IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Case 12.645

TYRONE DA COSTA CADOGAN

Alleged Victim

AND

BARBADOS

State Party

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WRITTEN SUBMISSIONS OF THE ALLEGED VICTIM

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[References to "CB Appendices" refer to the Inter American Commission's bundles of appendices before the Court.

References to "AVB Appendices" refer to the Alleged Victims' bundle of appendices before the Court.]

[1] INTRODUCTION

1. The alleged victim claims that the respondent, the State of Barbados, has failed to respect his fundamental rights and freedoms protected under the American Convention on Human Rights 1969 ("ACHR"). His claims can be summarised as follows:

   (i) The mandatory death sentence imposed upon him breaches his rights under Articles 4(1), 4(2), 5(1), 5(2), 8(1) and 8(2) , in conjunction with Article 1 of the Convention;

   (ii) The "savings clause" contained in section 26 of the Constitution of Barbados is incompatible with the respondent's obligations under Article 2, read in conjunction with Article 1, of the Convention, because it immunises laws which pre-date the Constitution, including the mandatory death penalty, from legal challenge, notwithstanding the incompatibility of such laws with fundamental rights;

   (iii) The failure of the State Party to cause a comprehensive psychiatric/psychological examination of the victim to be undertaken and made available for the purposes of the trial breaches the victim's right to a fair trial protected under Article 8 of the Convention and is also cruel and inhuman contrary to Articles 5(1) and 5(2) of the Convention.

[2] THE SIGNIFICANCE OF THIS CASE

2. The alleged victim submits that it is of primary importance that this Court consider his case because:

(i) **The most fundamental rights are at stake:**
The right to life, to humane treatment and to due process of law have been and continue to be violated. The rights at stake have been recognised as "the most fundamental" [Edwards v The Bahamas, report no. 48/01, 4th April 2001, para. 147.]

(ii) **The State Party has failed to adopt measures to bring the domestic law into conformity with the Convention despite the decision of this Honourable Court in Boyce et al v Barbados (Judgment of November 20, 2007, Series 169):**

In November 2007, this Honourable Court ruled conclusively in Boyce et al v Barbados that the mandatory death penalty violates Articles 4(1) and 4(2) of the Convention. In spite of this, the State Party has taken no steps to assure the victim that the death penalty imposed upon him in violation of his rights under the Convention would not be carried out. Rather, the victim has been left to suffer the cruelty and inhumanity of contemplating his execution knowing that any such execution would be in stark contravention of his rights.

(iii) **This Court is the only forum in which the victim's right to life, humane treatment and due process of law can be upheld:**

As a result of section 26 of the Barbados Constitution, the domestic courts are prohibited from declaring the mandatory death penalty to be contrary to fundamental Constitutional rights and from providing any remedy.

[3] FACTS, JURISDICTION AND PROCEDURE

3. The facts in relation to the alleged victim, his offence and the history of his legal proceedings are summarised in paragraph 3 of the Commission's application to this Court, and are fully set out in paragraphs 41-51. The alleged victim gratefully adopts, without repeating, this exposition of his case. Likewise, the victim gratefully adopts and relies on:

(i) the Commission's statement of the provisions governing the jurisdiction of the Court [paragraphs 9-10 of the application];
(ii) the history of the processing of the victim's communication by the Commission and the response thereto by the respondent [paragraphs 11-26];
(iii) the statement of relevant domestic legislation and jurisprudence [paragraphs 27-36];

(iv) the account of judicial proceedings in Barbados for the crime of murder [paragraphs 37-40];

(v) the alleged victim also relies on the submissions made by the legal representatives of the alleged victim to the Commission regarding the failure of the State Party to cause a comprehensive psychiatric/psychological examination of the victim to be undertaken and made available for the purposes of the trial [See "CB" Appendices E8, E11].

4. In respect of (v) above, the alleged victim will in addition rely on the clinical psychology report by Dr Timothy Green in respect of a psychological examination carried out on the alleged victim [See AVB Appendix 3[1]]. Dr Green's evidence concerns the relevance of the alleged victim's mental state with regard to defences to the charge of murder. In addition the alleged victim will rely on expert evidence to be contained in a psychiatric report from Professor Nigel Eastman [See AVB Appendix 4], the purpose of which is to address generally the relevance of mental heath in death penalty cases from a medical perspective. The alleged victim will in addition rely on expert evidence to be contained in a report from Mr Edward Fitzgerald QC [See AVB Appendix 5], the purpose of which is to address from a legal perspective the relevance of mental state to both trial and sentence in death penalty case. Finally the alleged victim himself will file a further witness statement addressing matters concerning his trial. These further affidavits and reports are yet to be filed, save for Dr Green's clinical psychology report at AVB Appendix 3.

5. The alleged victim requests that the Court admit the evidence of Professor Nigel Eastman and Mr Edward Fitzgerald QC as expert evidence.

[4] LEGAL ARGUMENTS:

6. The alleged victim adopts and endorses the arguments set out in the Commission's application to this Court in respect of his case. Additional specific legal arguments advanced by the alleged victim are set out below.

A Summary and Background to complaint

(i) Convention violations: Mandatory Death Penalty

7. The alleged victim complains that he was sentenced to death exclusively on the basis of the category of his offence; there has been no judicial determination of the mitigating or aggravating circumstances of his particular offence, nor of his personal characteristics. He submits that the mandatory death sentence condemns him to death without consideration of his individual humanity. It subjects him to an arbitrary deprivation of life, contrary to Article 4(1) of the Convention. It fails to ensure that the penalty of death is imposed only for the most serious crimes, as required by Article 4(2), and it violates his right to have his sentence determined by a competent, independent and impartial tribunal in

[1] This report is to be supplemented.

accordance with Article 8(1), and violates his right of appeal in accordance with Article 8(2)(h). Further, the savings clauses contained in the Constitution, by immunising the mandatory death penalty from being held unconstitutional, violates Article 2 of the Convention. Further, contrary to Article 5(1) and (2), it is cruel and inhuman and degrades his inherent dignity as a human person by not treating him as a uniquely individual human being; the mandatory death penalty "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty".[2]

8. **Article 4:** This Honorable Court has already held that the mandatory death penalty violates the right to life protected by Article 4(1) and 4(2) of the Convention [see for example *Boyce et al v Barbados* (Judgment of November 20th 2007, Inter-Am. Ct. H.R., series 169) and *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (Judgment of June 21, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 94 (2002)].

9. **Article 2:** In addition, this Honorable Court has made clear that the savings clause violates Article 2 of the Convention (See *Hilaire* at para. 111-116 and *Boyce* at paragraphs 75-80).

10. **Articles 5 and 8:** This Honorable has not yet however determined whether the mandatory death penalty also violates: (i) under Article 5(1) the physical, mental and moral integrity of the person; (ii) the prohibition under Article 5(2) against cruel inhuman or degrading punishment or treatment; and (iii) the right to a fair trail protected by Article 8 of the Convention.

11. In previous applications in which these complaints have been made, the Court has found it unnecessary to determine the matter because other violations concerning the imposition of the mandatory death penalty have been found established (see for example *Boyce et al v Barbados Judgment of November 20th 2007,* para 64). The alleged victim submits that there is however a need for theses further violations to be considered and determined by this Court; such consideration would, it is submitted, significantly add to the case-law of the Convention under these Articles and further protect and promote fundamental rights.

12. Moreover, a decision by this Court that the mandatory death penalty also violates the physical, mental and moral integrity of the individual, constitutes a cruel and inhuman punishment and violates due process rights would add additional moral incentive and compulsion for Member States to take steps to bring domestic law into conformity with the Convention. A determination that the mandatory death penalty constitutes an arbitrary deprivation of life and fails to reserve the death penalty for the most serious crimes, while on its own is a significant indictment of the mandatory death penalty, would, it is submitted, be profoundly re-enforced by a further determination that other rights, universally accepted as core, non-derogable rights, are also contravened. A Member State would more readily be spurred into action when required to justify to its citizenry the continued retention

[2] *Woodson v North Carolina* 428 US 280, 304 (1976), cited with approval by this court in *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (Judgment of June 21, 2002, Inter-Am Ct. H R , (Ser. C) No 94 (2002)) at para 105

of a law that is considered and condemned by the international community to be cruel and inhuman and in violation of fair trail rights. A shift in this way in the language of the discourse concerning the compatibility of the mandatory death penalty with international human rights law would, it is submitted, hasten compliance by Member States concerned to be seen to be protectors rather than violators of the rights and dignity of the individual.

(ii) Convention violations: Failure to conduct a psychiatric/psychological examination prior to trial and/or sentence

13. The alleged victim complains that the failure of the State Party to cause a comprehensive psychiatric/psychological examination to be undertaken and made available for the purposes of the trial breached his right to a fair trial protected under Article 8 of the Convention and is also cruel and inhuman contrary to Articles 5(1) and 5(2) of the Convention.

14. This failure is submitted to have effected his rights both at the time of trial, as it prevented him from presenting defences available to him, and his rights at the time of sentence as it allowed for the imposition of the death sentence without consideration in particular of his mental health. The imposition of the death sentence on someone suffering from a mental illness is, it is submitted, inhuman and degrading.

(ii) The Attitude of the State Party

15. Prior to this Court's decision in *Boyce et al v Barbados*, the State Party had argued that:

    (i) Its international treaty obligations did not prohibit it from imposing the mandatory death penalty;
    (ii) The findings of the Court and Commission in respect of the mandatory death penalty in the jurisdictions of other States Parties were not determinative of the position of the mandatory death penalty in Barbados, and that therefore the issue in relation to Barbados had not yet been determined;
    (iii) The Court and Commission were wrong in law in finding that the mandatory death penalty in other jurisdictions was contrary to the OAS Charter: "any case in which the Court or Commission has suggested that either the OAS Charter or American Convention prohibits the application of mandatory capital punishment is incorrect as a matter of international law." [Submissions of the State of Barbados in the matter of the Death Penalty 20 October 2003].

16. The State Party not only argued that the findings of this Court and Commission were wrong and/or did not apply to Barbados, it also sought to execute the prisoners on death row whilst their complaints that the mandatory death penalty violated their rights under the Convention were pending before the Commission and notwithstanding the provisional measures ordered by this Court.

17. The attitude of the State Party in this way flew in the face of the clearest interpretation of Convention rights by this Court and the Commission in *Hilaire* and *Edwards*[3] and contravened the principle that an authoritative interpretation by this Court or Commission in respect of one State Party will inform the obligations of other State Parties with like practices and legislative provisions. The State Party's behaviour undermined the competence of the Inter-American organs to interpret authoritatively Convention rights and the principles upon which the Inter-American system, being as it is a regional inter-governmental agency, guarantees individual fundamental rights.

18. The State Party had maintained this position in relation to the mandatory death penalty because of the decision of the Judicial Committee of the Privy Council ("JCPC") in *Boyce v R* [2005] 1 AC 400 that the mandatory death penalty was immune from challenge under the Barbados Constitution by virtue of section 26 thereof. This demonstrated either a misunderstanding, or a wilful disregard, of its obligations under Article 2 of the Convention. Indeed, the JCPC was unanimous in finding that (i) if called upon to interpret the State Party's international obligations, it would find the mandatory death penalty to be in breach and (ii) but for the immunising effect of the "savings clause" contained in section 26 of the Barbados Constitution, the mandatory death penalty would be contrary to the prohibition on inhuman and degrading punishment contained in section 15(1) of the Constitution. That was the clearest possible indication that section 26 of the Barbados Constitution, in acting as a bar to the protection of fundamental rights, was contrary to the State Party's duty under Article 2 of the Convention to "undertake to adopt, in accordance with their constitutional processes and the provision of [the] Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms," as this Court was eventually to hold in *Boyce et al v Barbados*.

19. In seeking (i) to rely on the existing Constitutional provisions that prevent it from domestic compliance with its international obligations and (ii) to increase, through the Constitution Amendment Act 2002, the scope of the immunization afforded by the savings clauses, the State Party has demonstrated wholesale disregard for its obligations under Article 2 of the Convention. It also demonstrated a clear disregard for norms of international law, pursuant to which all consequent obligations must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfillment. As this Court had previously confirmed[4], these are rules that may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions. These principles of international law have also been codified in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.

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[3] See also *Downer and Tracey v Jamaica* (Report No 41/00; 13th April 2000); *Rudolph Baptiste v Grenada* (Report No. 38/00; 13th April 2000); *Donnason Knights v Grenada* (Report No 47/01; 4th April 2001); *Leroy Lamey & Others v Jamaica* (Report No 49/01; 4th April 2001); *Damian Thomas v Jamaica* (Report No. 50/01; 4th April 2001); *Joseph Thomas v. Jamaica* (Report No 127/01, 3rd December 2001); *Paul Lallion v Grenada* (Report No. 55/02, 21st October 2002); *Benedict Jacob v Grenada* (Report No. 56/02, 21st October 2002); *Denton Aitken v Jamaica* (Report No 58/02, 21st October 2002); and *Dave Sewell v Jamaica* (Report No. 76/02, 27th December 2002).

[4] International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, December 9, 1994, Inter-Am. Ct. H.R. (Ser. A) No. 14 (1994), para 35.

20. This attitude of the State Party prevailed when the alleged victim in these proceedings was convicted of murder and sentenced compulsorily to death by hanging.

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

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

The position in Malawi

22. The question of the constitutionality of the mandatory death penalty in Malawi has recently been clarified by the decision of the High Court of Malawi in the case of *Francis Kafantayeni et al V. The Attorney General of Malawi* 46 ILM 564 (2007).

23. The High Court unanimously held that the mandatory death sentence for the offence of murder violated the constitutional guarantees protecting every person from inhuman treatment or punishment and the right of the accused person to a fair trial including the right of access to justice.

The position in the United States

24. The history of the mandatory death penalty in the United States discloses clear evidence that, by the 1960s (if not much earlier), it was recognised that the imposition of a mandatory death sentence on all those convicted of murder was "disproportionate" and "inappropriate" and thus inhuman.The Supreme Court of the United States examined this history of the mandatory death penalty in *McGautha v California* [1971] 402 US 183, *Furman v Georgia* (1972) 408 237, and *Woodson v North Carolina* (1976) 428 US 280.

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

26. Almost from the outset jurors reacted unfavourably to the harshness of mandatory death sentences (*Woodson*, at p.952, citing Bedau at p.27; Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa.L.Rev. 1099, 1102 (1953); Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L.Rev. 32 (1974); *McGautha v. California*, supra, 402 U.S., at 198-199, 91 S.Ct., at 1462-1463; *Andres v. United States*, 333 U.S. 740, 753, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1948) (Frankfurter, J., concurring); *Winston v. United States*, 172 U.S. 303, 310, 19 S.Ct. 212, 214, 43 L.Ed. 456 (1899)).

27. States initially responded by limiting the classes of capital offences (*Woodson,* at p.290, citing Bye, at p.5; Hartung, *Trends in the Use of Capital Punishment*, 284 Annals of Am. Academy of Pol. and Soc. Sci. 8, 9-10 (1952)). This failed to resolve the problem of juries often refusing to convict murderers rather than subject them to automatic death sentences.

28. In 1794, Pennsylvania attempted to redress this by confining the mandatory death penalty to "murder of the first degree" encompassing all "wilful, deliberate and premeditated" killings (*Woodson,* at p.290, citing Pa.Laws 1794, c. 1766; Bedau p.24). Within a generation most States had divided murder into capital and non-capital offences (*Woodson,* at p.290, citing Bedau p.24; Davis, *The Movement to Abolish Capital Punishment in America*, 1787-1861, 63 Am.Hist.Rev. 23, 26-27, n.13 (1957)).

29. By 1900, 23 States and the Federal Government had made death sentences discretionary for first-degree murder. During the next two decades 14 other States followed suit (*Woodson*, at p.291), and by the end of World War I, all but 8 States, Hawaii, and the District of Columbia, had either adopted discretionary death penalty sentencing regimes or abolished the death penalty altogether (*Woodson*, at p.291)[5].

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

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

31. By the late 1950s only 10 States retained a single category of murder as defined at common law (*Woodson,* at FN 21; citing American Law Institute, Model Penal Code s 201.6, Comment 2, p. 66 (Tent. Draft No. 9, 1959)). However, this proved to be an unsatisfactory means of identifying persons appropriately punishable by death as juries, unwilling to impose the death penalty in a significant number of first-degree murder cases, refused to return guilty verdicts for that crime (*Woodson,* at p.290, citing Bedau at p.27; Mackey, n. 18 (1974); *McGautha v. California*, at 199, 91 S.Ct., at 1463).

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

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

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[5] The essential principle that a penalty may be cruel (or inhuman) because it is excessive was laid down as long ago as 1910 in Weems v US 217 US 349 (see the analysis in Furman at pp.398-402). And since the 1937 case of *Pennsylvania ex rel. Sullivan v Ashe* 302 US 51 (summarised in *Woodson* at p.961), the Supreme Court has recognised that the Eighth Amendment requires that sentences be individualised.

> "The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society, jury determinations and legislative enactments, both point conclusively to the repudiation of automatic death sentences" [pp.292-293]

> "Although the Court has never ruled on the constitutionality of mandatory death penalty statutes, on several occasions dating back to 1899 it has commented upon our society's aversion to automatic death sentences." [p.296]

> "Perhaps the one important factor about evolving social values regarding capital punishment upon which the Members of the *Furman* Court agreed was the accuracy of *McGautha's* assessment of our Nation's rejection of mandatory death sentences." [p.297]

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

> "I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of 'the common-law rule imposing a mandatory death sentence on all convicted murderers.'"

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

<u>The position in Belgium, the Union of South Africa and Lesotho</u>

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

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

The position in Canada

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

The position in India

39. In India, classification was introduced on 22nd November 1969 and the mandatory death penalty was abolished for nearly all types of murder by (at the very latest) 1973. The 1973 Criminal Code in India, provides in s.354(3) that:

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

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

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

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

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

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

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

43. Similar provisions in St Christopher and Nevis were likewise struck down [*R v Berthill Fox* [2002] 2 WLR 1077. In, *R v Lambert Watson* [2005] 1 AC 472, the JCPC unanimously found the mandatory death penalty in Jamaica to be contrary to the right to life guarantee in the Constitution and the prohibition on cruel and unusual punishment, notwithstanding that Jamaica had legislated to restrict the class of capital murders to more serious cases.

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

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

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

See also *Coard et al V. The Attorney General* (Judgement of February 7th 2007, JCPC, Appeal No 10 of 2006) for the situation in Grenada.

<u>The decisions of International and Regional Bodies</u>

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

> "that the *Offences Against the Person Act* [of Trinidad and Tobago] automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness. Consequently, this Act prevents the

judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different. In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely human life, and is arbitrary according to the terms of Article 4(1) of the Convention." [para 103]

...

"The Court concurs with the view that to consider all persons responsible for murder as deserving of the death penalty, 'treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty'." [para 105]

"In countries where the death penalty still exists, one of the ways in which the deprivation of life can be arbitrary under Article 4(1) of the Convention is when it is used, as is the case in Trinidad and Tobago due to the Offences Against the Person Act, to punish crimes that do not exhibit characteristics of utmost seriousness, in other words, when the application of this punishment is contrary to the provisions of Article 4(2) of the American Convention." [para 107]

"the Court concludes that because the *Offences Against the Person Act* submits all persons charged with murder to a judicial process in which the individual circumstances of the accused and the crime are not considered, the aforementioned Act violates the prohibition against arbitrary deprivation of life, in contravention of Article 4(1) and 4(2) of the Convention." [para 108]

This finding was recently endorsed by this Court in their judgment in the case of Boyce et al v Barbados, delivered on 20th November 2007.

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

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

(Case No. 862/1999; 14th December 2005); *Persaud and Rampersaud v. Guyana* (Case No. 812/1998; 16th May 2006); *Larrañaga v. The Philippines* (Case No. 1421/2005; 14th September 2006).

B DEATAILED LEGAL SUBMISSIONS:

I. THE MANDATORY DEATH SENTENCE: Violations of Articles 4, 5 and 8

(i) Violation of Article 4: Arbitrary deprivation of life

49. The alleged victim submits that the imposition of the mandatory death penalty constitutes an arbitrary deprivation of life, automatically and generically mandating the application of the death penalty for murder and disregarding the fact that murder may have varying degrees of seriousness. Consequently, this prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different.

50. As the Supreme Court of India observed in *Mithu v State of Punjab* (cited above):

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

51. It is submitted that this analysis of the indiscriminate effect of the mandatory death penalty falls squarely within the definition of arbitrary.

52. The existence of the prerogative of mercy cannot rectify the arbitrariness of the mandatory sentence for the reasons set out above:

i) it is not a judicial body;

ii) it meets in private;

iii) it is not obliged to give reasons for its decisions;

iv) there is no right for the condemned person to make oral submissions or to call or cross-examine witnesses;

v) there are no established legal guidelines governing the exercise of the Mercy Committees' functions and the merits of its decisions are not subject to review in a court of law.

53. It is submitted that because the mandatory death penalty fails to individualise the sentence in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused, it contravenes the prohibition of the arbitrary depravation of the right to life recognised in Article 4(1)

of the Convention [see judgment of the Inter-American Court in Boyce & Joseph v- Barbados at paragraphs 56-62].

54. The alleged victim submits, for all of the reasons set out from the inquiry of the British Royal Commission on Capital Punishment in 1953 onwards that the offence of murder is so broad in its range of potential culpability that it cannot properly be said that the mandatory death sentence for murder is truly restricted to only "the most serious offences".

55. It is submitted that Section 2 of the Offences Against the Person Act of Barbados does not confine the application of the death penalty to the most serious crimes, in contravention of Article 4(2) of the Convention. [See judgment of the Inter-American Court in Boyce and Joseph –v- Barbados at paragraph 53 – 55 and 62].

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

(ii) Violation of Article 5: Inhuman and degrading treatment

57. In *Hilaire* the Inter-American Court of Human Rights, endorsing the view of the Supreme Court of the United States of America in *Woodson*, observed that:

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

58. It is respectfully submitted that such treatment does not accord with the right of everyone to have his physical, mental and moral integrity respected and is thus in breach of Article 5(1) of the Convention, and further it constitutes inhuman and degrading punishment or treatment and so violates Article 5(2).

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

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

such a person, courts of law are justified in concluding that the law requiring the imposition of the same is inhuman." [paras. 215-6]

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

(iii) Violation of Article 8: fair trial

60. The mandatory death sentence prevents the courts from determining the appropriate sentence after conviction for murder and precludes any opportunity on the part of an offender to make representations to the court as to whether the death penalty is a permissible or appropriate form of punishment. It also prevents any effective review by a higher court as to the propriety of a sentence of death in the circumstances of any particular case. Instead mandatory sentencing for murder requires a sentence of death to be imposed without regard to the individual circumstances of either the offence or the offender. As a consequence, individuals subjected to this law cannot effectively exercise their right to a hearing, with due guarantees, by an independent tribunal (Article 8(1)) and their right to appeal the judgment to a higher court (Article 8(2)(h). It is therefore submitted that the mandatory death penalty is also in violation of Article 8 of the Convention.

61. The alleged victim submits that the requirement of fair hearing covers the entire criminal proceedings comprising the two components of a criminal case, (whether the court is exercising trial or appellate jurisdiction), namely - the liability decision (conviction or acquittal/discharge), and sentencing. With respect to the alleged victim the mandatory sentencing provisions simply shut him out from being heard on why the sentence prescribed, the death sentence, should not be applied to him.

62. The principle that the right to a fair hearing extends to all aspects of a criminal trial, including sentence, accords with the well-established principle that human rights must be given a generous and purposive interpretation (*R v Big M Drug Mart Ltd* (1985)18 DLR (4th) 321,395-6 *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), 328-9, *S v Zuma* 1995(2)SA 642(CC) at paras 13-19).

63. The alleged victim submits that the mandatory death sentence provision contained in section 2 OAPA 1994 [See CB Appendix A.4)negates the possibility of a fair trial on sentencing by not allowing individual mitigation.

64. The Appellant further submits that mandatory death sentence violates his right to have his sentence reviewed by a higher court, which is one of the essential components of fair hearing and a right that is explicitly protected by Article (8)(2)(h) of the Convention. Section 2, OAPA 1994 prevents an appellate court from reviewing the sentence imposed on the alleged victim. By excluding the possibility of determining an appropriate individual sentence, mandatory sentences prevent any consideration of factual or personal factors at the appeal stage.

65. That the mandatory death sentence violates the right to a fair trial in this way was, it is submitted, implicitly acknowledged in the conclusions of the Inter-American Commission on Human Rights in *Edwards v The Bahamas* (Report No. 48/01, 4 April 2001):

> "[B]y reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of a crime for which the sentence was mandated".

II THE SAVINGS CLAUSE IN THE BARBADOS CONSTITUTION: Violations Of Article 2 in conjunction with Articles 1(1), 4(1), 4(2) And 25(1)

66. In Boyce & Joseph –v- The Queen [2005] 1 AC 400, a majority of the JCPC (five members against four) held the mandatory death penalty of Barbados not to be unconstitutional. However, this was only because of the immunising effect of the Savings Clause contained in Section 26 of the Constitution and not because it would, but for the savings clause, be compatible with fundamental rights.

67. The Constitution of Barbados is drafted so as to immunize from challenge on grounds of incompatibility with fundamental rights any law which is deemed to be 'an existing law' by section 26 of the Constitution. Since the *OAPA 1994* is such a law, the mandatory death penalty cannot be challenged domestically on grounds of incompatibility with fundamental human rights[6]. Therefore, this Court and the Commission are the only fora in which the alleged victim can raise the complaints set out in these submissions.

68. In *Hilaire et al –v- Trinidad* and *Boyce & Joseph et al –v- Barbados*, the savings clause in the 1976 Constitution of Trinidad and Tobago was found to violate Article 2 of the ACHR by this Court:

> "111. Article 2 of the American Convention provides that:
>
> > [w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the State Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
>
> 112. Based on the above provision, the Court has consistently held that the American Convention establishes the general obligation of State Parties to bring their domestic law into compliance with the norms of the Convention, in order to guarantee the rights set out therein. The provisions of domestic law that are adopted

[6] See majority judgment in *Boyce and Joseph v The Queen* [2004] UKPC 32, Privy Council Appeal No 99 of 2002, Judgment of 7 July 2004. See CB Appendix A 16

must be effective (principle of effet utile). That is to say that the State has the obligation to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice.

113. If the States, pursuant to Article 2 of the American Convention, have a positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognised in the Convention, it follows, then, that they also must refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them. These acts would likewise constitute a violation of Article 2 of the Convention."

69. In *Boyce & Joseph*, this Court found the savings clause in the 1966 Constitution of Barbados to violate Article 2 of the Convention, in relation to Articles 1(1), 4(1), 4(2) and 25(1) of the Convention:-

"75. Section 26 of Barbados' Constitution prevents courts from declaring the unconstitutionality of current laws that were enacted or made before the Constitution came into force on November 30, 1966. It is referred to as the "savings clause" because it effectively "saves" such laws from constitutional scrutiny. In effect, Section 26 immunises pre-constitution laws that are still in effect from constitutional challenge even if the purpose of such challenge is to analyse whether the law violates fundamental rights and freedoms. Such is the case with Section 2 of OAPA, which has existed since the enactment of the Offences Against the Person Act of 1868. That is, Section 2 of OAPA is a law that existed before the current Constitution came into force, and continues to be the law of Barbados. Thus, by virtue of the "savings clause", the constitutionality of Section 2 of OAPA may not be challenged domestically.

79. Similarly, in the present case, Section 26 of the Constitution of Barbados effectively denies its citizens in general, and the alleged victims in particular, the right to seek judicial protection against violations of their right to life.

80. Accordingly, in light of the Court's jurisprudence, and to the extent that Section 26 of the Constitution of Barbados prevents judicial scrutiny over Section 2 of the Offences Against the Person Act, which in turn violates the right not to be arbitrarily deprived of life, the Court finds that the State has failed to abide by its obligations under Article 2 of the Convention, in relation to Articles 1(1), 4(1), 4(2) and 25(1) of such instrument."

70. Based on this Court's jurisprudence it is submitted that there are three ways in which Barbados has failed to abide by its obligations under Article 2 of the Convention, in relation to Articles 1(1), 4(1), 4(2) and 25(1) of the ACHR:

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

(ii) it has failed to take any step to repeal section 26 of the Constitution, despite the fact that the conflict between that section and the State's international obligations was made explicit in the decision of the majority of the JCPC in *Boyce and Joseph*[7] and by the Inter-American Court in *Boyce & Joseph*;

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

III *THE FAILURE TO CAUSE A COMPREHENSIVE PSYCHIATRIC/PSYCHOLOGICAL EXAMINATION OF THE VICTIM TO BE UNDERTAKEN AND MADE AVAILABLE FOR THE PURPOSE OF THE TRIAL AND/OR SENTENCE: Violations of articles 5(1), 5(2) and 8*

71. The mental state of a person accused of committing murder may impact upon the course of his trial in a number of different ways including:

(i) The accused's mental state may affect his fitness to plead and stand trial at all;

---

[7] See Lord Hoffmann at paras 25, 27 & 31: ". their Lordships feel bound to approach this appeal in the footing that the mandatory death penalty is inconsistent with the international obligations of Barbados .. If their Lordships were called upon to construe section 15(1) of the Constitution [the prohibition on inhuman and degrading treatment], they would be of opinion that it was inconsistent with a mandatory death penalty for murder. The reasoning of the Board in *Reyes v The Queen* [2002] 2 AC 235, which was in turn heavily influenced by developments in international human rights law and the jurisprudence of a number of other countries, including states in the Caribbean, is applicable and compelling.. [However] if one reads section 26 [of the Constitution] together with section 1 [of the Constitution], it discloses a clear constitutional policy.. No existing written law is to be held to be inconsistent with sections 12 to 23 [the fundamental rights provisions]. Existing laws are to be immunised from constitutional challenge on that ground " See CB Appendix A 16

(ii) The accused's mental state may be such as to sustain a plea of insanity;

(iii) The accused's mental state could form the basis of a finding of diminished responsibility which would result in an acquittal of murder but a conviction of manslaughter for which the penalty in Barbados is imprisonment at the discretion of the trial judge;

(iv) In a case where the accused is alleged to be guilty of murder because of his alleged participation in a joint enterprise, his mental state might be relevant to a defence based on his inability to understand the nature of the joint enterprise and agree to participation in it;

(v) The accused's mental state could cast doubt on the admissibility of any statement to the police, taken without legal advice or the presence of an independent person. A suspect has to be informed of his right to consult a lawyer and that information would not be effectively given unless the suspect was capable of understanding it. Moreover, even if the statement was properly admitted into evidence, the jury might require a warning that there is special need for caution before convicting the appellant in reliance on it because of his or her mental state.

(vi) The accused mental state could preclude the imposition of the sentence of death, even though death is ordinarily a mandatory sentence.

[See generally Lester Pitman v The State [2008] UKPC 16, para 30 and the expert evidence of Edward Fitzgerald QC (See AVB Appendix 5).]

72. The right to a fair trial is a fundamental right in the legal systems of Member States and is guaranteed by Article 8 of the American Convention. Article 8(2)(c)&(f) specifically provide that every person accused of a criminal offence is entitled, with full equality, to the minimum guarantees of:

"adequate .... means for the preparation of his defence..."

...

"the right .... to obtain the appearance, as witnesses, of experts or other pesons who may throw light on the facts.

73. Given the expected indigence of persons charged with murder, it is submitted that the right to a fair trial requires the provision of facilities for the conduct of psychiatric/psychological examination of an accused with a view to determining whether an accused is fit to plead, or is not guilty by reason of insanity, or is not guilty of murder but guilty of the lesser offence of manslaughter by reason of diminished responsibility, or is not a party to a joint enterprise because of his

inability to understand the nature of the enterprise, or whether a statement given to the police is admissible in evidence, whether the accused upon conviction may lawfully be sentenced to death. The right to a fair trial, it is submitted, requires that nobody should be found guilty of murder and sentenced to death or executed if they suffer from a significant mental disorder. The right to such facilities in this way re-enforces the right to life by ensuring that the death penalty is reserved for the most serious offences and is never imposed where significant mental disorder is present.

74. The underlying principle is that nobody should be convicted of a capital offence, sentenced to death or executed if they suffer from significant mental disorder at the time of the offence; and that nobody should be sentenced to death, or executed if illness develops later and is present at the time of either sentence or execution. This principle can be dated back as far as Blackstone, who said:

> "Idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution". (Blackstone's Commentaries on the Laws of England 1765-1769, Book 4 chapter 2)

(i) Relevance of mental state at trial and need for assessment

75. In this instance, there is no evidence that the State Party caused the victim to be examined by a competent psychiatrist/psychologist in order that the results of that examination might be made available to the defence or the trial judge. The Commission found that there was no violation of the right to a fair trial primarily because the defence did not request that the victim be examined by a psychiatrist/psychologist. However, what 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.

76. By Article 2 of the Convention, State Parties undertake to "adopt ..... such legislative or other measures as may be necessary to give effect" to the right and freedoms recognised in the Convention. Given the significant impact the mental state of an accused may have on the course of his trial, his right to "adequate .... means for the preparation of his defence" and "the right .... to obtain the appearance, as witnesses, of experts or other pesons who may throw light on the

facts" can only be effectively recognised it is submitted by positive steps on the part of the state to ensure that in every case of a trial for murder where the only penalty upon conviction is death the accused is examined by a psychiatrist to determine whether any defence is available. The obligation on the part of the state to have such an examination conducted would eliminate the risk that the less than diligent legal representative of the accused would fail to appreciate the need to have a psychiatric/psychological examination conducted and so fail to request that one be carried out. In the case of a murder charge where the life of the accused is at stake, it is dangerous and fails to fully protect the right to life to let the determination of the crucial question whether an accused ought to be examined depend upon the competence of his lawyer or his lawyer layman's judgment that the facts of the case fails to reveal any mental disorder making an examination unnecessary.

77. The only psychiatric report produced in the domestic courts was the admittedly unsatisfactory report of Dr Mahy who, it was conceded, established no more than that there was the need to have the victim examined more comprehensively. Dr Mahy's report was unsatisfactory because he was only able to examine the victim on one occasion [see AVB Appendix 2]. The alleged victim has now been further and more comprehensively examined by Dr Timothy Green who has concluded that the victim "suffers from a Personality Disorder as well as Alcohol Dependence...[and that] this would have had a direct bearing on Mr Cadagon's conviction and sentence as Personality Disorder and Alcohol Dependence could lead to a disposal of diminished responsibility in a murder trial ..." (See AVB Appendix 3).

78. Had such an examination been conducted as a matter of course it is now clear that the victim would have had a better opportunity to present an appropriate defence to murder at trial. Furthermore, the judge would have been required to respect the principle that it is wrong to impose a sentence of death on a severally mentally handicapped defendant.

79. The absence of a competent, independent psychological assessment of the alleged victim at the time of his trial rendered the proceedings unfair, and thus contrary to Article 8 of the Convention, because it deprived him of a defence, namely diminished responsibility, which would have reduced his criminal liability from murder to manslaughter. This is manifestly unfair because (1) it means that the alleged victim has been convicted of an offence for which the psychological evidence now available suggests he does not bear the requisite culpability [see report of forensic clinical psychologist Dr Tim Green at AVB Appendix 3]; and (2) he has wrongly been exposed to an inhuman penalty, namely the mandatory death sentence, which would not have been available to the court had he been convicted of the lesser offence of manslaughter. Indeed the court would not even have had a discretion to impose a death sentence in respect of a manslaughter conviction, because the maximum penalty for that offence under Barbadian law is life imprisonment (section 6 of the Offences Against the Person Act Cap. 141).

80. It is submitted that these consequences, and in particular erroneous exposure of the alleged victim to a mandatory death penalty, additionally amount to inhuman treatment, contrary to Article 5 of the Convention.

81. In order to appreciate the critical importance of obtaining adequate assessment of the alleged victim's mental state at the time of trial, it is necessary to consider the distinction between murder and manslaughter in Barbadian law.

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

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

83. Section 4 of the Offences Against the Person Act ("OAPA") reduces a person's liability from murder to manslaughter if, at the time of the killing:

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

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

84. Both alcohol dependence and personality disorder, from which the alleged victim has been assessed as suffering [see report of Dr Tim Green at Appendix 3 AVB], either separately or in combination, are capable of constituting an "abnormality of mind" within the meaning of section 4 OAPA.

85. The burden of proving diminished responsibility is on the accused – s.4(2) OAPA. As noted above, the maximum penalty for this offence is life imprisonment, but the sentencing judge retains a discretion to impose a lesser sentence.

The consequences of the failure to identify the alleged victim's abnormality of mind at trial

86. In the particular circumstances of a mandatory death sentence, the enormity of the consequences of a conviction for murder instead of manslaughter are such that rigorous, independent assessment of a defendant's mental state is a pre-requisite if a serious miscarriage of justice is to be avoided. This is especially so in a case, such as that of the alleged victim, where commission of the killing is admitted and the issue at trial is the defendant's *mens rea*. In this connection, Clive Lewis, senior lecturer in psychology at the University of the West Indies states that:

> "it is ...customary for a defendant to be subjected to a detailed psychological evaluation of their current mental state. The results of such a process can be used to make inferences about a person's state

in the past. The evaluation should include in-depth structured clinical interviews, by at least two independent clinicians, and administration of a battery of psychometric tests." [letter of Clive Lewis dated December 28 2006 at Appendix 6 AVB]

87. No such evaluation was conducted in the alleged victim's case until the assessment carried out by Dr Tim Green in support of the application to this Court.

88. It is submitted that the evidence of Dr Green casts this aspect of the alleged victim's complaint in a wholly new light. The Commission declined to find that absence of adequate psychological assessment at trial resulted in a violation of the alleged victim's rights under Article 8 essentially on the grounds identified by the Caribbean Court of Justice ("CCJ"), namely that there was at that time no medical evidence of an abnormality of mind substantially impairing the alleged victim's mental responsibility [see Commission Report No.60/08 para. 115 at Appendix D1]. However, the Court is now presented with evidence of such abnormality in the form of Dr Green's report. The alleged victim's complaint of violations of Article 8 and 5 therefore fall to be considered afresh in light of that new evidence.

89. It is respectfully submitted that the new evidence materially undermines the reasoning of the CCJ, and consequently of the Commission, on this issue. Further, it has not been possible for the alleged victim to obtain this evidence prior to this point due to an absence of legal aid for the purpose of independent psychological assessment.

90. It is noted that:

(i) the State party maintains that had a psychological assessment been requested by or on behalf of the alleged victim at trial, provision would have been made for him to be examined by a doctor at a state hospital; and

(ii) that the CCJ made reference to an assessment conducted by a Dr Belle within two days of the index offence.

91. However, for the reasons set out below, neither of these factors is sufficient to ensure the requisite level of assessment for a fair trial as guaranteed by Article 8, or to protect him, contrary to Article 5, from the inhuman exposure to conviction and sentence of death for a crime for which he does not bear the requisite mental responsibility.

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.

93. In respect of any assessment conducted by Dr Belle, first, no report of this examination has been disclosed to the alleged victim or his representatives [see letter from the alleged victim's legal representatives to the Director of Public

Prosecutions dated 11 July 2008 at Appendix 8 AVB]. In any event, the CCJ itself acknowledged this to have been a "limited evaluation" aimed only at assessing the alleged victim's fitness to instruct counsel and to stand trial. The threshold for unfitness in these respects is very high: a defendant must suffer from exceptionally severe and pronounced mental illness or disability before he becomes unfit to instruct counsel or to stand trial. By contrast, assessment as to whether a defendant suffers from an abnormality of mind within the meaning of s.4 OAPA is a far more wide-ranging and in-depth process. In the circumstances, an assessment of fitness to plead cannot fairly give rise to a conclusion that a defendant does not suffer from an abnormality of mind for the purposes of s.4 OAPA.

94. Further, or alternatively, the alleged victim maintains that in the circumstances of his case, the failure of his trial attorney to request an independent forensic psychiatric or psychological assessment was grossly incompetent. This was on any account a difficult case in that the alleged victim admitted the *actus reus* of the killing but denied the requisite intent to kill or to cause serious bodily harm. In such circumstances, the question as to whether a defence of diminished responsibility might be available is critical and falls to be considered by any competent defence counsel. It is of note that trial counsel acknowledges, albeit indirectly, that excessive "liquor and drugs" might point to an abnormality of mind in this case [see letter from trial attorney Dr Waldron-Ramsay to the alleged victim's present legal representatives dated 26 September 2006 at Appendix 7 AVB]. However, he gives no account as to why, having recognised the potential relevance of excessive liquor and drugs, he took no steps to have the alleged victim medically assessed in that regard. Since the alleged victim is indigent and was therefore provided with legal aid counsel, the failure of the State party to provide competent counsel violated his rights under Article 8(2)(e).

95. In so far as the CCJ placed reliance on the report of Dr Mahy in finding there to be no evidence to undermine trial counsel's decision not to seek a medical assessment of the alleged victim's mental state, it is submitted that it was wrong to do so. Dr Mahy had assessed the alleged victim on a *pro bono* basis and expressly stated in his report that due to time constraints he was not in a position to give a definitive opinion [see report of Dr Mahy at Appendix 2XXX]. Notwithstanding these constraints, he expressed the view that the alleged victim "qualifies for a dual diagnosis of anti-social personality disorder and substance abuse" and that "his altered mental state is most likely related to substance abuse in an individual who already has a major personality disorder." It is submitted that these findings raise sufficient concern about the availability of a defence of diminished responsibility to require proper investigation if a fair trial process, including the appellate stages, is to be achieved. In these circumstances, it is respectfully submitted that the CCJ's refusal of the alleged victim's application for an adjournment in order to allow a full mental state assessment to take place was in violation of his rights under Article 8 of the Convention.

96. It is submitted that there is need for a determination by this Court as to whether Member States are obliged to have comprehensive psychiatric/psychological examinations carried out on persons accused of murder as a matter of course

and without the need for a request for such an examination on the part of the defence. The alleged victim is not aware of any ruling by this Court on this point.

***(i) Relevance of mental state the and need for assessment* at time of sentence**

97. An accused's mental state is also relevant to the sentencing stage of trial as it could also preclude the imposition of the sentence of death, even though death is ordinarily a mandatory sentence (See *Lester Pitman v The State* [2008] UKPC 16, para 30, *Pipersburgh & Robateau v The Queen* [2008] UKPC 11 paras 32 onwards, and the expert evidence of Edward Fitzgerald QC (ABV Appendix 5).

98. Because the death penalty is mandatory upon conviction for murder, independent impartial experts did not properly investigate the mental handicap of the alleged victim since it is mistakenly regarded as irrelevant to the legality of the sentence. But it is submitted that at the time of Independence in Barbados it was not lawful to impose, still less to maintain on appeal, a sentence of death on a person shown to be suffering from severe mental handicap so that a mandatory sentence of death was preserved by the Constitution subject to the exception that it should not be imposed on a severely mentally handicapped or ill person. It is, therefore, submitted that in the case of the alleged victim the imposition and maintenance of the death penalty violates the Convention (Articles 5 and 8) due the State's failure to provide independent and impartial expert psychiatric evaluation prior, not only to conviction but also to the imposition of the death penalty.

99. The presence of a mental disorder has been recognised by courts around the world as one of the most important mitigating factors at the sentencing stage in death penalty cases, and this is so even where a defence at trail based on mental disorder has failed. The JCPC found in *R v Reyes* [2002] 2 AC 235 that the presence of a depressive illness was crucial to the non-application of the death penalty. In that case the Belize Chief Justice had found, on sentencing, that there was an element of diminished responsibility even though the jury at trial had rejected the defence of diminished responsibility.

100. Other examples include the case of *R v Berthill Fox* [2002] 2 AC 284 where the presence of mental disorder (in the form of steroid rage) was the main reason given by the sentencing judge (Baptiste J) in St Kitts in for declining to impose the death penalty on Berthill Fox, a body-builder who had killed his common-law wife and mother-in-law in a fit of anger in circumstances where his powers of self-control were diminished by years of steroid abuse. Mental disorder was again a major reason for the decision of Saunders JA in St Lucia not to impose the death penalty in the case of *R v James*.

101. Further, it is submitted that there is now a recognised norm of international law prohibiting the imposition of a death sentence on the mentally disordered:

(i) Firstly there is clearly a long-standing common law principle that both "idiots" and the "insane" should not be sentenced to death or executed (see Blackstone at 1.3 quoted above).

(ii) Secondly, there is a growing and virtually unanimous international consensus that those suffering from significant mental disorder at the time of the offence, or the sentencing stage, or at the time of execution should not suffer the death penalty.

(iii) Thirdly, the existence of an international consensus on this issue is further supported by the Resolutions and decisions of international human rights bodies – including the General Assembly of the United Nations (the "UN"), the Economic and Social Council of the UN, the UN Human Rights Commission and the Human Rights Committee of United Nations.

(i) Common law principle

102. The principle that it is cruel or inhuman to execute the "insane", (i.e. "mentally ill") or "the idiot" (i.e. the severely mentally handicapped) is of common law origin. In recent years, the principle has been reinforced and restated in United States Supreme Court cases:

> In Ford v Wainwright (477) US 399, it was recognised that it was wrong in principle and unconstitutional to execute the mentally ill. It follows that, if it is unconstitutional to execute such offenders, then it is unconstitutional to sentence them to death in the first place if there is evidence of mental illness either at the time of the offence or at the time of sentence.
>
> In Atkins v Virginia (536) US 2002 the United States Supreme Court recognised that it is unconstitutional to sentence to death or execute the mentally handicapped – with a suggestion that this covers all those with IQs of 70-75 or less. The judgments of the Supreme Court referred to the existence of an international consensus that the execution of the mentally retarded was inhuman or cruel.

(ii) International consensus:

103. It is submitted that there is a growing and virtually unanimous international consensus that those suffering from significant mental disorder at the time of the offence, or the sentencing stage, or at the time of execution should not suffer the death penalty. The reasoning of the Supreme Court in Atkins v Virginia articulates some of the major reasons for the international norm: -

> "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability. In light of

these deficiencies, the Court's death penalty jurisprudence provides two reasons to agree with the legislative consensus. First, there is a serious question whether either justification underpinning the death penalty – retribution and deterrence of capital crimes – applies to mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability. If the culpability of the average murderer is insufficient to justify imposition of death, see Godfrey v Georgia 446 US 420, 433, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioural impairments that make mentally regarded defendants less morally culpable also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty's deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanour may create an unwarranted impression of lack of remorse for their crimes."

104. As can be seen from this reasoning, the justification for a general prohibition on the imposition of the death penalty on anybody suffering from significant mental disorder is primarily the reduced responsibility of such persons, and the absence of true retributive and deterrent purposes on imposing such a sentence on the mentally abnormal.

(iii) International consensus: Resolutions and decisions of international human rights bodies

105. The United Nations and other Inter-Governmental Organisations (such as the Organization for Security and Co-operation in Europe, OAS, the Council of Europe and European Union) have long recognised the need to protect in general the rights of those with mental disorder. More specifically, there has been explicit focus on the need to pay particular attention to how those with mental disorders are treated in the criminal justice system. As a result, the last quarter of a century has witnessed a growing body of norms and standards that prohibit the execution of persons suffering from mental disorder.

106. With the Declaration on the Rights of the Mentally Retarded, adopted in 1971, the UN began a long history of advocating on behalf of this group. The Declaration calls on nations to recognise the right of the mentally retarded person to protection from degrading treatment and to assure that, "if prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility".

107. Similarly, at the regional level, action has been taken to create politically and legally binding instruments in order to enhance the protection of those with recognised mental disorder. For instance, the Parliamentary Assembly of the Council of Europe in Recommendation 1235 (1994) on Psychiatry and Human Rights refers to a body of case-law developed under the European Convention on Human Rights 1950 on treatment of persons with mental disorders, as well as observations from the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment regarding practices involving placements of psychiatric patients. In 1999, the Organisation of American States' Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, reaffirmed "the inherent dignity and equality" of persons with disabilities. And in 2001, the Inter-American Commission on Human Rights called on members states of the OAS to establish laws that "guarantee respect for the fundamental freedoms and human rights of persons with mental disability...incorporating international standards and the provisions of human rights conventions that protect the mentally ill" in a Recommendation of the Inter-American Commission on Human Rights for the Promotion and Protection of the Rights of the Mentally Ill.

108. With particular regard to the death penalty, the United Nations has taken increasingly assertive measures to protect the mentally retarded from execution. These measures began in 1984 with the Economic and Social Council's adoption of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, of which Safeguard 3 protects "the insane" from execution. The Safeguards were endorsed by the General Assembly in the same year. Five years later the Council clarified that Safeguard 3 includes elimination of the death penalty for "persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." Further, in 1996, the Council reiterated its call for full implementation of the Safeguards, in part because of concerns for the lack of protection from the death penalty of those who are mentally retarded.

109. Since 1997, the United Nations Human Rights Commission, a governmental body made up of representatives from 53 countries, has called on countries that maintain the death penalty to observe the UN Safeguards in the UN document, Question of the Death Penalty. The resolution has since been adopted with stronger language urging retentionist countries "[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person". The language used was changed in the 2005 resolution to protect persons suffering from any form of mental or intellectual disability.

110. Since 1982, the UN Commission on Human Rights also has appointed a Special Rapporteur on Extra judicial, Summary or Arbitrary Execution, whose mandate includes reviewing those countries which still apply the death penalty. In his Annual report of 1994 he states that "International law prohibits the capital punishment of mentally retarded or insane persons", extending the ambit in 1998 (when Ms. Asma Jahanqir took the role) to include the mentally ill, stating "Governments that continue to enforce capital punishment legislation with respect to minors and the mentally ill are particularly called upon to bring their domestic legislation into conformity with international legal standards". She went further in

2002, confirming that she had "intervened in cases where restrictions on the use of death penalty against persons suffering from mental handicap or illness had been violated" and as a consequence there had been some positive developments, such as the State of North Carolina passing a law banning the death penalty for mentally disturbed persons.

111. Further the UN Human Rights Committee has generally found a violation of Article 7 of the ICCPR (prohibition of Torture and inhuman or degrading treatment) in cases concerning lengthy detention on death row, the method of execution and the issuance of execution warrants for mentally incapable persons.

112. As to international instruments at the regional level, including the political agreements of the OSCE, they have also forged a broader approach to the issue of mental disorder in relation to the death penalty. In its Human Dimension Implementation Meeting background paper in 2007 the OSCE stated that, "Those states that have not yet abolished the death penalty should not impose it on people who, at the time of the crime, were under 18 years of age or suffering from any form of mental disorder".

113. It is submitted that to sentence to death a person suffering from mental illness constitutes inhuman and degrading treatment. In order to ensure that those suffering with a mental illness are not sentenced to death independent impartial experts must properly investigate and assess all those charged with the offence of murder where, as is the case in Barbados, the penalty for murder is death. Thereafter there must be the opportunity for the assessment to be considered.

114. In the case of the alleged victim since it is mistakenly regarded as irrelevant to the legality of the sentence no full and proper investigation into the alleged victim's mental state was conducted. It is therefore submitted that in the case of the alleged victim the imposition and maintenance of the death penalty violates the alleged victims rights under Article 5, as the failure exposed him to the possibility of an inhuman and degrading treatment or punishment. Further it violated his Article 8 rights by preventing him from having available evidence relevant to consideration of the lawful sentence.

Conclusion:

115. The alleged victim submits that the evidence of Dr Green demonstrates that the imposition and maintenance of the death penalty in his case would violate the Convention (Articles 5 and 8) given his mental impairment, which was not raised at his trial for lack of funds, and the necessity of the State to provide a psychiatric evaluation prior to imposing and carrying out his execution.

116. The presence of significant mental disorder and the alleged victim's inability to raise this issue due to lack of funds as well as the inability of the state to assess his mental state prior to conviction and sentence is a violation of his right to a fair trial and not to be exposed to inhuman and degrading treatment or punishment. It violates the principle that nobody should be convicted of a capital offence, sentenced to death or executed if they suffer from a significant mental disorder.

REPARATIONS AND COSTS

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

(i) Declaration of violations

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

(ii) Commutation of sentence

119. A direction that the State of Barbados commute the death sentence of the victim and substitute therefore a sentence of life imprisonment with appropriate opportunity to apply for parole.

(iii) Adoption of necessary legislative measures

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

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

122. A direction that the State of Barbados adopts such legislative or other measures as may be necessary to ensure the indigent persons charged with murder are provided with adequate facilities for the conduct of psychiatric/psychological examinations in every case, in compliance with the requirements of the American Convention, including the right to a fair trial under Article 8 and the right to humane treatment under Article 5 of the Convention.

(iv) Compensation

123. In relation to compensation, the alleged victim is aware that the Court has within its discretion the power to order financial compensation in respect of violations. However, in order to emphasise that this action is brought not to enrich the alleged victim, but rather to preserve his life and to secure his humane treatment, he does not seek financial compensation in respect of any violations.

(v) Costs

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

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