Application of the Inter-American Commission on Human Rights before the

INTER-AMERICAN COURT OF HUMAN RIGHTS

000213

in the case of

Tyrone DaCosta Cadogan
v.
Barbados

Case No 12.645

RESPONSE OF THE STATE OF BARBADOS

Agent:

The Hon. Freundel J. Stuart, Q.C., M.P.
Deputy Prime Minister, Attorney General and Minister of Home Affairs

Deputy Agent:

Dr. David S. Berry
Senior Lecturer in Laws
University of the West Indies

17 March 2009

CONTENTS

1 INTRODUCTION

1. Barbados is pleased to Respond to the complaints of the Inter-American Commission on Human Rights (the "Commission") and Mr. Tyrone DaCosta Cadogan (hereafter, the "Petitioner"), in relation to Case 12.645, *Tyrone DaCosta Cadogan v. Barbados* before this Honourable Court.

2. Barbados takes this opportunity to express its views on a number of documents[1] in relation to the case, including:

   a. the petition of Mr. Tyrone DaCosta Cadogan, entitled Communication Under the American Convention on Human Rights in the Matter of Tyrone DaCosta Cadogan v. Barbados, dated 29 December 2006 (hereafter, the "Petition"),[2]

   b. the Commission's Report No. 7/08, Admissibility, Petition 1460-06, Tyrone DaCosta Cadogan v. Barbados, OEA/Ser/L/V/II.131, Doc. 12, dated 4 March 2008 (hereafter, the "Admissibility Report"),[3]

   c. the Petitioner's Further and Additional Observations on the Merits of the Case Under the American Convention on Human Rights of 2 May 2008 (hereafter, the "Additional Observations"),[4]

   d. the Petitioner's Further Observations on the Merits of the case Under the American Convention on Human Rights, undated, but attached to a letter from Simons Muirhead & Burton dated 23 May 2008 (hereafter, the "Further Observations"),[5]

   e. the report on the merits of the Inter-American Commission on Human Rights, as amended, entitled "Report No. 60/08, Case 12.645, Merits, Tyrone DaCosta Cadogan v. Barbados", dated 25 July 2008, but amended pursuant to the Commission's letter of 15 August 2008 (hereafter, the "Report on the Merits"),[6] and

---

[1] For the sake of efficiency and economy, the State will refer 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.]**." Also, unless this would be of assistance to the Honourable Court, the State will not reproduce decisions of either the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights as appendices to its pleadings.

[2] **Application, Appendix E1.**

[3] **Application, Appendix D2.**

[4] **Application, Appendix E8.**

[5] **Application, Appendix E9.**

[6] **Application, Appendix D1.**

f. the Applicant's Submissions re Referral to the Inter-American Court of Human Rights, dated 12 September 2008 (hereafter, the "Referral"),[7]

g. the Commission's Application to the Inter-American Court of Human Rights in the Case of Tyrone DaCosta Cadogan (Case 12.645) against the Republic of Barbados, dated 31 October 2008 (hereafter, the "Application"),[8] and

h. the Written Submissions of the Alleged Victim, undated (although a partly legible date stamp appears to indicate 21 January 2009: "21 ENE 2009") (hereafter, the "Petitioner's Written Submissions").[9]

3. However prior to canvassing the issues of jurisdiction, admissibility, and the merits of Case 12.645, the State avails itself of this opportunity to identify certain consequences necessarily arising from the decision of this Honourable Court in the case of *Boyce et al. v. Barbados*.[10]

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

4. The State accepts the binding nature of the decision of the Inter-American Court of Human Rights in the case of *Boyce et al v. Barbados*.[11] 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.

5. In this regard 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*. The State reminds the Commission and the Honourable Court, and informs the Petitioner, of 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.[12] That Report contains a number of clarifications and commitments by the State, some of which are equally relevant to the present case, including:

---

[7] **Application, Appendix E17**

[8] **Application.**

[9] **Petitioner's Written Submissions**

[10] *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.

[11] *Ibid.*

[12] 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 the present Response.

ACTIONS TAKEN BY STATE IN COMPLIANCE WITH THE JUDGMENT OF NOVEMBER 20, 2007, ON THE PRELIMINARY OBJECTIONS, MERITS, REPARATIONS, AND COSTS IN THE CASE OF *BOYCE ET AL V. BARBADOS*

3. The State intends to comply with the above Order of the Court in full.

[...]

5 The State is pleased to inform the Court that it 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. Please find attached a copy of the Warrant of Commutation, issued by His Excellency Sir Clifford Straughn Husbands, the Governor General of Barbados, of June 13, 2008.

[...]

iii) The issue of the abolition of the mandatory death penalty, in accordance with paragraph 127(b) of the Judgment, has received the State's active attention since December 2007. 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. The State will forward to the Court evidence of the relevant legislative change(s), once available.

iv) The issue of the repeal of Section 26 of the Constitution, in accordance with paragraph 127(c) of the Judgment, has received the State's active attention since December 2007. Following extensive inter-Ministerial consultation and full deliberation by Cabinet, the State has decided that section 26 of the Constitution should be repealed. The State will forward to the Court evidence of this Constitutional change, once available.

[...]

6. The State offers its continued cooperation with the Court in fully implementing its obligations under the judgment of November 20, 2007, and will inform the Court of further actions taken in this regard.

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

7. In light of the above commitments and the binding effect of the judgment of this Honourable Court in the case of *Boyce et al. v. Barbados*, and in consideration of the Commission's request for a commutation of Mr. Tyrone DaCosta Cadogan's death sentence, the State draws to the attention of the Court the process by which a sentence of death may be commuted under the laws of Barbados.

8. The relevant sections of the Constitution, Sections 77(1) and 78, provide as follows:

Proceedings of Privy Council

77. (1) The Privy Council shall not be summoned except by the authority of the Governor General acting in his discretion.

[...]

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.

(2) The Governor General shall, in the exercise of the powers conferred on him by subsection (1) or of any power conferred on him by any other law to remit any penalty or forfeiture due to any person other than the Crown, act in accordance with the advice of the Privy Council.

(3) Where any person has been sentenced to death for an offence against the law of Barbados, the Governor General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor General may require, to be forwarded to the Privy Council so that the Privy Council may advise him on the exercise of the powers conferred in him by subsection (1) in relation to that person.

(4) The power of requiring information conferred upon the Governor General by subsection (3) shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

(5) A person has a right to submit directly or through a legal or other representative written representation in relation to the exercise by the Governor-

General or Privy Council of any of their respective functions under this section, but is not entitled to an oral hearing.

(6) The Governor-General, acting in accordance with the advice of the Privy Council, may by instrument under the Public Seal direct that there shall be time-limits within which persons referred to in subsection (1) may appeal to, or consult, any person or body of persons (other than Her Majesty in Council) outside Barbados in relation to the offence in question; and, where a time-limit that applies in the case of a person by reason of such a direction has expired, the Governor-General and the Privy Council may exercise their respective functions under this section in relation to that person, notwithstanding that such an appeal or consultation as aforesaid relating to that person has not been concluded.

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

9. As provided in Section 77(1) the Privy Council may be summoned by the Governor General, acting under his discretion, to consider the exercise of the prerogative of mercy.

10. In addition, an individual, such as the Petitioner in the present case, may apply to the Governor General at any time to exercise the prerogative of mercy.

11. Normally, as a result of the decision of the Caribbean Court of Justice in the case of *Attorney General et al v. Jeffrey Joseph and Lennox Ricardo Boyce*,[13] the Barbados Privy Council would meet to consider the exercise of the prerogative of mercy at the conclusion of all of the applicant's legal processes, including international legal petitions:

> [143] Notwithstanding these apparent advantages [of three meetings of the Privy Council to consider the prerogative of mercy at each stage of the applicant's 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

[13] *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**].

> considers there is a strong case for a commutation. If there is no decision in favour of commutation, then further deliberation would have to be adjourned.[14]

12. In the present case, the Barbados Privy Council has not met to consider the prerogative of mercy in relation to Mr. Cadogan,[15] even though Report No. 60/08[16] of the Inter-American Commission on Human Rights is available, because no final decision has been taken by this Honourable Court.

13. However, as indicated by Justices de la Bastide and Saunders in the above-quoted passage, if the particular circumstances of the individual give rise to the possibility of a strong case for commutation, then the Privy Council may be convened by the Governor General to consider the exercise of the prerogative of mercy.

14. In this regard, the State informs the Honourable Court that it will provide to the Governor General for His Excellency's information the following documents: (1) the judgment of the Court in the case of *Boyce et al v. Barbados*,[17] (2) the Report on the Merits of the Commission (Report No. 60/08),[18] and (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.[19]

* * *

15. The State also notes that the effect of the State's commitments and understandings, as set out above, is that all of the grounds of complaint advanced in the Application of the Commission, except for one aspect of the relief requested in that Application, will be satisfied upon completion of the necessary legislative changes.[20] Put another way, Barbados submits that the above-noted commitments and understandings fully satisfy every aspect of the Commission's case against the State except for the commutation. The latter, as already indicated, may be initiated at any time at the request of the Petitioner himself.

---

[14] *Ibid.*, Joint Judgment of the President the Right Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders, para. 143 (emphasis added).

[15] The State hereby answers the Commission's query in paragraph 51 of the Application.

[16] 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**]

[17] *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.

[18] 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**].

[19] Attached as **Exhibit 1** to the present Response.

[20] See paragraphs 7-8 of the Commission's Application, in which it sets out the purpose of the application and the relief requested [reproduced below, in para. 31]. See also, Application, paras 112 and 119-120.

16. 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.[21] Additionally, other portions of the Petitioner's case are irrelevant to the present case, because they merely amount to recitations of complaints against the State in the former case of *Boyce et al. v. Barbados*.[22]

17. Therefore, in the present response the State limits itself to rebutting these 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.

18. The State firmly rejects all of the above complaints of the Petitioner as misconceived, groundless and meritless at law.

3 OBJECTIONS TO JURISDICTION

3.1 Exhaustion of Domestic Remedies

19. The State submits that this Honourable Court should reject the Petition as inadmissible for failure to exhaust domestic remedies.[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,[24] 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.[25]

---

[21] 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.

[22] E.g., **Petitioner's Written Submissions**, paras 15-19 and 70(iii).

[23] 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).

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

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

20. Although the Petitioner pursued substantially the same claims in Barbados domestic courts, his appeals were against conviction alone. He did not raise the potential violation of his right to a fair trial, as protected by Section 18 of the Constitution, which is the central claim in the current Petition.[26] The Petitioner therefore had, and 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 (adequate psychiatric expertise) and 3 (adequacy of legal aid).[27]

21. Further, because legal aid is in fact available in Barbados for constitutional challenges,[28] this domestic remedy requiring exhaustion is effective, not unduly burdensome and is not exceptional. Barbados 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.

22. The State draws the attention of the Court to the Memorandum of Mr. Anthony V. Grant, Director of Community Legal Services of July 8, 2008, attached as Exhibit 1 to Barbados' Response of 9 July 2008,[29] which expressly indicates that legal aid is available for constitutional motions, as well as attaches a list of recent instances in which such legal aid certificates were granted.

23. This fact of financial assistance provides clear grounds for distinguishing pronouncements about the exceptional nature of constitutional motions, both by the UN Human Rights Committee and the Inter-American Court of Human Rights in the *Case of Herrera-Ulloa v. Costa Rica*.[30] Constitutional motions are not extraordinary or unduly burdensome in Barbados, and represent effective domestic remedies that must be exhausted under the terms of Articles 46(1)(a) and 47(a) of the *American Convention on Human Rights*.

24. Accordingly, the State submits that the Honourable Court should declare the Petition inadmissible as a result of failure to exhaust domestic remedies.

3.2 Breach of Fourth Instance Rule

25. The State also objects to the admissibility of two of the remaining aspects of the Petition as contravening the fourth instance rule and as thereby falling outside of the Court's jurisdiction *ratione materiae*, namely, Grounds 1 (diminished responsibility) and 4 (effectiveness of legal representation).

---

[26] Section 18 of the Constitution is reproduced below, starting at p. 25 [it is also reproduced in **Application, Appendix A1**].

[27] See the State's submissions commencing in paragraph 58, below.

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

[29] **Application, Appendix E13**

[30] *Case of Herrera-Ulloa v. Costa Rica*, I-A Ct. H.R., Judgment of July 2, 2004, Series C No. 107, paras 84-85

26. International human rights jurisprudence is clear and consistent in prohibiting the use of international bodies as a fourth instance of domestic appeal. It is well established that bodies such as the Inter-American Commission on Human Rights and this Honourable Court cannot "act as appellate bodies with the authority to examine alleged errors of domestic law or fact that national courts may have committed while acting within their jurisdiction;" in fact the Commission, if a petition "contains nothing more than the allegation that the domestic court's decision was wrong or unjust, [...] must apply the fourth instance formula and declare the petition inadmissible *ratione materiae*."[31] This Honourable Court has recognised the applicability of the fourth instance rule in its jurisprudence,[32] as have both the European Court of Human Rights and the UN Human Rights Committee.[33]

27. The State submits that the complaints in Grounds 1 and 4 raised by the Petitioner amount to a thinly disguised attempt to use the Inter-American processes as a fourth instance of appeal and are therefore inadmissible. They are also manifestly groundless and obviously out of order: Article 47(c), *American Convention on Human Rights*, and Article 34(b) of the *Rules of Procedure of the Inter-American Commission on Human Rights*.[34]

    a. The Petition is almost identical (with verbatim duplication in places) to the Amended Notice of Application, which was submitted by the Petitioner's counsel to the Caribbean Court of Justice.[35] All of the grounds of appeal of the Amended Notice of Application, in substantially the same form as the present Petition – including arguments on diminished responsibility and the effectiveness of legal representation – were definitively dismissed by the Caribbean Court of Justice in the Petitioner's appeal. The reasoning of the Court is lucid and compelling and the State refers to it throughout the present Response.

---

[31] JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (CAMBRIDGE, 2003), p. 93 [citing: Case 11.673, *Santiago Marzioni (Argentina)*, Inter-Am. Comm. HR 86, para. 51, OEA/Ser.L/V/II.95, doc. 7 rev. (2 March 1998), and Case 11.137, *Juan Carlos Abella (Argentina)*, Inter-Am. Comm. HR, 18 November 1997, 271, 302, para. 142, OEA/Ser.L/V/II.98, doc. 6 rev. (1997)].

[32] See, e.g., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Preliminary Objections, I/A Court H.R., Series C No. 32, Judgment of September 11, 1997, paras 17-18.

[33] JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (CAMBRIDGE, 2003), pp. 94-95 (and the authorities cited therein).

[34] *Rules of Procedure of the Inter-American Commission on Human Rights*, reprinted in INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM (UPDATED TO JANUARY 2007).

[35] **Application, Appendix B3**. See also the abbreviated summary in paragraph 48 of the Application itself.

28. For the above reasons, through the Honourable Court, the State invites the Commission to withdraw the case, as provided under Articles 48(1)(c) of the *American Convention* and 53(1) of the *Rules of Procedure of the Inter-American Court of Human Rights*.[36]

29. If for any reason the Commission is unable to accede to this request, the State respectfully submits that this Honourable Court should exercise its discretion and strike the present case from its docket on the ground that no issues remain for it to exercise jurisdiction over, and because the Petition as inadmissible.

3.3 Complaint No Longer Involves the Commission as a Party

30. Further, the State draws to the attention of the Court the fact that all of the complaints in the present case which are identified by the Commission in its Application, except one aspect of the relief requested, have been resolved by the State.

31. The purpose of the Commission's Application is set out in paragraph 7 of the same document, and the relief requested is set out in paragraph 8, as follows:

> II. PURPOSE OF THE APPLICATION
>
> 7. The purpose of the present application is to ask the Court to conclude and declare that the State of Barbados:
>
> a) By imposing the mandatory death penalty on Mr. Tyrone DaCosta Cadogan violated Articles 4(1), 4(2), 5(1), 5(2) and 8(1) of the American Convention on Human Rights, in conjunction with Article 1(1) of the same treaty; and
>
> b) Has not fulfilled its obligations under Article 2 of the American Convention on Human Rights in relation to section 2 of the Offences Against the Person Act 1994 of Barbados and section 26 of the Constitution of Barbados because it has not brought its domestic legislation into compliance with the rights and freedoms protected under the American Convention.
>
> 8. As a result of the above mentioned, the Inter-American Commission requests the Court to order the State to:
>
> 1. Grant Mr. Cadogan the commutation of his death sentence;
>
> 2. Adopt such legislative or other measures as may be necessary to safeguard against any imposition of the death penalty not in conformity with the terms of Articles 4, 5 and 8 of the American Convention; and

[36] *Rules of Procedure of the Inter-American Court of Human Rights*, reprinted in INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM (UPDATED TO JANUARY 2007).

> 3. Adopt, within a reasonable time, such legislative or other measures necessary to ensure that the Constitution and laws of Barbados are brought into compliance with the American Convention, and specifically, remove the immunizing effect of section 26 of the Constitution of Barbados in respect of "existing laws".[37]

32. The Commission, even though applying the heightened level of scrutiny required in capital punishment cases, specifically rejected the Petitioner's submissions on Grounds 1-4, set out above, and did not adopt them in its final Merits Report[38] or in its Application to this Honourable Court.

33. As a result, the State submits that this Honourable Court is confronted with a novel situation: the only complainant with juridical personality to appear before the Court[39] no longer has any substantive basis of complaint under Inter-American human rights norms.

34. The State accepts that once a case is filed before the Court, under Article 23(1) of the *Rules of Procedure of the Inter-American Court of Human Rights* the Petitioner may submit pleadings autonomously. However this provision does not grant the Petitioner, as per Article 61(1), full *locus standi* before the Court. Consequently, the State submits that there remains only one outstanding issue, that of commutation, on the part of the sole complainant with *locus standi*. The process for such relief may at any time be initiated by the Petitioner himself.

35. In such a situation, since Article 61(1) of the *American Convention* only allows a State Party or the Commission the right to bring a case before this Honourable Court, not the Petitioner himself, the State submits that the case should be withdrawn by the Commission,[40] or struck out on the Court's own initiative.[41]

* * *

36. For the above reasons, the State submits that this Honourable Court should exercise its discretion and refuse to accept jurisdiction over Case 12.645, or deem it inadmissible.

---

[37] See also Report No. 60/08, Case 12.645, Merits, Tyrone DaCosta Cadogan v. Barbados, OEA/Ser/L/V/II.132, Doc. 36, 25 July 2008, para. 5 **[Application, Appendix D1]**.

[38] Report No. 60/08, Case 12.645, Merits, Tyrone DaCosta Cadogan v. Barbados, OEA/Ser/L/V/II.132, Doc. 36, 25 July 2008, paras 115 (rejecting Grounds 1, 3 and 4), and 116 (Ground 2) **[Application, Appendix D1]**.

[39] As specifically stated in Article 61(1) of the *American Convention on Human Rights* "Only the States Parties and the Commission shall have the right to submit a case to the Court."

[40] *American Convention on Human Rights*, Art. 48(1)(c); *Rules of Procedure of the Inter-American Commission on Human Rights*, Art. 34(c).

[41] *Rules of Procedure of the Inter-American Court of Human Rights*, Art. 53(1).

4 REPRESENTATION

37. According to Articles 21 and 33 of the *Rules of Procedure of the Inter-American Court of Human Rights* the State has designated as its:

a. **Agent**, the Hon. Freundel J. Stuart, Q.C., M.P., Deputy Prime Minister, Attorney General and Minister of Home Affairs of Barbados, and

b. **Deputy Agent**, Dr. David S. Berry, Senior Lecturer at the Faculty of Law of the University of the West Indies.

5 JURISDICTION OF THE COURT

38. Barbados ratified the *American Convention on Human Rights* on November 27, 1982, and accepted the contentious jurisdiction of this Honourable Court on June 4, 2000. The State accepts the jurisdiction of the Inter-American Court of Human Rights to consider arguments related to the Commission's Application of 31 October 2008, as provided for under Article 62(3) of the *American Convention*. Nevertheless, for the reasons provided above, the State requests the Court to refuse to take jurisdiction over the case and declare it inadmissible.

6 PROCESSING BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

39. Unless the State otherwise disputes a matter of fact or law in answering the Application of the Commission of 31 October 2008 in (a) the present Response, (b) any attached documents, (c) documents submitted subsequently to this Honourable Court, or (d) its oral pleadings or evidence, the State accepts as accurate the procedural summary of the Commission's processing of the Petition in that Application.

40. Except as provided in paragraph 4, above, the State expressly denies any allegations or implied allegations that Barbados has in any manner breached its obligations under the *OAS Charter* (including as interpreted by the American Declaration), the *American Convention on Human Rights*, or any other rule of customary or conventional international law.

7 FACTUAL MATTERS

7.1 General

41. To the extent that the State does not otherwise dispute or reject the factual assertions of the Petitioner or of the Commission, or provide conflicting facts in the present Response or any attached documents or subsequent oral pleadings or evidence, for present purposes the State accepts the summary of considerations of fact by the Commission in its Application.

7.2 Specific Inaccuracies of Fact and Law

42. In this regard, there are a number of factual and legal errors which the State feels compelled to correct for the benefit of this Honourable Court in the various documents already before it, namely:

a. The Petitioner is incarcerated in Barbados' new prison, Her Majesty's Prison Dodds. The address for this institution is: Barbados Prison Service, Her Majesty's Prison Dodds, Dodds, St. Philip, Barbados.[42]

b. Contrary to the statement in paragraph 35 of Report No. 7/08 of the Commission[43] and in other documents,[44] legal aid is available in Barbados for Constitutional Motions:

i. Memorandum of the Director of the Community Legal Services Commission, of July 8, 2008.[45]

ii. Community Legal Services Act, CAP 112A, First Schedule, Part II (c). For convenience, Part II provides:

FIRST SCHEDULE

Matters in respect of which legal services may be

provided on the grant of a legal aid certificate

[...]

---

[42] Petition, page 1 [as reproduced in **Application, Appendix E1**].

[43] Report No 7/08, Admissibility, Petition 1460-06, Tyrone DaCosta Cadogan v. Barbados, March 4, 2008, para. 35 **[Application, Appendix D2]**.

[44] Petition, para. 18 **[Application, Appendix E1]**.

[45] Exhibit 1 to Barbados' Response of 9 July 2008 **[Application, Appendix E13]**.

Part II

CIVIL

Family Law

All family law matters except divorce.

Other matters involving

(a) minors;

(b) tenants and tenantries within the meaning of the *Security of Tenure of Small Holdings Act*, *Tenantries Control Act* and the *Tenantries Freehold Purchase Act*;

(c) an application under section 24 of the *Constitution*;

(d) an application for a Writ of *habeas corpus ad subjiciendum* [46]

c. There was not sufficient "evidence before the trial judge which would have dictated that he place the defence of Diminished Responsibility before the jury."[47] As elaborated below, this is confirmed by the unanimous judgments in the Petitioner's case about intention at both the level of the Court of Appeal and the Caribbean Court of Justice.[48]

d. The Petitioner was not "denied access to expert psychiatric assistance."[49] As demonstrated below, the Petitioner had at all times the right to avail himself of the free and independent psychiatric services of the staff of the Barbados Psychiatric Hospital.

e. The Petitioner did not have the right, as a matter of fact or law, to a "Senior and Junior Attorney-at-Law properly funded by the State." [50]

---

[46] Emphasis added. The Community Legal Services Act was attached to the letter of July 4, 2008, of the Acting Minister of Foreign Affairs, Foreign Trade and International Business to the Commission [and is found in **Application, Appendix A14**].

[47] Petition, para. 21 [**Application, Appendix E1**].

[48] *Tyrone DaCosta Cadogan v The Queen*, Criminal Appeal No. 16 of 2005, Judgment of 31 May 2006 (C.A.), per the Chief Justice, the Honourable Sir David Simmons K.A., B.C.H. [**Application, Appendix B2**]; *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.), per the Honourable Mr. Justice David Hayton [**Application, Appendix B4**].

[49] Petition, para. 27(i) [**Application, Appendix E1**].

[50] Petition, para. 27(ii) [**Application, Appendix E1**].

f. The judgments of both the Court of Appeal and the Caribbean Court of Justice in the case of Mr. Cadogan flatly contradict the assertion that the Petitioner's Attorney-at-Law was ineffective.[51]

g. The Universal Declaration of Human Rights of the United Nations is not an international human rights treaty.[52]

h. Even if the drafters of the Barbados Constitution may have examined the text of the *European Convention on Human Rights*, there is no link of "parentage" between the two documents.[53] Further, Barbados has never been a State Party to, and is not bound by, the *European Convention*.

i. Barbados is not a "Republic," as incorrectly specified on the cover of the Application. The State of Barbados is a constitutional democracy with the Queen as Head of State.

j. 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*,[54] 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.[55]

    i. This is clearly established in the Joint Judgment of the President the Right Honourable Mr Justice de la Bastide and the Honourable Mr Justice Saunders, in which, at para. 133, their Lordships held: "the respondents were entitled by virtue of the legitimate expectation created by their Government's ratification of the ACHR and its subsequent conduct and statements, to a reasonable time to file and complete proceedings in the Inter-American system" (emphasis added). The doctrine of legitimate expectation applies to all cases where a petition has already been commenced before an international human rights body.

---

[51] Petition, para. 27(iii) [**Application, Appendix E1**]

[52] Petition, para. 29 [**Application, Appendix E1**]

[53] Petition, para. 30 [**Application, Appendix E1**]

[54] *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**]

[55] 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 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.

ii. The State first drew the Commission's attention to this rule by means of the letter of the Acting Minister of Foreign Affairs, Foreign Trade and International Business, to the Commission of 4 July 2008.[56] The State again drew the Commission's attention to this rule 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.[57] This Honourable Court also considered this position in its continued Provisional Measures Order of 2 December 2008.[58]

iii. However the State must respectfully reiterate its position to the Honourable Court. Under the laws of Barbados Precautionary Measures and Provisional Measures Orders are completely unnecessary in relation to any case involving the application of the death penalty so long as the legitimate expectation upheld by the Caribbean Court of Justice in the case of *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce* has not been defeated by a prior, publicised statement by the Executive. As a result, the Precautionary Measures request in paragraph 3 of the Petition was unnecessary, as was the request by the Commission for Provisional Measures from the Inter-American Court of Human Rights.

k. No warrants of execution have been read against Tyrone DaCosta Cadogan, as erroneously implied by the legal representatives of the Petitioner.[59]

8 SUBSTANTIVE RESPONSE TO GROUNDS IN THE APPLICATION AND PETITION

43. If the Court is unable to accept Barbados' submissions on jurisdiction and admissibility, the State offers the following responses to the subsisting complaints of the Petitioner in Case 12.645.

8.1 Ground 1 – Diminished Responsibility Is Inapplicable

44. The State submits that because the Petitioner has dropped arguments related to diminished responsibility in its final written submissions[60] this matter is no longer before the Honourable Court. Nevertheless, out of an abundance of caution, the State offers the following submissions rebutting this aspect of the Petitioner's case.

---

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

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

[58] Order of the Inter-American Court of Human Rights of December 2, 2008, Provisional Measures Requested by the Inter-American Commission on Human Rights Regarding the State of Barbados, Case of Tyrone DaCosta Cadogan, "Decides", paras 1-2.

[59] See, e.g., **Petitioner's Written Submissions**, para. 70(iii).

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

45. Firstly, the State submits that diminished responsibility simply could not arise in fact or at law in the present case. There was no evidence before the trial judge that would dictate that the defence of diminished responsibility be placed before the jury. To the contrary, the unanimous decisions of the Chief Justice, the Honourable Sir David Simmons K.A., B.C.H., at the Barbados Court of Appeal and of the Honourable Mr. Justice David Hayton at the Caribbean Court of Justice manifestly demonstrate that such a defence was unsupportable. Secondly, the State contests as inaccurate and misleading the explanation in the Petition of the role of, and burdens associated with, diminished responsibility. The State addresses the latter point first.

8.1.1 Legal Framework in Which Diminished Responsibility Will Arise

46. The defence of diminished responsibility arises under Section 4 of the Offences Against the Person Act,[61] which 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.

47. As stipulated in Section 4, the defence of diminished responsibility applies 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. as substantially impaired his mental responsibility for his acts and omissions in

   i. doing, or

   ii. being party to

   the killing.

[61] **Application, Appendix A4.**

48. Thus, contrary to the submissions of the Petitioner, diminished responsibility applies to abnormalities of mind which arise from inherent causes, including severe mental handicap, 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;[62] likewise, the doctrine of joint enterprise would fall under the definition of diminished responsibility in Section 4.[63]

49. Section 4 indicates 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 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. 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. The judge will instruct the jury along the following lines:

> Providing that the prosecution has proved all the elements of the offence of murder, you must convict the defendant of that offence, unless you find that at the time of the offence he was suffering from an abnormality of mind which in law substantially impaired his mental responsibility for the killing. If he was, his responsibility is diminished and that will reduce the offence from one of murder to one of manslaughter.
>
> The law is that it is for the defendant to prove that his responsibility is diminished. He does not have to make you sure of that, but he does have to satisfy you of it

---

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

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

on the balance of probabilities, i.e., he must prove by evidence that it is more likely than not that when he killed X his mental responsibility for his actions was substantially impaired.

There are three elements which the defence must prove before this defence can be established. They must all be present:

1. At the time of the killing the defendant suffered from an abnormality of mind.

The word mind includes perception, understanding, judgement and will.

An abnormality of mind means a state of mind so different from that of an ordinary human being that a reasonable person (in other words yourselves) would judge it to be abnormal.

2. The abnormality of mind must arise from either:

A condition of arrested or retarded development of mind; or

Any inherent cause; or

It must be induced by disease or injury.

As to these two elements, although the medical evidence which you have heard is important, you must consider not only the evidence of the doctors, but also the evidence relating to the killing and the circumstances in which it occurred. Consider the behaviour of the defendant both before and after that event and take into account his medical history.

3. The abnormality of mind must have substantially impaired the defendants' mental responsibility for what he did [i.e., his acts or omissions which caused death].

Substantially impaired means just that. You must conclude that his abnormality of mind was a real cause of the defendant's conduct. The defendant need not prove that his condition was the sole cause of it, but he must show that it was more than merely a trivial one [which did not make any real/appreciable difference to his ability to control himself].

You should approach all of these questions in a broad, common sense way. If the defence has failed to prove any one or more of these elements, providing that the prosecution has proved the ingredients of murder to which I have referred, your verdict must be Guilty of murder. If, on the other hand the defence has satisfied you that it is more likely than not that all three elements of the defence of diminished responsibility were present when the defendant killed X your verdict

> must be Not guilty of murder but guilty of manslaughter [on the grounds of diminished responsibility].[64]
>
> If the judge does not put the defence 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 the Petitioner's trial the judge instructed the jury on intention and specifically alerted them to the potential effect of alcohol and drugs on intention.[65] These instructions to the jury were endorsed by the Court of Appeal and the Caribbean Court of Justice, as will be demonstrated below.

50. 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. In addition, such a defence can be raised by the defendant, defence counsel, and judge.

8.1.2 Diminished Responsibility Does Not Arise in the Present Case, as Demonstrated by the Unanimous Decisions of the Court of Appeal and the Caribbean Court of Justice

51. 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.[66] The unanimous judgment of the Caribbean Court of Justice, per Mr. Justice David Hayton, upheld the Petitioner's conviction and dismissed arguments (a) challenging the trial judge's directions to the jury on intent, (b) raising the defence of diminished responsibility, and (c) alleging incompetence of counsel.[67] Furthermore, the Caribbean Court of Justice specifically dealt with the questions in the Petition related to psychiatric evidence.

52. Barbados refers the Court to the decision of the Court of Appeal, which sets out the facts related to the crime in considerable detail, including the incriminating oral statement voluntarily made to the police following arrest, and the written statement amounting to a

---

[64] CROWN COURT BENCH BOOK, SPECIMEN DIRECTIONS [bracketed text in original; attached as Exhibit 4 to Barbados' Response of 9 July 2008 **[Application, Exhibit E13]**. Note that these directions are merely examples, an "indication of the type of direction which could be given," rather than specimens suitable for all cases.

[65] 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.

[66] *Tyrone DaCosta Cadogan v The Queen*, Criminal Appeal No 16 of 2005, Judgment of 31 May 2006 (C.A.) **[Application, Appendix B2]**.

[67] *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]**.

confession to the murder.[68] After thoroughly reviewing the evidence and the law related to intent for murder, the Chief Justice 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.[69]

53. The Caribbean Court of Justice 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, the Caribbean Court of Justice stated that "[e]vidence in his statement and in the witness box revealed cunning, coherent actions both just before and just after the robbery."[70] The Court concluded:

> [5] We agree with the Court of Appeal's view that where there is evidence of a direct violent attack on a victim, as there was in this case, and where the accused has admitted in his sworn evidence that he was aware of what he was doing when he made his first stab with his butcher's knife, and where the trial judge has directed the jury to pay regard to all the relevant circumstances before and after the attack in order to decide if the accused intended to kill or cause serious bodily harm to the victim, there was no need for the direction on virtual certainty argued for by Mr Shepherd.[71]

54. The jury was properly directed on intent and there was clear evidence upon which they could reasonably have based their verdict.

55. The Caribbean Court of Justice also allowed counsel to pursue new grounds of appeal and the Respondent did not object.[72] One of these grounds was that of diminished responsibility. When addressing this issue the Caribbean Court of Justice appears to have examined the very same letter by Dr. Mahy that is relied upon by the Petitioner in the present case.[73] The Caribbean Court of Justice fully considered the relevance of the defence of diminished responsibility, weighed the evidential value of the letter, and held

---

[68] *Tyrone DaCosta Cadogan v. The Queen*, Criminal Appeal No. 16 of 2005, Judgment of 31 May 2006 (C.A.), para. 7 **[Application, Appendix B2]**.

[69] *Ibid.*, para. 49.

[70] *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. 4 **[Application, Appendix B4]**.

[71] *Ibid*, para. 5.

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

[73] 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]**.

that the Applicant's submission in this area was baseless. It may be of assistance to the Court to set out this passage of the judgment of Mr. Justice David Hayton in full:

> **Diminished responsibility**
>
> [7] It was submitted that the trial judge should have put the issue of diminished responsibility to the jury and/or have advised the Applicant's counsel to pursue this defence to a murder charge, but, in the absence of medical evidence of some abnormality of mind substantially impairing the Applicant's mental responsibility, this submission is baseless. Section 4 of the Offences Against The Person Act (Cap 141) only prevents a killer from being 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 causes, or induced by disease or injury, as substantially impaired his mental responsibility for his acts or 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."
>
> [8] It was then submitted that, in order to help establish a plea of diminished responsibility at this late stage, there should be admitted into evidence a preliminary opinion of a Consultant Psychiatrist, Dr George Mahy, dated 27th June, 2006. By section 29(1) of the Criminal Appeal Act (Cap 113A), "the Court may, if it thinks necessary or expedient in the interests of justice ... (c) ... receive the evidence, if tendered, of any witness."
>
> [9] However, by section 29 (2) it is provided that:
>
> "Without limiting subsection (1), where evidence is tendered to the Court under that subsection, the Court, *unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal*, shall receive the evidence if
>
> (a) it appears to the Court that the evidence is likely to be credible ...; and
>
> (b) the Court is satisfied that though it was not adduced at the trial there is a reasonable explanation for the failure to adduce it."
>
> [10] The problem with Dr Mahy's preliminary opinion is that, even if received into evidence, it "would not afford any ground for allowing the appeal." As admitted by Mr Tariq Khan, dealing with this point on behalf of the Applicant, at best it could afford grounds for a stay of this special leave application until a further, definitive, psychiatric report on the Applicant could be obtained, though there is a problem trying to obtain funds for such a report. He submitted that if such a report could be obtained and if it provides some credible evidence of some abnormality of the mind that could support a plea of diminished responsibility, then special leave should be granted, so that the case could be referred back to the Court of Appeal for cross-examination upon the report; otherwise, leave should not be granted.
>
> [11] This is clutching at straws. Dr Mahy's preliminary opinion is very weak material upon which to hope to establish a basis for a diminished responsibility

> plea. Dr Mahy saw the Applicant only once when the latter "was well orientated and denied ever having any features of a psychotic illness" as set out in the opinion. His adolescent and adult life style, as there described, is very like the usual aberrant behaviour of thousands of under-privileged young men indulging in some marijuana while over-indulging in alcohol. Thus, the evidence in support of Dr Mahy's "impression" that "from the account [the Applicant] gives of his life style he has a major Personality Disorder with a strong psychopathic element" falls short of the standard required for presenting an arguable case on abnormality of the mind.
>
> [12] Dr Mahy's conclusions were also premised on the Applicant genuinely being unable to recollect stabbing the victim sixteen times. In this connection, the Applicant in his statement to the police admitted that, after he first stabbed her from behind, the victim turned round and recognised him, and he recognised that she recognised him. In the witness box he denied this, though he later admitted it to Dr Mahy. He was thus lucid at the start of the stabbing and his conduct was therefore open to a possible inference that he went on with the stabbing so that his victim could not bear witness against him
>
> [13] Overall, the new evidence provided by Dr Mahy lacks the "degree of cogency which gives concern as to the safety of the verdict", as neatly put by the Privy Council in *Ramdeen v The State*[3] at [8] when rejecting the admissibility of fresh evidence of two expert psychiatrists. It is thus unnecessary to consider further problems occasioned by the availability, if sought, of evidence like that of Dr Mahy at the trial. One should note that we have been informed that, if counsel had believed there to be reason to obtain psychiatric evidence as to the possible existence of an abnormality of mind of the Applicant, he could have obtained such evidence from one of the psychiatrists employed at the Psychiatric Hospital by the Barbados Government: part of their duties is to provide such services free in a case like the present.[74]

56. The Caribbean Court of Justice dismissed the value of Dr. Mahy's letter, as "fall[ing] short of the standard required for presenting an arguable case on abnormality of the mind." The letter described an adolescent and adult lifestyle that, unfortunately, is shared by many of those underprivileged young men in the region who abuse drugs and alcohol. Moreover the Court noted that the findings of Dr. Mahy hinged on "the Applicant genuinely being unable to recollect stabbing the victim sixteen times," but that extrinsic evidence presented at the trial and *explicitly referred to in the expert letter itself* demonstrated that the Petitioner was lucid and recalled the events after the initial stabbing.

57. The State submits that the Clinical Psychology Report of Dr. Tim Green, attached as Appendix 3 to the Petitioner's Written Submissions, adds nothing to Petitioner's case. This Report describes, 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

---

[74] *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 (emphasis added, citing: 3 [1999] UKPC 50) **[Application, Appendix B4]**

young men indulging in some marijuana while over-indulging in alcohol."[75] The sole, surprisingly short, paragraph describing Mr. Cadogan's account of the murder[76] does not in any way refute either the Petitioner's own written statement to the police or extrinsic evidence related the offence.

8.2 Ground 2 – Adequate Psychiatric Expertise Available

58. 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.

59. The Petitioner has advanced two different claims under this Ground.

a. The first claim, addressed in the Petition and in the Additional Observations, is that any person accused of an offence potentially subject to the death penalty must have the right to obtain state funding to call as an expert witness a psychiatrist who is, at least potentially, not employed by any state institution or even based in Barbados (i.e., private psychiatrists, or overseas psychiatric experts).

b. The second claim, arising after the lack of adoption of the first by the Commission in its Report on the Merits, is simply that all persons accused of an offence potentially subject to the death penalty must be subject to a full psychiatric evaluation by the State. The Petitioner phrases this duty in the passive, but its obligatory quality remains clear, there being "the obligation on the part of the State Party to ensure that a psychiatric examination is undertaken in every case of a charge of murder, whether or not a request for such an examination is made."[77] Psychiatric evaluations under such circumstances are mandatory: they must be imposed upon any accused regardless of his or her wishes.

60. The State will address these two different claims in order.

8.2.1 Expert Witnesses, Psychiatric Expert Witnesses and Funding

8.2.1.1 The Right to Call an Expert Witness

61. Firstly, as a preliminary point, and as applicable to both claims, Barbados draws the attention of this Honourable Court to the fact that the right to call an expert witness is guaranteed by Section 18(2)(e) of the Constitution of Barbados. For convenience, Section 18 of the Constitution provides:

---

[75] *Ibid*, para. 11 [statement about the previous report].

[76] Clinical Psychology Report of Dr. Tim Green, **Petitioner's Written Submissions, Appendix 3**, para. 4.32.

[77] **Petitioner's Written Submissions**, para. 75.

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

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

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

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

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

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

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

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

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

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

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

(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at

the trial for that offence, save upon the order of a superior court in the course of appeal proceedings relating to the conviction or acquittal.

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

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

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

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

(10) Nothing in subsection (9) shall prevent the court or other tribunal from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other tribunal-

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

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

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

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

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

(c) subsection (5) to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court

> so trying such a member and convicting him shall, in sentencing him to any punishment, take into account any punishment awarded him under that disciplinary law.
>
> (12) Nothing contained in subsection (2) *(d)* shall be construed as entitling a person to legal representation at public expense.

62. Section 18(2)(e) provides the accused with a right to call witnesses, which would include expert witnesses; Section 18(11)(b) allows for the law to impose conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds.

8.2.1.2 The Principle of 'Equality of Arms'

63. In addition, Barbados' courts have interpreted Sections 18(2)(c) and (e), as embodying the principle of 'equality of arms.' This latter principle, which is also recognised in the Inter-American system of human rights,[78] entitles the defendant, *inter alia,* to obtain and carry out the examination of witnesses on the same conditions as prosecution witnesses. 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*, 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."

[78] E.g., Report No. 60/08, Case 12.645, Merits, Tyrone DaCosta Cadogan v. Barbados, OEA/Ser/L/V/II.132, Doc. 36, 25 July 2008, para. 116 (and the authorities cited therein) [**Application, Appendix D1**].

> 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***.[79]

64. This principle applies to the present Petition in the sense that a defendant must be entitled to obtain the attendance, and carry out the examination, of an expert psychiatric witness on the same conditions as those applying to prosecution witnesses.

8.2.1.3 'Overseas' Facilities

65. 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. Nevertheless, as also clearly stated by the Chief Justice, at times funding of overseas experts will be necessary:

> [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

[79] *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**]]

> 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.[80]

66. In sum, the principle of equality of arms will extend to the provision of overseas expert witnesses where they are unavailable in Barbados and are necessary for a proper and adequate defence to a criminal charge.

8.2.1.4 Free Psychiatric Services

67. In addition, in the context of the present Petition, the State reiterates that under the laws and practices of Barbados a defendant can avail himself of the services of a qualified expert witness from the Barbados Psychiatric Hospital free of charge.

68. It is uncontested that the Petitioner chose not do so in the present case. Contrary to statements made by the Petitioner in his written submissions, he had every opportunity to present expert psychiatric evidence.[81] He could have done so free of charge. He did not

---

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

[81] Therefore the statement by the legal representatives of the Petitioner, in paragraph 33 of the Petition **[Application, Appendix E1]**, is unfounded, misleading and potentially mischievous:

require any legal aid for such services. Therefore it is fanciful to imagine that any miscarriage of justice possibly arose.

69. Further, the case of *Ake v. Oklahoma* 470 U.S. 68, 105 S.Ct. 1087, which is extensively relied upon in the Petition, is easily distinguishable and is of no assistance to this Honourable Court. In *Ake v. Oklahoma* the trial judge denied an express request for psychiatric assistance in a context where insanity was the sole defence of the accused and psychiatric evidence was led by the prosecution during the sentencing hearing. Justice Marshall expressly mentions these points at pages 86-88 of his majority judgment:

> [9] We turn now to apply these standards to the facts of this case. On the record before us, it is clear that Ake's mental state at the time of the offense was a substantial factor in his defense, and that the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made. For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment, just four months after the offense, was so bizarre as to prompt the trial judge, *sua sponte,* to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that this mental illness might have begun many years earlier. App. 35. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant.FN11 Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense.FN12
>
> FN11. See n. 1, *supra*.
>
> FN12. We express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding.
>
> In addition, Ake's future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake at the state mental hospital testified at the guilt phase that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, Okla.Stat., Tit. 21, § 701.12(7) (1981), and on which the prosecutor relied at sentencing. We therefore conclude that Ake also was entitled to the assistance of a psychiatrist on this issue and that the denial of that assistance deprived him of due process.FN13

---

33. The Applicant submits that because of lack of legal aid he was deprived of the opportunity to present evidence as to whether he was suffering from mental illness at the time of the crime in 1994. Consequently, he has suffered a grave miscarriage of justice. [Emphasis added.]

> FN13. Because we conclude that the Due Process Clause guaranteed to Ake the assistance he requested and was denied, we have no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment, in this context.
>
> Accordingly, we reverse and remand for a new trial.[82]

70. None of these factors arise in the case of Tyrone DaCosta Cadogan. It is uncontested that there was no request for psychiatric assistance made by Mr. Cadogan, let alone any denial by a state actor of such a request. In paragraph 37 of the Petition it is expressly stated that "No psychiatric evidence was adduced in this case." Further, paragraph 39 of the Petition expressly concedes: "It is admitted that there is no evidence that the Applicant attempted to seek assistance from the Crown in this regard."

71. In addition, contrary to the position in *Ake v. Oklahoma*, in Barbados free psychiatric expert assistance was, and remains, available to the Petitioner. There was and is no barrier to Mr. Cadogan obtaining a psychiatric 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. The Petitioner himself alludes to this fact in paragraph 40 of the Petition:

> 40. In Barbados the Crown has previously argued that free psychiatric services are available to persons in the position of the Applicant as it is always open to the defence to arrange for the Applicant to be seen by a Psychiatrist attached to the Crown's [sic] Psychiatric Hospital.[83]

72. 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.

73. If the Petitioner had raised insanity or diminished responsibility, or evidence before the court suggested it, the trial judge *of his own accord* would have required a psychiatric assessment. As demonstrated below, such a judicial request is one of many ways in which the Barbadian legal system provides for psychiatric assistance without charge.

8.2.2 Numerous Opportunities to Obtain Expert Psychiatric Assistance Throughout Criminal Proceedings

74. The Barbadian criminal justice system provides a number of different mechanisms to identify persons suffering from psychiatric illnesses, even if they themselves do not raise the issue.

---

[82] *Ake v. Oklahoma* 470 U.S. 68, pp. 86-88 (emphasis added).

[83] Emphasis added. The institution is named the "Psychiatric Hospital" and has no relation to the Office of the Director of Public Prosecutions.

a. In a murder trial, for example, the accused must be assessed by a psychiatrist for fitness to plea within 24-48 hours of being charged. Such assessment provides an opportunity to detect psychiatric illness and was provided in the case of Mr. Cadogan, as expressly conceded by the Petitioner.[84]

b. If the accused is detained in prison while awaiting trial he will have the opportunity to see one of the psychiatrists that periodically visits the prison.

c. When appearing before a magistrate or judge, the defence and prosecution may request and obtain a psychiatric assessment of the accused. Counsel for both the prosecution and defence have relied upon the free psychiatric services of the Psychiatric Hospital.

d. Further, if evidence before the magistrate or judge suggests the possibility of diminished responsibility or the existence of some form of psychiatric illness the magistrate or judge should require a psychiatric assessment. Failure to do so can provide a ground for appeal.

e. Following trial, if the accused has been convicted and is being detained in prison, defence counsel may request a psychiatric assessment of the individual to use in the appeal process.

f. Finally, if at any time during incarceration following conviction a prisoner is classified as insane by a properly qualified medical officer, then provision will be made for his or her removal to the Psychiatric Hospital. Following successful treatment the prisoner will be returned to prison. If treatment is unsuccessful, the individual will remain in the Psychiatric Hospital.

75. 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.[85] If the Petitioner had suffered from such a mental disorder, under the laws of Barbados the defence of diminished responsibility would preclude his trial for murder: Offences Against the Person Act, Section 4. In such a case the Petitioner could not have been tried for murder, but instead for manslaughter, and only then if he possessed the necessary mental capacity for trial. Thus he could not have been subject to the death penalty.

76. In sum, it is submitted that the Petitioner, his counsel, the prosecution, and all of the judicial officers involved in his case had numerous opportunities to avail themselves of the free services of the Psychiatric Hospital. That no one did so, as supported by the extensive analysis of the Petitioner's capacity in the decisions of the Court of Appeal and Caribbean Court of Justice, was not the result of negligence or error. Rather, it appears from the record that there was no doubt in anyone's mind that the defence of diminished

[84] **Petitioner's Written Submissions**, para. 90(ii).

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

responsibility would be of no assistance to the Petitioner. His actions, written confession, oral statements at trial, and all of the corroborating evidence fully supported a finding beyond a reasonable doubt of both the mental capacity and intention to commit murder.

8.2.3 Impartiality and Independence of the Staff of the Psychiatric Hospital

77. The Petitioner expressly concedes that "free psychiatric services are available to persons in the position of the Applicant as it is always open to the defence to arrange for the Applicant to be seen by a Psychiatrist attached to the ... Psychiatric Hospital."[86] As a result there is absolutely no merit in the Petitioner's argument that free psychiatric expert witnesses were not available, and such arguments are, at the minimum, mischievous.

78. Further, the submission in paragraph 41 of the Petition is disappointing. The Petitioner states:

> 41. the Applicant will submit that Psychiatrists attached to the Crown's [*sic*][87] Psychiatric Hospital are salaried officers and as such Crown Agents who rely on the Crown for their advancement. In the circumstances it is the Applicant's contention that proper facilities for the defence of persons charged with murder who are exposed to mandatory death sentences are entitled as of right to funded psychiatric expert assistance.[88]

79. This is reiterated in similar terms in paragraph 92 of the Petitioner's Written Submissions:

> 92. The alleged victim respectfully submits that assessment by a state, as opposed to an independent, psychologist would not meet the requisite standard of fairness. The alleged victim has concerns about the impartiality of doctors employed by the prosecuting state. In addition, he has concerns about the confidentiality of any conversation he might have with a state doctor and of any resulting report.[89]

80. The clear and intended implication of this submission is that psychiatrists attached to the Psychiatric Hospital are not independent and that somehow their salaries and advancement are tied to the successful prosecution of persons suffering psychiatric illness. This argument is deeply misconceived. Moreover, since it has been repeated despite the clear

---

[86] Petition, para 40 **[Application, Appendix E1]**

[87] The institution is named the "Psychiatric Hospital" and has no relation to the Office of the Director of Public Prosecutions.

[88] **Application, Appendix E1**.

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

and incontrovertible evidence to the contrary of Dr. MacLachlan, submitted to the Commission on 14 August 2008,[90] this argument is also mischievous.

81. Although the Government of Barbados funds the Psychiatric Hospital, it does so in the same way that it funds other independent government institutions, such as the Queen Elizabeth Hospital and state funded schools. The Psychiatric Hospital and its staff have no fiscal connection of any kind with, or any dependency upon, the Office of the Director of Public Prosecutions or the Office of the Attorney General.[91] Rather, salaries of staff at the Psychiatric Hospital are determined by the Psychiatric Hospital, and indirectly, by the Ministry of Health.[92] In addition, the professional advancement of the staff of the Psychiatric Hospital is not determined by either the Office of the Director of Public Prosecutions or the Office of the Attorney General. Advancement is determined through the Psychiatric Hospital, the Ministry of Health, and the Personnel Administration Division.[93]

82. Moreover, it cannot be seriously argued that any form of employment with the State affects the integrity, professionalism, impartiality and independence of psychiatrists in Barbados. If the Petitioner's view was correct, his own expert psychiatric witness, Dr. Mahy, equally would be disqualified, as it is doubtful that Dr. Mahy or any other psychiatrist could have practiced for any length of time in Barbados without working for the Queen Elizabeth Hospital, which is state funded. The latest expert witness offered by the Petitioner, although not employed by any branch of the Government of Barbados, also appears to be employed by a government institution in the United Kingdom: the Bethlem Royal Hospital.[94]

83. More important perhaps is that fact that the Petitioner's argument fundamentally misunderstands the nature of the medical profession. Psychiatrists in Barbados, like those everywhere, are bound by a medical oath (the Hippocratic Oath) to care for and treat their patients. This is a solemn, professional and moral obligation and requires them to aid persons suffering from serious psychiatric illness. As stated by Dr. Brian Machlan, at page 23 of his letter:

> Psychiatrists, as medical practitioners, are bound by ethical and professional obligations in dealing with patients in general, and in related professional matters such as the giving of psychiatric evidence. Medical practitioners are guided by ethical values which have been instilled in their training, their work environments, and experiences, and they can be called to account by the local Medical Council

---

[90] Letter of Dr. Brian MacLachlan to the Attorney General and Minister of Home Affairs, dated 18 July 2008, attached to the Letter of the Hon. Chrisopher Sinckler, Minister of Foreign Affairs, to the Inter-American Commission on Human Rights, dated 12 August 2008 **[Application, Appendix E18]**.

[91] Letter of Dr. Brian MacLachlan, *ibid.*, p. 2.

[92] *Ibid.*

[93] *Ibid.*

[94] **Petitioner's Written Submissions, Appendix 3.**

> which has the power to determine if a doctor continues to be registered to practice if there are ethical or professional violations.
>
> Psychiatrists testifying in Court are placed, as are all witnesses, under oath which requires of them to tell the truth. Apart from the moral, ethical and professional importance of the need to do so, there are potentially adverse legal consequences to the psychiatrist should it be determined that the evidence given has not been truthful.[95]

84. The State takes umbrage at the attempts by Counsel for the Petitioner to malign the integrity of the Barbadian medical system, and requests that this Honourable Court dismiss outright this misconceived and mischievous claim.

8.2.4 The Inadvisability of Mandatory Psychiatric Testing

85. The second broad claim of the Petitioner, originally formulated in paragraph 22 of the Referral,[96] and expanded upon in the Petitioner's Written Submissions, is that when a person is charged with an offence potentially subject to the death penalty, that person must be provided by the State with a comprehensive psychiatric evaluation. The Petitioner states in paragraph 75 of the Petitioner's Written Submissions:

> [W]hat is contended for in this case is not merely the provision of the facility to be examined by a psychiatrist/psychologist upon request, but rather the *obligation on the part of the State Party to ensure that a psychiatric examination is undertaken in every case of a charge of murder, whether or not a request for such an examination is made*.[97]

86. In short, the Petitioner seeks the imposition by this Honourable Court of a system of mandatory, full psychiatric assessment.

87. The State submits that the Petitioner's proposed system, of which the State has been unable to find any example of anywhere in the world, is deeply problematic for a number of reasons. Of course it would have tremendous resource implications for a small country such as Barbados, both in terms of the amount of time, and number of psychiatrists, required for such assessments. The Petitioner expressly concedes this point in paragraph 1 of the Further Observations:

> As to whether the State is required to provide a psychiatric expert in death penalty cases, it is recognised that practical economic considerations may preclude the existence of a *mandatory* duty of obtaining a psychiatric or

---

[95] Letter of Dr. Brian MacLachlan to the Attorney General and Minister of Home Affairs, dated 18 July 2008, attached to the Letter of the Hon. Christopher Sinckler, Minister of Foreign Affairs, to the Inter-American Commission on Human Rights, dated 12 August 2008, p. 3 **[Application, Appendix E18]**.

[96] **Application, Appendix E17.**

[97] Underlined emphasis in original; italics added for emphasis.

psychological report in every murder case: see *Smalling v. The Queen* [2001] UKPC 12 at para 26.[98]

88. In addition to this concession, however, the Petitioner's argument is misconceived in two further fundamental ways.

89. Firstly, the State does not accept that any form of mandatory psychiatric assessment is either desirable or necessary, given the wide range of safeguards already in place to prevent the criminal prosecution for murder of a person who suffers from a mental illness or other mental impairment that could negate his or her criminal liability:

a. An accused at all times has access to free psychiatric services at the Barbados Psychiatric Hospital;

b. In a murder trial the accused must be assessed by a psychiatrist for fitness to plea within 24-48 hours of being charged (as occurred in the case of Mr. Cadogan);

c. If the accused is detained in prison while awaiting trial he will have the opportunity to see one of the psychiatrists that periodically visits the prison;

d. When appearing before a magistrate or judge, both the defence and prosecution may request and obtain a psychiatric assessment of the accused, free of charge;

e. Further, if evidence before the magistrate or judge suggests the possibility of diminished responsibility or the existence of some form of psychiatric illness the magistrate or judge should require a psychiatric assessment; failure to do so provides a ground for appeal;

f. Following trial, if the accused has been convicted and is being detained in prison, defence counsel may request a psychiatric assessment of the individual for use in the appeal process (as occurred in the case of Mr. Cadogan);

g. If at any time during incarceration, following conviction, a prisoner is classified as insane by a properly qualified medical officer then provision will be made for his or her removal to the Psychiatric Hospital for treatment;

h. The defence of diminished responsibility prevents a conviction for murder; and

i. Finally, the Crown must prove its case against the accused, including the requisite level of intent, beyond a reasonable doubt.

90. Secondly, the Petitioner's argument flies in the face of the fundamental rights of the accused to contest the criminal charges brought against him or her and to decide whether to plead insanity or diminished responsibility. In fact a wide variety of human rights related to

---

[98] **Application, Appendix E9** (emphasis in original)

liberty, equality and due process of law will be infringed if the Petitioner's submissions are accepted.

91. Thus, if an accused were to be subject to mandatory psychiatric assessment and found to be unfit to plead as a result of mental illness or other mental impairment, that person would be sent to the Barbados Psychiatric Hospital for treatment. In such circumstances, the Crown's case against the accused would be stayed, not dropped. The accused would be detained in the Psychiatric Hospital by Order of the Court until the Court determines that he or she can be released. Section 13 of Barbados' Mental Health Act provides:

> 13. (1) Notwithstanding section 7(1), where a person on trial before the High Court
>
> (a) is found unfit to plead; or
>
> (b) is found not guilty by reason of insanity; or
>
> (c) is found guilty but is suffering from diminished responsibility,
>
> that court shall order him to be detained in a mental hospital until Her Majesty's pleasure is known and thereupon the Governor-General may give an order for the safe custody of that person during such detention.
>
> (2) The Governor-General may by warrant either absolutely or conditionally discharge any person detained under subsection (1).[99]

Section 13 has been modified by developments under the common law. Detention is now during the Court's pleasure, not during Her Majesty's pleasure, and is subject to review by the Court every four years: *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.[100]

---

[99] Mental Health Act, Cap 45, attached as **Exhibit 2** to the present Response.

[100] The Chief Justice, the Hon. Sir David Simmons, K.A., B.C.H., issued practice directions to all Barbadian judges at the conclusion of *Scantlebury v The Queen* [Unreported] C.A. B'dos, Criminal Appeal No. 34 of 2002, 2005-04-13 (Barbados Court of Appeal), attached as **Exhibit 3** to the present Response, regarding the changes resulting from the Court's finding of the unconstitutionality of indeterminate sentences at Her Majesty's pleasure. In para. 82.8 the Chief Justice states in relation to the Mental Health Act:

> Directions
>
> [82] Before parting with this appeal and, pending the return of the successful appellants in Tennyson Griffith to the High Court for sentencing in accordance with paragraph [25] of the decision of the Privy Council and the enactment of amending legislation, we now issue directions to be followed by trial judges when sentencing offenders to detention during pleasure.
>
> [...]
>
> 8. Where under s 13 of the Mental Health Act, Cap. 45, a person on trial before the High Court is found unfit to plead or is found guilty but is suffering from insanity or diminished responsibility, the order of the Court for detention "until Her Majesty's pleasure is known" shall henceforth be "until

92. In such a situation the detention of the accused under the Mental Health Act would be reviewed every four years.

    a. If the above review by the Court demonstrates that the accused can stand trial, since the accused remains subject to prosecution for the offence, the relevant authorities will then have to decide whether the trial should proceed.

    b. If the mental state of the accused does not change or otherwise improve, the accused will remain in the Psychiatric Hospital. In such circumstances the accused will not be able to contest the original charge, to clear his or her name, or otherwise be acquitted of the charge by a court of law.

93. By not allowing a person the right to choose whether or not to be comprehensively assessed by a psychiatrist, the Petitioner's submissions remove the possibility of an accused having the chance to prove his innocence or to put the Crown to the test of proving the case against him beyond a reasonable doubt. This obligation upon the Crown is a fundamental part of any criminal justice system and serves as one of the basic checks upon abuse of power. It also serves as a primary mechanism to guarantee that both the Crown prosecution services and other law enforcement authorities, such as the police, properly perform their duties.

94. Further, it is submitted that a mandatory system of full psychiatric assessment would offend the principles of fundamental justice. Under the common law the criminal justice system is founded on respect for the autonomy and dignity of human beings, including the right of an accused to control his or her defence.

95. Although a defence such as diminished responsibility or insanity may arise independently of the wishes of the accused under the Barbadian legal system, as discussed above, such a defence need not be raised by the accused as long as he or she satisfies the standard of fitness to plea. Any person satisfying this standard, under the principles of fundamental justice, must be considered capable of conducting his or her own defence. This capacity entails such basic rights as those to make decisions about whether to defend oneself, to rely upon counsel, or to call and examine witnesses.

96. If, however, an accused directly raises questions related to whether he or she has a mental illness or other mental impairment, or whether he or she has the capacity for criminal intent, then the Crown and the magistrate or judge will explore the applicability of diminished responsibility and other such defences.

97. In this way criminal justice strikes a careful balance between the fundamental right of the accused to conduct his or her own defence, the requirement that the Crown prove all elements of the crime beyond a reasonable doubt, including the requisite mental capacity and intention (*mens rea*), and the overarching principle that a person who is insane or

---

the pleasure of the Court is known" and the references to the Governor-General in s.13 (1) and (2) of Cap. 45 shall be substituted by references to 'the Court'. This Act should be amended by Parliament.

mentally incompetent at the time of the offence should not be convicted. In short, the accused, if able to satisfy the test for fitness to plea, will be assumed competent to conduct his or her defence. Only if that fitness is later thrown into doubt by the accused, or by evidence laid before the court, will the fundamental right of the accused to conduct his or her defence be qualified by the need to safeguard against an improper conviction.

98. Further, even if a mandatory psychiatric assessment was deemed inconclusive and did not lead to immediate detention at a psychiatric facility, the accused would be placed in the impossible position of having to raise other criminal defences in a situation where the spectre of insanity already has coloured the minds of the judge and the jury. Mental illness has a stigma associated with it, including inferences such as that persons with mental illness are more likely to commit a crime, and the credibility of an accused might be irreversibly damaged by any evidence of insanity.

99. As a result of the above considerations the State is surprised that the Petitioner would seek to make a case for mandatory psychiatric assessment. Such mandatory psychiatric assessment *prima facie* would violate a number of fundamental rights protected under the Inter-American system of human rights. These include the rights of an accused to:

a. liberty and security of the person,[101]

b. equality before the law, [102]

c. protection of honour, dignity, reputation and private life,[103]

d. recognition as a person, having rights and obligations,[104]

e. apply to a court to ensure respect for his or her rights,[105]

f. be presumed innocent and to be tried according to law,[106]

g. a hearing, with due guarantees and within a reasonable time, in the substantiation of any accusation of a criminal nature made against him,[107]

---

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

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

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

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

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

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

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

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,[108]

h. have his physical, mental and moral integrity respected,[109] and

i. equal protection of the law.[110]

100. These rights are elaborated in the following articles of the American Declaration of the Rights and Duties of Man and of the *American Convention on Human Rights*, respectively:

American Declaration of the Rights and Duties of Man

Article I

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

Article II

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article V

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Article XVII

Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

Article XVIII

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXVI

Every accused person is presumed to be innocent until proved guilty.

---

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

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

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

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

American Convention on Human Rights

Article 5. Right to Humane Treatment

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

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

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: [...]

> d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
>
> e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
>
> f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.

Article 24. Right to Equal Protection

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

101. Further, and although the State is not a party to this convention, mandatory psychiatric assessment would likely violate the fundamental rights of the accused under the *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities*.[111]

102. 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 prove his innocence, unable to defend his dignity, reputation, private life and mental integrity, unable to exercise his full personhood and autonomy, 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.

---

[111] E.g., Articles I and II of the *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities*, provide:

Article I

For the purposes of this Convention, the following terms are defined:

1. Disability

The term "disability" means a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment

2 Discrimination against persons with disabilities

a The term "discrimination against persons with disabilities" means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.

b A distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the right of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference. If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination.

Article II

The objectives of this Convention are to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society.

8.3 Ground 3 – Legal Aid Provided by the State is Sufficient

103. 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. If such is not done, then according to the Petition this amounts to a failure to inform the Petitioner of his right to counsel.

104. This argument fails as a matter of both fact and law. Legally, every individual has a Constitutional right to counsel and is informed of this right in practice. Sections 13(2) and 18(2)(d) of the Barbados Constitution provide:

> **13.** [...]
>
> (2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted, at his own expense, to retain and instruct without delay a legal adviser of his own choice, being a person entitled to practise in Barbados as an attorney-at-law, and to hold private communication with him; and in the case of a person who has not attained the age of sixteen years he shall also be afforded a reasonable opportunity for communication with his parent or guardian.
>
> **18.** [...]
>
> (2) Every person who is charged with a criminal offence – [...]
>
> *(d)* shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

105. As a result of these provisions, police in Barbados are legally required to inform, and do in fact inform, an accused upon his arrest of his right to counsel and allow him to contact a friend or lawyer. Therefore, as a matter of law, an accused is informed of his right to counsel and is given the opportunity of obtaining counsel, upon detention.

106. 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. See the Notes on the Judges' Rules in Section 1121(c) of *Archbold Pleading, Evidence & Practice in Criminal Cases*,[112] and Section 13(2) of the Barbados Constitution (reproduced above).

107. 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

---

[112] T.R. FITZWALTER BUTLER AND MARSTON GARSIA, ARCHBOLD PLEADINGS, EVIDENCE & PRACTICE IN CRIMINAL CASES, 36TH EDITION (SWEET & MAXWELL, 1966), p. 418 [attached as Exhibit 6 to Barbados' Response of 9 July 2008 [**Application, Appendix E13**]].

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 at *each step* of the criminal justice process an accused may be informed of his right to legal aid:

a. If upon arrest the accused says he cannot afford counsel, or does not know a lawyer, then the police will inform him that he can obtain a legal aid lawyer and refer him to such a lawyer from the legal aid list;

b. If the accused obtains counsel, that counsel, if practicing at the criminal bar, will most likely be registered on the legal aid scheme. The vast majority of criminal lawyers, including some Queen's Counsel, are on the legal aid list;

c. If the particular counsel the accused contacts is not on the legal aid list and the accused is indigent, that counsel will refer him to a lawyer who is on the list;

d. If the accused is on remand in prison awaiting trial, he will be approached by a means officer for legal aid while in prison;

e. If the matter reaches a magistrate, then if the criminal charge is one for which legal aid is available,[113] or the accused does not have a lawyer, then he will be informed by the magistrate of his right to legal aid; and

f. If the matter comes before a judge in the same circumstances, information about legal aid will be provided.

108. As a result of the above checks and balances inherent in the Barbadian criminal justice system in the vast majority of cases an accused will be informed of his right to legal aid, and practically assisted in obtaining it, if his charge and financial circumstances merit it.

---

[113] Part I of the First Schedule of the Community Legal Services Act **[Application, Appendix A14]**, provides for legal aid certificates to be granted for the following criminal matters:

(a) Any capital offence;

(b) Manslaughter;

(c) Infanticide;

(d) Concealment of birth;

(e) rape;

(f) all offences where the person charged is a minor;

(g) any indictable offence the trial of which is certified by the trial Judge to be, or as likely to be, of difficulty and to require the assistance of an attorney-at-law on behalf of the person charged therewith for its proper determination;

(h) any indictable offence the trial of which or an appeal from the conviction of which is certified by the trial Judge or the Court of Appeal, as the case may be, to involve, or as likely to involve, a point of law of public importance and require the assistance of an attorney-at-law on behalf of the person charged or convicted, as the case may be, for its proper determination.

109. Regarding the Petitioner's argument that legal aid should be provided for both junior and senior counsel, the State submits that the Court should reject it for four fundamental reasons.

a. Firstly, legal aid is provided for the services of *any* counsel. There is no cap on rank or qualifications. Rather, some of the most senior and well respected counsel, including distinguished Queen's Counsel, take cases under legal aid. Thus an accused has access to the highest levels of legal expertise in his defence. In fact, in Mr. Cadogan's particular case, the Caribbean Court of Justice expressly noted that he was defended by a very senior and experienced counsel.[114]

b. Secondly, this matter was aired before the most senior court of Barbados, the Caribbean Court of Justice, which decisively rejected any suggestion that the level of legal aid provided is in any way inadequate. Mr. Justice David Hayton examined, and dismissed, arguments related to lack of public funding, both for psychiatric reports and for legal aid:

> **Prejudice from lack of better public funding**
>
> [18] Lack of public funding for making the services of an independent (non-Government employed) psychiatrist available to the Applicant has no significance, because we have no evidence that the free services provided by the Government-employed psychiatrist at the Psychiatric Hospital would be either biased or incompetent, while we have also found that there was inadequate evidence for alleging that counsel should have had the Applicant examined to see if there was any mental abnormality present.
>
> [19] Whatever the intrinsic merits of Mr Shepherd's submissions that legal aid fees for murder trials should be higher and that for such trials there should be legal aid for leading counsel as well as junior counsel or at least, two counsel, the Applicant did have the benefit of an experienced counsel throughout, a man well-known to the Applicant's family. The Applicant's position at trial was a very weak one. In our view he had a fair trial. There is nothing unsafe in the verdict.[115]

Although this Honourable Court is not bound by the determinations of the courts of Barbados, it is submitted that the unanimous opinions of five of the most senior and respected judges in the Caribbean region should be afforded significant weight. The Commission, it might be noted, also rejected this claim outright.[116]

---

[114] *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. 15 (reproduced below in footnote 121) **[Application, Appendix B4]**.

[115] *Ibid.*, paras. 18-19 (emphasis added).

[116] Report No 60/08, Case 12.645, Merits, Tyrone DaCosta Cadogan v. Barbados, OEA/Ser/L/V/II.132, Doc. 36, 25 July 2008, para. 115 **[Application, Appendix D1]**.

c. Thirdly, Barbados submits that the Court is in any event precluded from assuming jurisdiction over, and examining the merits of, the question of legal aid by reason of a reservation made by the State when depositing its instrument of ratification of the *American Convention on Human Rights*. The State made three reservations to the *American Convention*, all of which were accepted by all of the other States Parties.[117] The relevant reservation reads as follows:

> In respect of [Article] 8(2)(e) Barbadian law does not provide as a minimum guarantee in criminal proceeding any inalienable right to be assisted by counsel provided by the state. Legal aid is provided for certain scheduled offences such as homicide, and rape.[118]

As the Honourable Court established in the *Restrictions to the Death Penalty* case, a State's obligations under the *Convention* must be read subject to its reservations: a State's "reservations become a part of the treaty itself. It is consequently impossible to interpret the treaty correctly, with respect to the reserving State, without interpreting the reservation itself."[119] As a result, the State respectfully submits that its obligations under the *American Convention*, including its obligations under Article 29, must be interpreted as modified by its reservations, and that the above reservation excludes competence over questions related to legal aid.

d. Finally, and in the alternative, Barbados submits that questions regarding permissible levels of legal aid funding fall within the margin of appreciation accorded to states in the Inter-American system of human rights.

8.4 Ground 4 – Effectiveness of Attorney

110. The Petitioner states that his "Attorney-at-Law was ineffective in that there was a real objection which should have been made in relation to the admission of that evidence."[120]

111. The judgment of the Caribbean Court of Justice in the Petitioner's appeal addresses this argument and firmly dismisses it. Writing for the Court, Mr. Justice David Hayton noted

---

[117] Not a single State Party raised any objection to Barbados' reservations within the stipulated twelve-month period following notification of the reservation: "B-32: American Convention on Human Rights, "Pact of San Jose, Costa Rica", Signatures and Current Status of Ratifications," in INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM (UPDATED TO JANUARY 2007), p. 51 at p. 52.

[118] *Ibid.*, p. 53 [emphasis added].

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

[120] Petition, para. 55 [as reproduced in **Application, Appendix E1**].

that Mr. Cadogan's lawyer had been in practice longer than either of the other counsel appearing at the appeal and had substantial criminal experience, including murder trials.[121]

112. Moreover the Caribbean Court of Justice also expressly dismissed the argument that counsel might have been incompetent not to lead psychiatric evidence at trial:

> [16] In our view, as intimated in our approach to Dr Mahy's opinion, no question of incompetence arises over counsel not seeking to have a psychiatrist examine the Applicant to try to see if the Applicant might have an abnormality of the mind as a basis for alleging that his mental responsibility was substantially impaired. It could well have been that the Applicant denied having any mental abnormality symptoms, as he did when examined by Dr Mahy. Moreover, as appears from the Applicant's affidavit of 27 September 2006, his former counsel had known the Applicant's family (and presumably the Applicant) since "[he] was a little boy", so the family had contacted counsel after his arrest and counsel had visited him the following day. Counsel would also have the comfort of an evaluation of the Applicant's fitness to instruct counsel and to stand trial, such limited evaluation being provided by Dr Bell of the Psychiatric Hospital within two days of the murder. There is a real problem trying to discover evidence to justify finding incompetence in counsel's failure to run a defence of diminished responsibility. There are some counsel who seek out a faint possibility of running such a defence for want of anything better, but on the available evidence the Applicant's former counsel cannot be faulted for not falling into such a category.[122]

113. It is possible that the Petitioner denied having any mental abnormality. His lawyer was very experienced, including experience in the area of criminal defence. Further, his lawyer had known him since childhood. In addition the Petitioner was evaluated for fitness to instruct counsel and to stand trial by a leading psychiatrist at the Psychiatric Hospital. Given such facts, the State submits that there is no basis upon which the effectiveness of the Petitioner's attorney could be challenged, as a matter of fact or law. The Commission rejected this claim outright,[123] and the State respectfully requests this Honourable Court to do the same.

---

[121] Mr. Justice David Hayton states, 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**], at paragraph 15:

> [15] It needs also to be noted that we have been informed that the Applicant's former counsel has been in practice longer than either Mr Shepherd QC [acting for the Applicant] or Mr Charles Leacock QC [the Director of Public Prosecutions] who, throughout, has been counsel for the Respondent, and that he has acted as counsel in many criminal trials, including murder trials.

[122] *Ibid.*, para. 16 (emphasis added).

[123] Report No. 60/08, Case 12.645, Merits, Tyrone DaCosta Cadogan v. Barbados, OEA/Ser/L/V/II.132, Doc. 36, 25 July 2008, para. 115 [**Application, Appendix D1**].

9 SUBMISSIONS ON REPARATIONS

114. The State submits that in light of the above considerations, and taking into account the processes related to the commutation of the death sentence (as explained above, starting at paragraph 7), reparations are unnecessary and inappropriate in the present case.

115. The State notes in this regard that international and regional human rights organs in similar cases have held that the commutation of a death sentence is an appropriate and sufficient form of reparation. The Caribbean Court of Justice in the case of *Attorney General et al. v. Jeffrey Joseph and Lennox Ricardo Boyce*[124] followed this approach by deciding to sustain the commutation of the sentences of the two Petitioners and by not providing them with any additional compensation or other remedies. In the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* this Honourable Court found the commutation of death penalties sufficient and ordered no additional compensation to those persons who had not already been executed.[125]

116. Further, the commutation of the death sentence of the Petitioner is the *only* form of reparation expressly requested by the Commission (in paragraphs 112 and 120 (1) of the Application), which is not already in the process of being satisfied.

a. The State is undertaking the necessary legislative and other measures to safeguard against any imposition of the death penalty not in conformity with Articles 4, 5 and 8 of the *American Convention*, as requested in paragraph 120(2) of the Application.

b. The State is adopting legislative and other measures to bring the laws of Barbados into compliance with the American Convention, specifically by "remove[ing] the immunizing effect of section 26 of the Constitution of Barbados in respect of 'existing laws'", as requested in paragraph 120(3) of the Application.

117. With respect to the possibility of compensation, the State expressly denies that compensation is required by law or that it is either necessary or appropriate in this case. In this regard the State draws the attention of this Honourable Court to the fact that compensation *has been expressly waived and is precluded* by the Petitioners' own formal submissions: Petitioner's Written Submissions, paragraph 123. Likewise, the Commission does not request monetary damages in its Application. The State submits that in such cases the Court must accord the greatest respect to the will of the Petitioners themselves regarding such matters. According priority to the wishes of applicants regarding non-compensation is the accepted practice in international and regional human rights tribunals. This Honourable Court, for example, has held in cases involving violations of human rights by States that if the claimant does not ask for financial compensation the Court need not,

---

[124] **Application, Appendix A15.**

[125] *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, I-A Ct H.R., Judgement of June 21, 2002, Series C, No. 94, paras 211-216.

and in fact has not, provided it.[126] It is submitted that in such cases and in the present case a judgement of the Court *per se* would amount to full and complete satisfaction of any wrong and no compensation is required.[127]

118. Further, on the issue of legal fees, the State also draws the attention of this Honourable Court to the fact that any legal fees incurred by the lawyers for the Petitioners *have been waived and are expressly precluded* by their own formal statement as to the *pro bono* nature of their representation: Petitioner's Written Submissions, paragraph 124. This statement is also highlighted in paragraph 118 of the Commission's Application. As a result it is submitted that this Honourable Court should rule accordingly and award no costs, including no fees or expenses, as it did in the case of *Case of Caesar v. Trinidad and Tobago*.[128]

119. In the alternative, if the Court is minded to award a nominal sum for expenses directly incurred by counsel for the Petitioner, the State submits that, as expressly conceded in paragraph 124 of the Petitioner's Written Submissions, such expenses should only include those incurred "in respect of the hearing before the Inter-American Court." In this regard the State notes that in its respectful opinion, no such hearing is needed.

a. As has been demonstrated above, there is no longer an arguable case by the Commission before this Honourable Court since all of the Commission's claims except the one regarding commutation have been satisfied. The Commission is the only party expressly entitled to appear before the Court. In such circumstances the State has requested that the Commission withdraw the complaint, or that the Court strike the case from its docket. In either case, no award of costs or expenses on behalf of the Petitioner is necessary or appropriate, and the State submits that such should not be awarded.

120. In the further alternative, if costs and expenses in relation to a Court hearing are to be assessed, the State submits that under the Inter-American system of human rights such costs must be reasonable.[129] The lawyers for the Petitioners are potentially seeking to bring up to

---

[126] See, e.g., *Case of the Girls Jean and Bosico v República Dominicana*, I-A Ct H.R., Judgment of September 8, 2005, Series C, No. 130, in which this Court stated in para. 221:

> 221. This Court will not rule on pecuniary damage in favor of the victims or their next of kin, since neither the Commission nor the representatives requested compensation for this concept

[127] See, e.g., *Case of the Girls Jean and Bosico v República Dominicana, ibid*, para. 223, which this Honourable Court stated that "International case law has established repeatedly that the judgment constitutes, *per se*, a form of reparation."

[128] *Case of Caesar v Trinidad and Tobago*, I-A Ct. H.R., Judgment of March 11, 2005, Series C, No. 123, para. 135:

> 135 Since the representatives claimed no costs or expenses before the Court, as they are acting *pro bono*, and the Commission did not submit any observations on this point, the Court makes no award with regard to costs and expenses in the present case.

[129] *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, para. 131 [citing: *Cf Case of Garrido and*

five witnesses to the hearing of this Honourable Court in Costa Rica[130] and would seek to recover, presumably for all witnesses as well as for their sizeable legal team of at least seven[131] attorneys: (i) travel allowances, (ii) per diem allowances, (iii) courier costs, (iv) photocopy costs, (v) travel expenses incurred in visiting prisons, and (vi) affidavit fees.[132] The costs associated with such a disproportionately large legal team would be completely unreasonable. The State submits that this Honourable Court, as in the case of *Boyce et al. v. Barbados*, should not allow the recovery of such unreasonable costs and expenses against Barbados.[133]

10 EVIDENCE

121. In support of its submissions, Barbados offers the following evidence:

10.1 Documentary Evidence (List of Exhibits)

122. The following documents are relied upon by the State and are attached to its Response as Exhibits:

EXHIBIT NO.	DOCUMENT(S)
Exhibit 1	Letter of the Hon. Senator Irene Sandiford-Garner, Acting Minister of Foreign Affairs and Foreign Trade, of 30 January 2009, and its attached "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 attached appendices

Baigorria, supra note 135, para. 82; *Case of Escué Zapata, supra* note 51, para. 188, and *Case of Bueno Alves, supra* note 80, para. 219].

[130] See para. 124 of the **Petitioner's Written Submissions,** which seeks reimbursement for "travel and per diem allowance, accommodation for the legal representatives and the expert witnesses" (emphasis added). The State notes the at least three persons have been identified as potential witnesses or expert witnesses in the Petitioner's Written Submissions: Professor Nigel Eastman, Mr. Edward Fitzergard, Q.C., and Dr. Timothy Green. All three witnesses appear to reside in the United Kingdom: AVB Appendices 3, 4 and 5. Several other persons are also cited in the Petitioner's Written Submissions, including Dr. Clive Lewis (Appendix 6) and Dr. Waldo Waldron-Ramsay (Appendix 7), and therefore up to five persons might be asked to attend a hearing of this Honourable Court.

[131] The State notes that seven (7) legal representatives are listed on the final page of the **Petitioner's Written Submissions**: Alair Shepherd, Q.C., Douglas Mendes, S.C., Saul Lehfreund, MBE, Parvais Jabbar, Tariq Khan, Ruth Brander, and Alison Gerry.

[132] **Petitioner's Written Submissions,** para. 124.

[133] As stated by the Honourable Court in paragraph 133 of *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: "the Court deems that to order the State to cover the costs incurred by six legal representatives is not reasonable and necessary in the presentation of the present case."

Exhibit 2	Mental Health Act, Cap 45
Exhibit 3	*Scantlebury v. The Queen* [Unreported], C.A. B'dos, Criminal Appeal No. 34 of [redacted] (Barbados Court of Appeal)

10.2 Testimonial and Expert Witness Evidence

123. The State offers the following expert witnesses for the benefit of this Honourable Court:

a. Mr. Anthony V. Grant – Mr. Grant is the Director of Community Legal Services and is an expert on the Barbadian community legal services system. Mr. Grant will give evidence on the requirements for legal aid and the frequency of its provision [affidavit to be filed];

b. Dr. Brian MacLachlan – Dr. MacLachlan is a Consultant Psychiatrist at the Barbados Psychiatric Hospital and has provided expert psychiatric evidence in the law courts of Barbados. Dr. MacLachlan will provide expert evidence on the processes and facilities related to the Psychiatric Hospital and psychiatric assessment in criminal cases, as well as on the ethical and professional obligations of psychiatrists [affidavit to be filed].

11 CONCLUSIONS AND PRAYER FOR RELIEF

123. In consideration of the above, Barbados respectfully requests that this Honourable Court deny all of the claims and requests of the Petitioner and of the Commission, and in doing so,

a. affirm that the laws and practices of Barbados comply with the *American Convention* and do not in any way violate the rights and freedoms protected thereunder, including under Article 2 of that *Convention*.

b. deny all of the demands of both the Petitioners and the Commission, including those set out in paragraph 120 of the Application of the Commission in relation to reparations, and

c. affirm that the State's obligations in the context of the provisional measures ordered by the Court in the instant case have been fulfilled and/or have expired.

Respectfully submitted,

The Hon. Freundel J. Stuart, Q.C., M.P.
Agent of Barbados
Deputy Prime Minister, Attorney General and Minister of Home Affairs of Barbados

Dr. David S. Berry
Deputy Agent of Barbados
Senior Lecturer of Laws
University of the West Indies