's consideration of the expert report of Dr. Mahy. Even in the proceedings leading to the present case before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights the Petitioner has not once sought to obtain a full psychiatric evaluation from the expert and professional staff of Barbados's Psychiatric Hospital. This could have been done during any phase of the present proceedings and would not have been time-limited or costly (as no doubt were the expert reports of foreign psychiatrists such as Dr. Green and Professor Eastman).

36. Fourth, with respect to diminished responsibility, the State submits that the Clinical Psychology Report of Dr. Tim Green, attached as Appendix 3 to the Petitioner's Written Submissions,[41] and his subsequent Affidavit of June 8, 2009, add nothing to Petitioner's case. Both the Report and Affidavit describe, in the words of the Caribbean Court of Justice, an "adolescent and adult life style [which] is very like the usual aberrant behaviour of thousands of under-privileged young men indulging in some marijuana while over-

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[39] *Tyrone DaCosta Cadogan v. The Queen* [2006] CCJ 4 (AJ), CCJ Appeal No. AL 6 of 2006, Judgment of 4 December 2006 (C.C.J.), paras 7-13 (per Mr. Justice David Hayton).

[40] See, e.g., "Speaking Note of the Representatives of the Alleged Victim in the Case of Tyrone DaCosta Cadogan v. Barbados," as submitted at the Oral Hearing of the Inter-American Court of Human Rights, in San José, Costa Rica, on July 1, 2009, at pp. 4, 5, 6, 11, and 12 [hereafter "**Speaking Note of the Representatives**"].

[41] Clinical Psychology Report of Dr. Tim Green [**Petitioner's Written Submissions, Appendix 3**].

indulging in alcohol."[42] The sole, surprisingly short, paragraph describing Mr. Cadogan's account of the murder (para. 4.32 in both the Report and Affidavit) does not in any way refute either the Petitioner's own written statement to the police or extrinsic evidence related the offence.[43] Dr. Green's accounts also do not deal with fundamental inconsistencies in the Petitioner's story, such as how Dr. Green describes the robbery as being "suggested spontaneously" (para. 4.32), yet uncontradicted evidence at trial, including the voluntary witness statement of the accused himself,[44] proved that he was carrying with him a long-bladed butcher's knife, the murder weapon (35.6 cm long in total, of which the blade was 22 cm long and 1.5 cm wide).[45]

37. Further, there are a number of other inconsistencies in the Petitioner's statements that were not examined or dealt with in even the most cursory manner in either Dr. Green's Report or Affidavit. These inconsistencies, it is submitted, raise questions regarding the probative value of both Dr. Green's Report and Affidavit. This is because both documents characterised the Petitioner's accounts as being highly consistent. For example, in his Affidavit in paragraph 4.3 Dr. Green goes so far as to say that "[Mr. Cadogan's] account was internally and externally consistent."[46]

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[42] *Tyrone DaCosta Cadogan v. The Queen* [2006] CCJ 4 (AJ), CCJ Appeal No. AL 6 of 2006, Judgment of 4 December 2006 (C.C.J.), para. 11 (per Mr. Justice David Hayton) [statement about the previous report].

[43] It also appears to be inconsistent with the Affidavit of Mr. Cadogan of June 9, 2009 (attached to the letter of the Commission to the Court of June 10, 2009) [hereafter "**Affidavit of Mr. Cadogan of June 9, 2009**"]. In both Dr. Green's Report and Affidavit the Petitioner said that "following the offence he returned home and fell asleep on his lavatory after trying unsuccessfully to vomit." Yet in contrast in the Petitioner's sworn Affidavit of June 9, 2009, he says that "after the killing the police arrested me at Halls Road, Church of the Nazarene," where he was "preparing for Christmas Carole Practice." See also the testimony of Elson Greenidge, at p. 39, line 10 ff, of the Record of Proceedings in Criminal Appeal No. 16 of 2005, *Tyrone DaCosta Cadogan v. The Queen*, attached as **Appendix B1** to the **Application** [hereafter "**Trial Transcript**"].

[44] **Trial Transcript**, p. 45 (lines 21-24), p. 46 (lines 8-9), p. 47 (lines 2-4 and 14) [**Application, Appendix B1**].

[45] **Trial Transcript**, testimony of Len Sehntwali, p. 79 (lines 20-23) [**Application, Appendix B1**].

[46] The full statement is: "[Mr. Cadogan's] account was internally and externally consistent as he did not contradict his own account and the account that he offered to me was consistent with the account that he offered at trial and at other times as reflected in the documentation that was available to me."

38. Contrary to this position, however, the State submits that a number of significant inconsistencies are demonstrated in both the Report and Affidavit that should have been commented upon or investigated further. For example,

a) Dr. Green offers no analysis as to why, on the one hand, Mr. Cadogan describes his mother as "kind and loving" (Affidavit, paragraph 4.5), yet on the other indicates that she forced him to do all of the housework, became enraged and beat him (including with a plaited horsehair whip), nailed boards on the door in order to keep him in the house, and has yet to visit him in prison (Affidavit, paragraphs 4.5-4.6, 4.10).

b) Dr. Green also does not comment on the fact that although the Petitioner "was aware that his behaviour was naughty at times" (Affidavit, paragraph 4.7), yet he consistently states that "he was unsure why" he was beaten or otherwise punished (Affidavit, paragraphs 4.6, 4.8).

c) Likewise, he seems to have been consistently uncertain as to why his personal relationships ended, despite uniformly describing repeated incidents where he engaged in acts of violence, sometimes severe, against his partners (Affidavit, paragraphs 4.17. 4.18, 4.19, 4.27).

d) Moreover in most cases in which he describes some form of punishment (except the index offence), the Petitioner denies any guilt: being expelled from school after being accused of threatening to kill a girl (Affidavit, paragraph 4.14), being fired from work after being accused of stealing (Affidavit, paragraph 4.15), being accused of molesting a girl in his youth (Affidavit, paragraph 4.16).

e) In relation to substance abuse, Dr. Green also does not investigate the Petitioner's allegations that he experienced symptoms of withdrawal (Affidavit, paragraph 4.20),

which symptoms easily could have been confirmed by the third party testimony of prison staff.[47]

f) Nor does Dr. Green investigate the Petitioner's descriptions of intentional self-harm, such as cigarette burns, which again easily could have been corroborated by physical scarring (Affidavit, paragraphs 4.25-4.26).[48]

g) Nor does Dr. Green investigate the Petitioner's alleged attempts at suicide in prison, which again could have been confirmed by prison authorities, including medical staff (Affidavit, paragraph 4.25).

39. How the above inconsistencies, contradictions and uncorroborated statements could be considered to be part of a witness account that is "internally and externally consistent," is puzzling, to say the least.

40. Fifth, the Affidavit of Professor Nigel Eastman is equally of no assistance to the Petitioner. Professor Eastman's Affidavit is entirely speculative because he has never seen, interviewed or spoken to Mr. Cadogan. His affidavit entirely relies upon the affidavits and reports previously submitted to the Court, and makes basic mistakes about the status of the Petitioner's other expert witnesses (assuming, for example, that Dr. Mahy's post-conviction report was somehow relied upon during the Petitioner's trial, and criticising it as being inadequate – see Section 6 of the Affidavit).

41. Further, the Affidavit of Professor Eastman does not address the concerns raised in Dr. MacLachlan's Affidavit, submitted by the State on Jun 11, 2009. Nor does it present reliable evidence regarding the particular psychiatric facilities and practices available in Barbados. To the contrary, Professor Eastman in fact generically lumps all Caribbean territories together in his conclusion as not having the "facilities and personnel" to adequately assess all defendants facing capital charges ("Summary Conclusions"). Such a

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[47] See, e.g., the Affidavit of Dr. Brian MacLachlan of June 10, 2009, attached to the Letter of the Minister of Foreign Affairs of June 10, 2009, para. 27 [hereafter, "**Affidavit of Dr. Brian MacLachlan of June 10, 2009**"].

[48] **Affidavit of Dr. Brian MacLachlan of June 10, 2009**, para. 35.

simplistic and broad brush argument, as submitted by the Agent during this Honourable Court's Oral Hearing, is not only gravely deficient, spurious and has no basis in reality, it is also astonishingly patronising. By setting his analysis at such a broad and simplistic level Professor Eastman's views, it is submitted, equally would apply anywhere in the Americas.

42. For these reasons the State submits that overwhelming evidence shows that the accused did not fall under the category of those suffering from diminished responsibility and that the Report and Affidavit of Dr. Green and the Affidavit of Professor Eastman do not contradict such a position. Moreover the State submits that Dr. Green's Report and the Affidavits of both Dr. Green and Professor Eastman should be treated with some caution, since they are based upon a single interview (or no interview in the case of Professor Eastman), do not ask pertinent questions about inconsistencies raised in the Petitioner's statements, and draw conclusions that would be very difficult to substantiate based upon the information presented, as clearly demonstrated in the Affidavit of Dr. Brian MacLachlan of June 10, 2009.

43. Finally, the State again draws the attention of this Honourable Court to the fact that the Petitioner and his counsel chose not to obtain the kind of free and in-depth expert psychiatric report that would have been available from Barbados' Psychiatric Hospital. Before the Inter-American system of human rights, as for the appeal to the Caribbean Court of Justice, weak and speculative psychiatric evidence is proffered. No attempt is made by the Petitioner's expert witnesses to deal with any of the concerns or criticisms of Dr. Brian MacLachlan. In such circumstances, as fully conceded by the Petitioner, "[i]n the absence of cross-examination, this Honourable Court is not in a position to determine whether Dr. Green's conclusions are reliable and whether they are sufficient to mount a defence to a charge of murder under Barbados [sic] law."[49] Barbados submits that the Court should not act as a Court of fourth instance (as inadvertently conceded by the Petitioner's further statement that "this is a matter which ought properly to be resolved in the course of

[49] **Speaking Note of the Representatives**, at p. 5.

criminal proceedings before the domestic courts").[50] Rather, this Honourable Court should dismiss this claim as baseless and unsubstantiated.

5 Psychiatric Expertise

44. The State submits that its legal system fully complies with its *American Convention* obligations by providing free access to highly trained, professional and independent psychiatrists. These psychiatrists are available throughout the entire criminal prosecution process. The State draws the attention of the Court to the submissions in Barbados' Response of March 17, 2009, which it hereby affirms, and offers eight further observations in response to more recent arguments made by the Petitioner.

45. First, the State draws to the attention of this Honourable Court that in all murder cases an accused will be subject to a psychiatric assessment (for fitness to plead),[51] and the Petitioner himself concedes that he personally was subjected to such an assessment by Dr. Belle at the Psychiatric Hospital: Affidavit of Mr. Cadogan of June 9, 2009, para. 4. As fully elaborated by the Agent during his submissions at the Oral Hearing, Dr. Belle is the Chief Psychiatric Consultant, is in charge of the Psychiatric Hospital and is reputed to be the best available psychiatrist in Barbados. She is eminently qualified and counsel for the Petitioner has not anywhere suggested otherwise. As a result it must be emphasised that Mr. Cadogan was in fact examined by one of Barbados' senior psychiatrists prior to his trial for murder and was found fit to plead. Further, the State does not agree that the fitness to plead interview "was insufficient for the purpose of determining whether [the Petitioner] was suffering from any mental illness which might have afforded him a defence to the charge of murder."[52] He was questioned by an eminent psychiatrist. If she had detected a mental abnormality that raised any concerns she would have pursued further questioning.

[50] *Ibid.*, p. 5.

[51] **Affidavit of Dr. Brian MacLachlan of June 10, 2009**, para. 48.

[52] **Speaking Note of the Representatives**, at p. 3.

46. Second, it is uncontested that the Petitioner did not rely upon insanity or diminished responsibility in his defence, nor was there any use of psychiatric evidence by the prosecution in relation to sentencing.

47. Third, there is no evidence that the Petitioner suffered from "significant mental disorder at the time of the offence", as suggested by counsel for the Petitioner.[53] In fact, the various documents relied upon by the Petitioner – including the letter of Dr. Mahy and both the Report and Affidavit of Dr. Green – are inconclusive and inconsistent.[54] The State submits that these documents cannot raise any doubt about the Petitioner's mental status, and in support refers this Honourable Court to the Affidavit of Dr. MacLachlan. This affidavit raises a number of serious questions about the adequacy of the psychiatric evidence presented in the present case.

48. Fourth, the State reaffirms that psychiatric services, including the provision of expert psychiatric witnesses, are available free of charge in Barbados. The right to call a witness, including an expert witness, is guaranteed by Section 18(2)(e) of the Constitution of Barbados.[55] The principle of equality of arms is also guaranteed under the laws of

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[53] See, e.g., Additional Observations, para. 52 [**Application, Appendix E8**].

[54] See, e.g., the State's submissions in paragraphs 36-42, above.

[55] Subsections 18(1)-(2) of the Constitution provide:

> **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

Barbados, and entitles a criminal defendant to obtain the attendance and carry out the examination of an expert psychiatric witness on the same conditions as those applying to prosecution witnesses.[56] In terms of the precise facilities that must be provided to the defendant under this principle, the Chief Justice indicated in paragraphs 34 and 39 of the case of *Clyde Anderson Grazette v. Attorney General and Director of Public Prosecutions*, that the defence must be reasonable and practicable, so that if adequate facilities are available in Barbados for the defence, those facilities should be used rather than expensive overseas facilities.[57] Nevertheless, as also clearly stated by the Chief Justice, at times funding of overseas experts will be necessary.

(*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.

[56] As stated by the Chief Justice, the Hon. Sir David Simmons, K.A., C.B.H., in the case of *Clyde Anderson Grazette v. Attorney General and Director of Public Prosecutions*, High Court of Barbados, Civil Case No. 2016 of 2006 (Judgment of 30 January 2007), para. 25 (emphasis in original) [attached as Exhibit 5 to Barbados' Response of 9 July 2008 [**Application, Appendix E13**]], at paragraph 25:

Equality of Arms

[25] Section 18(2) (c) and (e) of the Constitution, in guaranteeing a defendant's right to be afforded the facilities referred to therein, embody the principle of "equality of arms". In particular, s.18 (2) (e) states that a defendant in a criminal trial must be afforded facilities to cross-examine prosecution witnesses and to obtain the attendance and carry out the examination of his witnesses on the same conditions as those applying to prosecution witnesses. The words italicised clearly imply equality as between the prosecution and defence. Therefore, in principle, a defence expert witness must be accorded the same facilities as an expert witness called by the prosecution – Bonisch v. Austria (1985) 9 EHRR 191. The Strasbourg jurisprudence and the developing U.K. jurisprudence on the Human Rights Act, 1998, both recognise that the rights, such as those enacted in s.18(2)(c) and (e) of the Constitution, imply a right to "equality of arms". The principle seems to have had its genesis in Neumeister v. Austria (1968) 1 EHRR 91. There, the European Court said at para. 22 that the principle of "equality of arms" is included in the wider notion of a fair trial. In Brown v. Stott, Lord Bingham said at p.106:

"Equality of arms between the prosecutor and the defendant has been recognised by the court as lying at the heart of the right to a fair trial."

The phrase means no more than that every party to proceedings must have a "reasonable opportunity of presenting his case to the court under conditions which do not place him at a disadvantage vis-à-vis his opponent". – see De Haes and Gijsels v. Belgium (1997) 25 EHRR 1 and Dombo Beheer BV v. Netherlands (1993) 18 EHRR 213.

[57] *Ibid.*, paras 34 and 39 (underlined emphasis added):

49. Fifth, for these reasons there was and is no barrier to Mr. Cadogan obtaining a full psychiatric evaluation and report. No funding was required by the Petitioner to obtain a psychiatric report, nor was there any need to approach a psychiatrist on a *pro bono* basis. Such assistance is free under the laws of Barbados. As a result there is absolutely no merit in the suggestions of the Petitioner that he was unable to obtain adequate psychiatric

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[34] I accept that, for the purpose of ensuring a fair trial, there should be "equality of arms" between prosecution and defence as far as is reasonable and practicable. But context is everything. The facts will determine the applicability of the general principle. Expert medical and scientific evidence is commonplace in criminal trials nowadays and is often the crucial evidence determinative of guilt or innocence. In a new and emerging field of science, such as DNA, a defendant in a criminal case should have access to expertise comparable to that afforded to the prosecution, subject to the recommendations which I make at para. [39] to ensure fairness and proportionality in the administration of the criminal justice process.

[...]

Recommended Procedure

[39] Accepting that in a proper case the Crown has an obligation to assist the defence in providing appropriate facilities to ensure the proper and adequate preparation of a defence to a criminal charge, I venture to recommend a procedure which may secure the attendance of an expert witness from overseas in a timely manner. *(1)* At an early date and no later than the Plea and Directions Hearing relating to the charge, the attorney-at-law for the defence should inform the Director of Public Prosecutions, in writing, of: *(a)* the desire of the defence to have the assistance of the Crown; *(b)* the name and address of the witness, his qualifications and field of expertise; *(c)* the cost of providing airfares; *(d)* the cost of hotel accommodation during the time when the witness is expected to be in Barbados; *(e)* the professional fees of the witness. *(2)* The final details and terms on which the Crown may provide the assistance should then be negotiated between the attorneys-at-law for the prosecution and defence. An attitude of reasonableness should pervade the negotiations. Because the Crown may have a legal duty to assist the defence is no reason to seek to impose unreasonable and exorbitant requests. *(3)* Before a request is made for the assistance of a witness from overseas, defence attorneys-at-law should first ascertain whether such a witness is available in Barbados. If the witness is available locally, every effort should be made to have the witness attend on behalf of the defence. For example, the Forensic Sciences Centre (FSC) in Barbados *now has the capability to do DNA analyses.* It did not have such capability at the time of the preliminary inquiry into the charge against the applicant. Thus, it would not have been unreasonable for the applicant to seek assistance from an overseas expert. However, having regard to the changed circumstances of the FSC, it would be reasonable now to ascertain first whether the expertise is available at the FSC and, if so, make use of it. The scientists at the FSC are highly qualified and well trained professionals who can be expected to give fair and impartial evidence. *(4)* If there is a genuine dispute between the parties, an application should be made to a Judge in Chambers by summons supported by affidavit for a decision or appropriate directions. *(5)* In every case where it is desired to secure the attendance of an expert witness with assistance from the Crown, the appropriate indication *must* be given on the questionnaire incorporated in the prescribed form for use at Plea and Directions Hearings. *(6)* It goes without saying that the information received from an overseas expert witness should be exchanged with the Crown in a timely manner.

assistance at any time as a result of indigence.[58] He had access to free psychiatric services prior to his trial, at every stage of the appellate process, and then from the moment of filing the Petition to the present.[59] He also had the right to expert witnesses, including psychiatric witnesses, and under the principle of equality of arms had the potential of calling an expert witness from anywhere in the world if local witnesses were unsuitable.

50. Sixth, the State submits that several of the arguments advanced during the Oral Hearing by Counsel for the Petitioner must be rejected because they misleadingly suggest the Barbados' capital punishment will remain mandatory. The State is on record as indicating that mandatory capital punishment will no longer be available under the laws of Barbados following the necessary legislative changes. Thus the Petitioner is incorrect to suggest that full psychiatric assessment is necessary in death penalty cases because of the mandatory nature of the sentence.[60] The sentence of death soon will no longer be mandatory, and when it is judicial sentencing procedures will allow submissions to be made about all of the aggravating and mitigating circumstances related to the individual, just as they are in other criminal cases in Barbados. At that point the individual, his defence counsel, the prosecution and the judge all would have the ability to request a psychiatric report.

51. Seventh, the State submits that despite clever argumentation by counsel for the Petitioner during the Oral Hearing, the essential submission on psychiatric assessment remains the

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[58] Counsel for the Petitioner stated during the Oral Hearing (as reflected in the **Speaking Note of the Representatives**, at p. 7):

> "It is fairly obvious that a defendant on a charge of murder will only be in a position to pursue such defences and arguments if he or she has access to the expert evidence of a psychiatrist to establish whether he or she is suffering from some disease of the mind. [...]
>
> "While there is no prohibition in Barbadian law which hinders a person accused of murder of tendering evidence of his mental condition, such persons usually find themselves in the unique position of indigence and, except in the most obvious cases, the fact that he may be suffering from a relevant mental condition may not be apparent to him or his legal adviser such as to prompt the taking of steps to have a psychiatric assessment done."

The clear implication of the above line of argument, it is submitted, is that indigence would somehow frustrate access to the expert evidence of a psychiatrist.

[59] See paragraphs 74-76 of **Barbados' Response of March 17, 2009**, describing the numerous opportunities for the Petitioner to obtain expert psychiatric assistance.

[60] See, e.g., **Speaking Note of the Representatives**, at pp. 9-10.

same: the Petitioner advocates mandatory, full psychiatric assessment. This position has been firmly rejected in paragraphs 85-102 of Barbados' Response of March 17, 2009, and the State again refers this Court to its earlier submissions. The continued, mandatory nature of the Petitioner's argument is revealed in the very words used in a number of passages in the "Speaking Note of the Representatives of the Alleged Victim in the Case of Tyrone DaCosta Cadogan v. Barbados," submitted to Inter-American Court of Human Rights at the Oral Hearing of July 1, 2009:

a) For example, despite indicating that "it is not being suggested that the State of Barbados is obliged to force persons accused of murder to submit themselves to a psychiatric examination" [p. 6], the Petitioner describes nonetheless submits that "Mr. Cadogan's right to a fair trial ... was infringed by the failure of the State of Barbados, even in the absence of a request from defence counsel, to cause a psychiatric evaluation of Mr. Cadogan to be carried out" [p. 6].[61] There is no suggestion that the State should have simply informed the Petitioner of the availability of such an evaluation; rather the State must "cause" it "to be carried out."

b) Further, when seeking to describe the psychiatric protocol proposed for Barbados, the Petitioner states that "[w]hat is envisaged here is no different in nature, albeit different in comprehensiveness, from the evaluation that is now carried out by the State of Barbados as a matter of course in order to determine fitness to plead" [p. 6]. However this statement is puzzling because the assessment of fitness to plead, as noted earlier, is formally required for all death penalty offences. It is not discretionary. All accused must undergo it. The Petitioner also compares the proposed psychiatric protocol as being "no different in any respect to the approach taken by the Courts of the Eastern Caribbean ... of requiring that a psychiatric evaluation be carried [*sic*] as a necessary prerequisite to a proper sentencing hearing" [p. 6]. Again, the wording is telling: the Petitioner is requesting a mandatory system of psychiatric assessment.

[61] See also the passage in *ibid.*, at p. 11, where the Petitioner speaks about "requiring that the State cause psychiatric assessments to be undertaken."

52. But even if the State is able to read the Petitioner's submissions as requiring something less than a mandatory full psychiatric assessment, it is not clear whether the Petitioner is requesting anything that does not already exist at present under the Barbadian legal system. The request, is set out at page 7 of the "Petitioner's Speaking Note" as follows:

> "[W]hat is being proposed is the establishment of a protocol whereby i) the State of Barbados would inform the accused and his Counsel of the availability of psychiatric assessments, either by a state employed psychiatrist or, in appropriate circumstances, by a psychiatrist in private practice funded by the State; ii) efforts are made by the State to fix appointments for such assessments to take place; and iii) in planning for the trial of a murder case the trial judge make enquiries as to whether a psychiatric assessment has been carried out. In all of this, it should be made clear that the consent of the accused and his Counsel are required."

a) Regarding the first element, if the Petitioner is requesting to be informed of the availability of psychiatric services, then the current system ensures this already. Everyone in Barbados knows that there is a Psychiatric Hospital and that someone seeking treatment can obtain it for free. Moreover every person accused of murder has to undergo a fitness to plead interview with a psychiatrist, and therefore will be made aware of the psychiatric services available.

b) Regarding the second element, if an accused person wishes to arrange an interview with a psychiatrist the State does not interfere with such a request. Police and prison authorities allow such requests and will assist in fixing appointments with psychiatric personnel. But at present appointments are not made unless there is a specific request for them. To do otherwise would be, with respect, foolish. If the Petitioner is asking that automatic appointments be made in every case where someone is charged with murder, and that psychiatrists be compelled to attend such appointments without confirmation that the accused either wants an interview or will even attend, then such a position must be recognised as being unreasonable in the extreme.

c) Regarding the third element, once Barbados has abolished mandatory capital punishment the trial judge will be perfectly entitled to ask whether a psychiatric assessment has been undertaken as part of the sentencing process. In fact the judge on

his own initiative can request such an assessment at any time during the trial if circumstances indicate that it would be helpful.

53. Eighth, the system of mandatory psychiatric assessment suggested by the Petitioner is deeply flawed and would violate a number of fundamental human rights and the principles of fundamental justice, as elaborated in paragraphs 90-102 of Barbados' Response of March 17, 2009. The common law criminal justice system is founded upon on respect for the autonomy and dignity of human beings, including the right of an accused to control his or her defence. Neither of these is respected by a system of mandatory full psychiatric assessment. In addition several important rights of the accused would be violated, including the rights of an accused to:

a) liberty and security of the person,[62]

b) equality before the law, [63]

c) protection of honour, dignity, reputation and private life,[64]

d) recognition as a person, having rights and obligations,[65]

e) apply to a court to ensure respect for his or her rights,[66]

f) be presumed innocent and to be tried according to law,[67]

g) a hearing, with due guarantees and within a reasonable time, in the substantiation of any accusation of a criminal nature made against him,[68]

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[62] See, e.g., American Declaration of the Rights and Duties of Man (hereafter, "American Declaration"), Art. I; *American Convention*, Art. 7.

[63] See, e.g., American Declaration, Art. II.

[64] See, e.g., American Declaration, Art. V; *American Convention*, Art. 11.

[65] See, e.g., American Declaration, Art. XVII.

[66] See, e.g., American Declaration, Art. XVIII.

[67] See, e.g., American Declaration, Art. XXVI; *American Convention*, Art. 8(2).

i. such due guarantees include the right to defend oneself, the right to be assisted by counsel of one's own choosing, and the right to call and examine witnesses,[69]

h) have his physical, mental and moral integrity respected,[70] and

i) equal protection of the law.[71]

54. Importantly, as demonstrated in US jurisprudence, non-consensual psychiatric assessment violates the right against self-incrimination and the right to legal counsel. As established by the US Supreme Court in the case of *Estelle v. Smith*,[72] the protection against self incrimination found in the Fifth Amendment also applies to involuntary psychiatric assessment. In *Estelle v. Smith* the trial judge, *sua sponte*, ordered a psychiatric evaluation of the respondent for the limited purpose of determining competency to stand trial.[73] This evaluation was later used by the State, even though the respondent offered no psychiatric evidence, for the purpose of proving his future dangerousness in order to obtain the death penalty.[74] In such circumstances Chief Justice Burger, delivering the Opinion of the Court, held that the respondent could not be compelled to respond to a psychiatrist:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson [the psychiatrist] to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless

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[68] See, e.g., *American Convention*, Art. 8(1).

[69] See, e.g., *American Convention*, Art. 8(2) (d)-(f).

[70] See, e.g., *American Convention*, Art. 5.

[71] See, e.g., *American Convention*, Art. 24.

[72] *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981), reproduced below in **Appendix B** to the present Final Written Submissions.

[73] *Estelle v. Smith, ibid.*, p. 465 [1874] [**Appendix B**].

[74] *Estelle v. Smith, ibid.*, p. 466 [1874-75] [**Appendix B**].

> could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.[75]

55. Further, the US Supreme Court held that a decision about whether to undergo a psychiatric evaluation is a difficult one, which requires legal advice from someone trained and skilled in the subject, and therefore involves the Sixth Amendment right to counsel:

> Because "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advise from someone who is trained and skilled in the subject matter." *Maness v. Meyers*, 419 U.S. 449, 466, 95 S.Ct. 584, 595, 42 L.Ed.2d 574 (1975). As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult ... even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." 602 F.2d, at 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel." *Powell v. Alabama, supra*, 287 U.S., at 69, 53 S.Ct., at 64.
>
> Therefore, in addition to Fifth Amendment considerations, the death penalty was improperly imposed on respondent because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel.[76]

56. As a result it is submitted that being subjected to a psychiatric evaluation without the assistance of counsel would violate an individual's right to legal assistance.

57. This is important to note in the context of the present case. If the Petitioner's submissions are accepted in their strongest form this right to legal assistance would clearly be breached. In the Petitioner's view, as expressed in the Petitioner's Speaking Note, the State not only must proactively intervene and offer the accused a psychiatric assessment, but also fix an appointment.[77] Further, as made clear at pages 9-10 of the Petitioner's Speaking Note, the

[75] *Estelle v. Smith, ibid.*, pp. 468-69 [1876] [**Appendix B**].

[76] *Estelle v. Smith, ibid.*, p. 471 [1877] (footnote text and citation omitted) [**Appendix B**].

[77] **Speaking Note of the Representatives**, p. 7.

Petitioner does not view counsel as playing an important role, or even any role at all.[78] Barbados submits that for this reason even a weaker regime, one in which psychiatric assessment is merely offered to an accused without the active participation of his or her counsel, would nevertheless violate the accused's right to legal assistance. As demonstrated by the Court in *Estelle v. Smith* the question of whether or not to undertake a psychiatric assessment is a complex one which requires legal advice from someone trained and skilled in such matters.

58. In sum, under a system of mandatory psychiatric assessment, as proposed by the Petitioner, an accused who has passed a fitness to plea assessment but fails a later full psychiatric evaluation will find himself: unequal at law, unable to conduct a full criminal defence, unable to defend his dignity, reputation, private life and mental integrity, unable to exercise his full personhood and autonomy, deprived of his right against self-incrimination and right to counsel and, eventually, deprived of his liberty. Such a system, it is respectfully submitted, seriously offends the principles of fundamental justice and the fundamental rights of the individual.

6 LEGAL AID

59. The Petitioner concedes that legal aid is available for a number of criminal matters in Barbados. However in the Petition counsel argues that an accused should be (1) notified of legal aid at the time of his detention, (2) advised about how to access it, and (3) provided with sufficient legal aid for both a junior and senior counsel.

[78] The Petitioner's views are inconsistent in this regard. On the one hand the Petitioner suggests at page 7 of the **Speaking Note of the Representatives** that "the consent of the accused and his Counsel are required." But then on the other hand, in *ibid.*, at pages 9-10, the Petitioner argues that involving Counsel in such decisions is inappropriate because Counsel "in all likelihood will have no expertise" and "may be misled by a determination that his client is fit to plead into thinking that there is no possibility that his client is suffering from a mental condition which will provide a defence to a charge of murder." This, the State submits, amounts to a case of blowing hot and cold at the same time: on the one hand Counsel is critical to making such decisions; on the other Counsel is deemed to be so incompetent as not to know the meaning of a fitness to plead examination. Of the two views, the State submits that the former is preferable – Counsel is crucial to such determinations – and this is supported by ample authority including the US Supreme Court's decision in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981) [reproduced below in **Appendix B**].

60. These submissions are meritless, as fully demonstrated in paragraphs 103-109 of Barbados' Response of March 17, 2009. The State hereby reaffirms these submissions and offers five further observations.

61. Firstly, for the record the State must note that legal aid is not required for all cases under the Inter-American system of human rights. As highlighted by this Honourable Court in Advisory Opinion OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies,* legal aid is not required for all cases.[79] Article 8(2)(e) of the *American Convention* itself does not require legal aid, since it states that assistance by counsel provided for the State is to be "paid or not as the domestic law provides."[80] However, as established by the Court in Advisory Opinion OC-11/90, in paragraph 26, legal aid is required only if the accused is indigent and the assistance of counsel is necessary to ensure a fair hearing:

> 26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing. Any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.[81]

[79] In *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights),* Advisory Opinion OC-11/90 of August 10, 1990, Series A No. 11, at para. 25, the Court states:

> 25. Sub-paragraphs (d) and (e) of Article 8(2) indicate that the accused has a right *to defend himself personally or to be assisted by legal counsel of his own choosing* and that, if he should choose not to do so, he has *the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides.* Thus, a defendant may defend himself personally, but it is important to bear in mind that this would only be possible where permitted under domestic law. If a person refuses or is unable to defend himself personally, he has the right to be assisted by counsel of his own choosing. In cases where the accused neither defends himself nor engages his own counsel within the time period established by law, he has the right to be assisted by counsel provided by the state, paid or not as the domestic law provides. To that extent the Convention guarantees the right to counsel in criminal proceedings. But since it does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his *economic status* if, when in need of legal counsel, the state were not to provide it to him free of charge.

[80] Emphasis added. Article 8(2)(e) of the *American Convention on Human Rights* provides as a minimum guarantee: "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."

[81] *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights),* Advisory Opinion OC-11/90 of August 10, 1990, Series A No. 11, para. 26. See also *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18 of September 17, 2003, Series A No. 18, para. 126.

62. In determining whether legal aid is required in a particular case the Court held in Advisory Opinion OC-11/90, at paragraph 28:

> 28. ... It is important to note here that the circumstances of a particular case or proceeding - its significance, its legal character, and its context in a particular legal system - are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.[82]

63. Secondly, Barbados submits that its legal aid system, as outlined in its Response, guarantees compliance with Article 8 of the *American Convention* and its interpretation by the Court in Advisory Opinion OC-11/90, by providing for legal aid in all cases which are significant, have a complex legal character, or are important to the legal system as a whole. In fact legal aid is widely available under the laws of Barbados for a variety of criminal and civil matters, including constitutional motions. In support the State refers this Honourable Court to the:

a) Community Legal Services Act;[83]

b) Memorandum of the Director of the Community Legal Services Commission of July 8, 2008;[84] and

c) Affidavit of Mr. Anthony V. Grant of June 4, 2009.[85]

64. These documents demonstrate that legal aid is provided both for specific categories of offences under the Community Legal Services Act, <u>including all capital offences</u>, and for any other (unspecified) offence in circumstances where (a) the trial is likely to be difficult

[82] *Ibid.*, para. 28.

[83] Community Legal Services Act, CAP 112A, First Schedule [attached to the letter of July 4, 2008, of the Acting Minister of Foreign Affairs, Foreign Trade and International Business to the Commission, and also found in **Application, Appendix A14**].

[84] Memorandum of the Director of the Community Legal Services Commission, of July 8, 2008, Exhibit 1 to Barbados' Response of 9 July 2008 [**Application, Appendix E13**].

[85] Affidavit of Mr. Grant, Director of Community Services, of June 4, 2009, attached to the Letter of the Minister of Foreign Affairs of June 10, 2009 [hereafter, "**Affidavit of Mr. Grant of June 4, 2009**"].

and will require a lawyer or (b) a point of law of public importance is raised.[86] Legal aid also is provided for constitutional motions.[87]

65. Thirdly, as demonstrated in the Affidavit of Mr. Grant, legal aid is in fact provided in numerous cases in Barbados, both civil and criminal; for example, in 2007-2008 a total of 994 certificates were issued, and in 2008-2009 so far 1107 legal aid certificates have been issued.[88]

66. Fourthly, the Petitioner did not apply for legal aid, either during his trial or for a constitutional motion.[89] But in his Affidavit the Petitioner appears to suggest that his counsel acted *pro bono*, thus obviating the need for legal aid in his case.[90]

67. Finally, although under the laws of Barbados there is no requirement under the law for a person to be informed of a potential right to legal aid at the time of his arrest,[91] nevertheless, as a factual matter, by being informed of his right to counsel and as a result of the checks and balances of the Barbadian criminal justice process, in the vast majority of cases an accused will be informed of his right to legal aid, and assisted in obtaining it, if his charge merits it and he satisfies a means test. In fact, even before the criminal justice process commences an individual will learn of legal aid through brochures posted on notice boards throughout the community, for example, in churches and in supermarkets.[92] An example of this brochure is appended to the Affidavit of Mr. Anthony Grant of June 4, 2009, as Exhibit AVG-2.

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[86] *Ibid.*, para. 7.

[87] *Ibid.*, paras 8, 17-21.

[88] *Ibid.*, para. 15.

[89] *Ibid.*, para. 23.

[90] **Affidavit of Mr. Cadogan of June 9, 2009**, para. 6.

[91] Section 13(2) of the Barbados Constitution [**Application, Appendix A1**]; T.R. FITZWALTER BUTLER AND MARSTON GARSIA, ARCHBOLD PLEADINGS, EVIDENCE & PRACTICE IN CRIMINAL CASES, 36TH EDITION (SWEET & MAXWELL, 1966), Notes on the Judges' Rules in Section 1121(c), p. 418 [attached as Exhibit 6 to Barbados' Response of 9 July 2008 [**Application, Appendix E13**]].

[92] **Affidavit of Mr. Grant of June 4, 2009**, para. 11 (d).

7 EFFECTIVENESS OF ATTORNEY

68. The State reaffirms its submissions on the effectiveness of the Petitioner's attorney, as set out in Barbados' Response of March 17, 2009.

69. The State also draws to the Court's consideration that neither prior to or during the course of his trial did Mr. Cadogan raise any question regarding the effectiveness of his lawyer. As recognised by the Inter-American Commission on Human Rights the appropriate time to raise issues of effectiveness is at this early stage.[93] In addition, Mr. Cadogan's attorney was found to be effective by every court that considered the question and no evidence has been provided that his actions were in any way incompatible with the interests of justice.

8 REPARATIONS

70. The State submits that in light of the above considerations, and taking into account the processes related to the commutation of the death sentence, that all reparations, including legislative and other measures, compensation, costs and expenses, except those already accepted in the State's Compliance Report of 30 January 2009,[94] are unnecessary and

[93] When considering this issue in its Report on the Merits in the case of *Denton Aitken v. Jamaica*, Case 12.275 (Jamaica), Report Nº 58/02, Annual Report of the IACHR 2002, OEA/Ser.L/V/II.117, Doc. 1 rev. 1 (7 March 2003), Inter-American Commission on Human Rights decided in para. 143:

> 143. After carefully considering Mr. Aitken's claims relating to the effectiveness of the representation by his trial counsel, the Commission does not find that the Petitioners have adequately substantiated these allegations. The information available does not suggest, for example, that Mr. Aitken made it known to State officials prior to or during his trial that he considered his legal representation to be inadequate, or that the conduct of Mr. Aitken's attorney was sufficiently ineffective that it would have been clear or should have been manifest to the trial judge that the behavior of Mr. Aitken's attorney was incompatible with the interests of justice.[56] Based upon these considerations, the Commission does not find violations of Articles 4 or 8 of the Convention in respect of this aspect of Mr. Aitken's petition. [Citing: *See similarly* Eur. Court H.R., Kamasinski v. Austria, 19 December 1989, Series A Nº 168, para. 65; UNHRC, Young v. Jamaica, Communication Nº 615/1995 (1997). See also McKenzie et al. Case, *supra*, para. 301, 302; Lamey *et al.* Case, *supra*, para. 216, 217.]

[94] The Report of Barbados on Measures Adopted to Comply with Judgment of the Inter-American Court of Human Rights in the Case of Boyce et al v. Barbados, Preliminary Objection, Merits, Reparations and Cost, Series C No. 169, Judgment of November 20, 2007, and its appendices, were attached to the letter of the Hon. Senator Irene Sandiford-Garner, Acting Minister of Foreign Affairs and Foreign Trade, of 30 January 2009. These documents were also appended to **Exhibit 1** of **Barbados' Response of March 17, 2009.**

inappropriate in the present case. For full argument on this point the State draws the attention of the Honourable Court to Section 9 of its Response of March 17, 2009.

71. Regarding the new suggestion on reparations made by counsel for the Petitioner during the oral hearing, Barbados submits that this Honourable Court should reject any requirement that the Petitioner be entitled to a re-sentencing hearing before either a High Court judge[95] or the Court of Appeal.[96] Barbados equally submits that the Court should reject the need for the State to make the suggested legislative amendments, including amendments requiring oral hearings.[97] The State submits that these suggestions should be rejected for three fundamental reasons:

a) Firstly, such suggestions push this Honourable Court into the uncomfortable and inappropriate role of being a further Legislature for Barbados. As clearly stated by the Agent during the Oral Hearing, the modalities of compliance with a judgment of this Honourable Court are matters for the State, within its margin of appreciation.

b) Secondly, these suggestions are premature and unnecessary. The State has not yet adopted the legislative framework by which it will abolish mandatory capital punishment. The State will adopt such a framework, and in doing so must consider the question of appropriate measures for persons who have been sentenced to death under the mandatory system of capital punishment. Any issues related to re-sentencing, it is submitted, only become relevant for the Court once the actual legislative framework has been adopted. At that time, only if the solutions enacted by Barbados in compliance with the Court's order in the case of *Boyce et al. v. Barbados* are considered inappropriate (which the State denies could be the case), will such questions arise. In the unlikely event that this happens, then this Court is fully capable of addressing all such matters in a further hearing under Article 63 of the *Rules of Procedure of the Inter-American Court of Human Rights*.

[95] **Speaking Note of the Representatives,** at p. 2.

[96] *Ibid.*, p. 12.

[97] *Ibid.*, p. 2.

c) Thirdly, these very issues are likely to be resolved by the Barbadian Court of Appeal in the near future. An application has been made seeking leave to appeal the decision of Mr. Justice William J. Chandler in the case of *Frank Anderson Carter v. Attorney General* and *Anthony Leroy Austin v. Attorney General* to clarify certain aspects of the law.[98] In this case the death sentences of both Mr. Carter and Mr. Austin were commuted to life imprisonment, with the condition that their cases be reviewed again after they had served a period of imprisonment of 30 years.[99] Both Messrs Carter and Austin challenged these conditions on a number of grounds, and Mr. Justice William J. Chandler upheld their challenges. The High Court determined that the conditions imposed by the Governor-General were unconstitutional and remitted the matter to the Chief Justice for imposition of sentence in accordance with the directions given in the case of *Mormon Scantlebury*.[100] In coming to the conclusion that a 30 year condition was unconstitutional, Justice Chandler held, *inter alia*, that: (1) the exercise of the prerogative of mercy by the Governor-General is an executive function,[101] (2) this executive function did not include judicial powers, such as the "power to impose or prescribe minimum sentences or minimum sentences to be served before review,"[102] and (3) Rule 42 of the Prison Rules 1974, which requires the review of sentences of all prisoners service a term exceeding 4 years at four-yearly intervals or shorter periods if deemed advisable, applies to life imprisonment and therefore to the applicants.[103] Justice Chandler also held that the ouster clause in section 77(4) of the Constitution, which precludes review of a decision of the Privy Council, was inapplicable because the

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[98] *Frank Anderson Carter v. The Attorney General of Barbados* and *Anthony Leroy Austin v. The Attorney General of Barbados*, High Court of Justice, Civil Division, Suit Nos. 1982 of 2003 and 2161 of 2003 (July 16, 2007), per Mr. Justice William J. Chandler [unreported], available at http://www.lawcourts.gov.bb/LawLibrary/events.asp?id=720, attached as **Appendix C** to the present Final Written Submissions.

[99] *Ibid.*, paras 3 and 14.

[100] *Scantlebury v. The Queen* [Unreported] C.A. B'dos, Criminal Appeal No. 34 of 2002, 2005-04-13 (Barbados Court of Appeal), para. 82.8 [attached as **Exhibit 3** to **Barbados' Response of March 17, 2009**].

[101] *Frank Anderson Carter v. The Attorney General of Barbados* and *Anthony Leroy Austin v. The Attorney General of Barbados*, *supra*, para. 28 [attached as **Appendix C** to the present Final Written Submissions].

[102] *Ibid.*, para. 38.

[103] *Ibid.*, paras 52-56.

failure to allow the applicants to see the documents considered by the Privy Council subsequent to the decision in *Lewis*[104] amounted to a breach of the right to a fair hearing and a denial of natural justice.[105] In sum, this case establishes that the Governor-General in commuting a death sentence cannot impose conditions on the period of time which must be served before a prison sentence may be reviewed, and that the Privy Council, in compliance with the decision in *Lewis*, must allow the applicant to see and comment upon the documents being considered when making a recommendation in relation to the prerogative of mercy. Applied to the present case, all commutations to life imprisonment granted by the Governor-General entitle the prisoner to have his sentence reviewed by the courts of Barbados every four years or shorter periods, if deemed advisable.

72. The State also notes that compensation *has been expressly waived and is precluded* by the Petitioners' own formal submissions: Petitioner's Written Submissions, paragraph 123. Likewise, the Commission does not request monetary damages in its Application.

73. Further, on the issue of legal fees, the lawyers for the Petitioners *have waived their fees and are expressly precluded* by their own formal statement as to the *pro bono* nature of their representation: Petitioner's Written Submissions, paragraph 124; Commission's Application, paragraph 118.

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[104] *Lewis v. The Attorney General of Jamaica* [2001] 2 AC 50 [attached as **Appendix A** to the present Final Written Submissions]. See footnote 6, above, for the requirements established by *Lewis* regarding the exercise of the prerogative of mercy.

[105] *Frank Anderson Carter v. The Attorney General of Barbados* and *Anthony Leroy Austin v. The Attorney General of Barbados*, *supra*, para. 94 [attached as **Appendix C** to the present Final Written Submissions].

9 Request for Relief

74. In conclusion, Barbados respectfully requests that this Honourable Court deny all of the claims and requests of the Petitioner, and in doing so,

a) affirm that the laws and practices of Barbados, subject to the undertakings given in the State's letter of January 30, 2009, comply with the *American Convention* and do not in any way violate the rights and freedoms protected thereunder,

b) deny all of the demands of the Petitioner in relation to reparations, except regarding commutation, and

c) affirm that the provisional measures ordered by the Court in the instant case should be vacated.

Respectfully submitted,

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Agent of Barbados

10 APPENDICES

10.1 Appendix A: Lewis v. The Attorney General of Jamaica [2001] 2 AC 50

[Attach judgment here]

10.2 Appendix B: Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981)

[Attach judgment here]

10.3 Appendix C: Frank Anderson Carter v. AG and Anthony Leroy Austin v. AG, High Court of Justice, Civil Division, Suit Nos 1982 of 2003 and 2161 of 2003 (July 16, 2007) [unreported]

[Attach judgment here]