ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S114 of 2013**

BETWEEN: **BONANG DARIUS MAGAMING**
Appellant

AND

10 **THE QUEEN**
Respondent

HIGH COURT OF AUSTRALIA
FILED
06 AUG 2013
THE REGISTRY SYDNEY

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSIONS SEEKING LEAVE TO APPEAR AS AMICUS CURIAE

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

20 ### Part II: Basis of appearance as amicus curiae

2. By summons filed on 16 June 2013, the Australian Human Rights Commission (**the Commission**) seeks leave to be heard as *amicus curiae* in this proceeding.[1]

3. The appeal is concerned with the validity of s 236B(3)(c) of the *Migration Act 1958* (Cth), which prescribes a minimum sentence of 5 years imprisonment, in respect of offences committed against s 233C of that Act, which is concerned with the aggravated offence of people smuggling of at least 5 people. The appellant contends essentially that the operation of s 236B(3)(c) offends the separation of judicial and prosecutorial functions, and deprives
30 the offender of his liberty as part of a sentencing process that is arbitrary, and so contrary to accepted notions of judicial power.[2]

4. The Commission seeks leave to make submissions on the following legal issues that arise on the appeal:

   a. the relevance of the common law to the concepts of judicial power, the judicial process contemplated by Ch III of the Constitution, and, more broadly, the rule of law which underpins Ch III;

   b. the influence of international human rights on the development of the common law;

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1 Appeal Book (**AB**) 94.

2 Grounds 2.1 and 2.2 of the Notice of Appeal filed 17 June 2013 [AB 88]. Appellant's Submissions filed 12 July 2013, para 4.

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c. the content of international human rights as they relate to mandatory minimum sentencing regimes; and

d. the relevance of international human rights, as they relate to mandatory minimum sentencing regimes, to the concepts of judicial power, proper judicial process, and the rule of law.

5. The Commission does not seek to be heard in support of any particular party.

Part III: Why leave to appear as *amicus curiae* should be granted

6. Leave to appear as *amicus curiae* should be granted to the Commission in the exercise of the Court's discretion on the basis that the Commission is willing to offer submissions on law that will assist the Court in a way in which it would not otherwise have been assisted.[3] This is demonstrated by the following factors.

7. First, the Commission is an independent body established by the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), which has the statutory function of intervening in legal proceedings that involve human rights issues, where the Commission considers it appropriate to do so and with the leave of the court hearing the proceeding, subject to any conditions imposed by the court.[4] The term "*human rights*" is defined in s 3 of the AHRC Act to include the rights and freedoms recognised in the 1966 *International Covenant on Civil and Political Rights* (**ICCPR**),[5] as the ICCPR applies to Australia, and which Covenant appears as Schedule 2 to the Act.

8. Secondly, the Commission has expertise in relation to: (a) the interpretation and application of Australia's international human rights obligations, including those arising under the ICCPR; and (b) the operation of the mandatory minimum sentencing provisions in the *Migration Act* and in State and Territory legislation, as set out in the affidavit of Professor Gillian Triggs sworn 26 June 2013 at paragraphs 11 to 19.

9. Thirdly, the Commission was granted leave to appear as *amicus curiae* in the Court of Appeal which considered that the submissions of the Commission "*threw a valuable and fundamental perspective on the debate*",[6] and

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3 See *Levy v State of Victoria* (1997) 189 CLR 579 at 604 (Brennan CJ).

4 Section 11(1)(o) of the AHRC Act. The form of appearance proposed is the filing of written submissions (Affidavit of Gillian Triggs, sworn 26 June 2013, para 3 [AB 96]) on the issues outlined in paragraph 23 of that affidavit [AB 99], and otherwise the making of oral submissions if, and to the extent that, this Court considers that it may be of assistance.

5 ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

6 *Karim v R* [2013] NSWCCA 23 at [38] (per Allsop P) [AB 46-47].

"*developed aspects of the Constitutional and international framework not developed by [the appellant below]*".[7]

10. Fourthly, the grounds of appeal are concerned essentially with the nature of judicial power and proper judicial process, and, as developed in the submissions of the appellant filed 12 July 2013, the operation of the rule of law in prohibiting arbitrary or capricious detention (paragraph 4(a)). These grounds implicate fundamental human rights: namely, the prohibition on cruel, inhuman or degrading treatment or punishment (recognised in article 7 of the ICCPR); the prohibition on arbitrary detention (recognised in article 9(1) of the ICCPR); and the guarantee of a fair hearing (recognised in article 14(1) of the ICCPR).

11. The submissions of the appellant do not address the impact of international human rights principles on the sentencing exercise prescribed by s 236B(3)(c), in its application to a person convicted of an offence against s 233C of the *Migration Act*. In that context, the Commission may assist the Court in providing a perspective not offered by other parties, and thereby contribute to the Court's reaching an informed decision. As developed in these submissions below, international human rights jurisprudence is relevant insofar as it impacts on the development of the common law which, in turn, informs the concepts of judicial power, proper judicial process and the rule of law.

12. Finally, it is submitted that any cost to the parties and/or delay consequent upon the grant of leave to hear the Commission would not be disproportionate to the assistance that is proffered.[8]

Part IV: Applicable provisions

13. The Commission adopts the appellant's statement of applicable legislation.

Part V: Issues addressed

14. For the reasons developed below, the Commission makes the following submissions:

    a. First, the common law provides content to the concepts of a fair trial and proper judicial process being aspects of the rule of law, which are protected by implication by Ch III of the Constitution. The precise content of those concepts will change over time in line with contemporary values and standards.

    b. Secondly, international human rights are an important and a legitimate influence on the development of the common law.

    c. Thirdly, international human rights jurisprudence suggests that a sentencing process that does not allow the court to give proper effect

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7 *Karim v R* [2013] NSWCCA 23 at [39] (per Allsop P) [AB 47].

8 See *Levy v State of Victoria* (1997) 189 CLR 579 at 605 (Brennan CJ).

to the individual circumstances of the offence and the offender in determining an appropriate sentence will not constitute a fair trial or proper judicial process.

15. In so submitting, the Commission does not suggest that the imposition of a mandatory minimum sentence will inevitably give rise to a disproportionate outcome, contrary to international human rights. However, such a sentencing process is an anathema to fundamental human rights where it gives rise to the potential for disproportionate outcomes in a context where what is mandated is the loss of liberty.

10 **(a) Relevance of common law to constitutional interpretation**

16. The fundamental principles that determine proper judicial process consistent with the character of the court and the nature and extent of judicial power are drawn from the common law. These principles include equality before the law and a fair trial according to law by a court that is both independent and impartial, and is perceived to be so.[9] These principles are aspects of the rule of law.[10]

17. The separation of the judicial function from the other functions of government advances two constitutional objectives: (i) the guarantee of liberty; and, to that end, (ii) the real and perceived independence and impartiality of Ch III
20 courts.[11] It has long been held that, by implication, s 71, when read with ss 1 and 61 of the Constitution, prohibits the Parliament of the Commonwealth from exercising the judicial power of the Commonwealth.[12] It is this constitutional separation of functions with which we are concerned.

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9 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Nicholas v R* (1998) 193 CLR 173 at 208-209 (Gaudron J). See *Karim v R* [2013] NSWCCA 23 at [111] (per Allsop P) [AB 75].

10 *Green v R* (2011) 244 CLR 462 at [28] (French CJ) (equal justice); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [457] (Kiefel J) (proportionality, in the context of judicial review of legislation for constitutional validity); *Momcilovic v The Queen* (2011) 245 CLR 1 at [22] (French CJ) (proportionality, in the context of determining whether a limit on a human right is 'reasonable'); [382] (Heydon J) (the protection of human rights is commonly thought to be closely connected to the rule of law); [556], [564], [563] (Crennan and Kiefel JJ) (the Constitution does not contain express guarantees to establish individual rights; this was left to the rule of law). The preamble to the post-war 1948 Universal Declaration of Human Rights provides that "*human rights should be protected by the rule of law*". See also *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 at 672; [1976] ECHR 3 at [69] (lawful detention); *Golder v United Kingdom* (1975) 1 EHRR 524 at 589; [1975] ECHR 1 at [34] (fair hearing).

11 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (Jacobs J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), where the determination of criminal guilt is viewed as one of the basic rights necessarily protected and enforced by the judicial branch of government.

12 See, for example, *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at

18. As the court below affirmed,[13] constitutional principles, including those governing the exercise of judicial power, may be interpreted and applied having regard to the changing context of contemporary values.[14] This, in turn, includes international values or standards as reflected in the common law. This is not to suggest that the Constitution must be read to conform to, or so far as possible with, the rules of international law.[15] Rather, later generations may, as a consequence of political, social or economic developments both within and outside Australia, deduce propositions from the words of the Constitution that earlier generations did not perceive.[16] The denotation of those words is not fixed.[17]

19. This was explained by McHugh J in *Al-Kateb v Godwin* as follows:[18]

> No doubt from time to time the making or existence of (say) a[n international] Convention or its consequences may constitute a general political, social or economic development that helps to elucidate the meaning of a constitutional head of power. But that is different from using the rules in that Convention to control the meaning of a constitutional head of power.

20. Chief Justice Gleeson in *Roach v Electoral Commissioner* held that "*changed historical circumstances*" include "*legislative history*".[19] Those circumstances were constitutionally relevant in interpreting the requirement in ss 7 and 24 of the Constitution that the senators and members of the House of Representatives be "*directly chosen by the people*" of the State or the Commonwealth respectively. They indicated a constitutional protection of

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97 and 98 (Dixon J); *The Queen v Davison* (1954) 90 CLR 353 at 364-365 (Dixon CJ and McTiernan J), 380-381 (Kitto J); *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 249-50 (Mason J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ), 54-55 (Gaudron J), 66 (McHugh J).

13 *Karim v R* [2013] NSWCCA 23 at [108]-[109] (per Allsop P) [AB 74-75].

14 *Victoria v Commonwealth* (1971) 122 CLR 353 at 396-397 (Windeyer J); *Cheatle v The Queen* (1993) 177 CLR 541 at 549, 552 and 560-561; *Singh v Commonwealth* (2004) 222 CLR 322 at 335 [18], 340 [27] (Gleeson CJ), at 385 [159]-[160] (Gummow, Hayne and Heydon JJ), at 413 [249] (Kirby J); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [6]-[7] (Gleeson CJ).

15 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 592-594 [69] and [71] (McHugh J).

16 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 593 [69] (McHugh J).

17 *Victoria v Commonwealth* (1971) 122 CLR 353 at 399 (Windeyer J); *Singh v Commonwealth* (2004) 222 CLR 322 at 413 [249] (Kirby J).

18 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 593-594 [71] (McHugh J). One example of this practice, cited by McHugh J in *Al-Kateb* at [72] is *Lawrence v Texas* 539 US 558 (2003). For other more recent examples of such practice by the US Supreme Court, see *Graham v Florida* 560 US __ (2010); 130 S.Ct. 2011 and *Miller v Alabama* 567 US __ (2012); 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

19 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7] (Gleeson CJ).

universal adult suffrage, notwithstanding that in 1901 those words did not mandate that standard.[20]

21. As Gleeson CJ explained in *Singh v Commonwealth*:[21]

> It is in the nature of a written, federal Constitution that a division of governmental power, necessarily involving limitations upon such power, agreed upon in the past, binds future governments. That the terms of the agreement were to have that future operation is a matter relevant to an understanding of their meaning, but the role of a court is to understand and apply the meaning of the terms, not to alter the agreement.

22. Furthermore, in explaining that meaning is always influenced, and sometimes controlled, by context, the Chief Justice held (at [12]) that 'context':

> ... includes the whole of the instrument, its nature and purpose, the time when it was written and came into legal effect, other facts and circumstances, including the state of the law, within the knowledge or contemplation of the framers and legislators who prepared the Constitution or secured its enactment, and developments, over time, in the national **and international** context in which the instrument is to be applied. (emphasis added)

23. The Chief Justice concluded (at [18]) that: "*Changing times, and new problems, may require the Court to explore the potential inherent in the meaning of the words, applying established techniques of legal interpretation*".[22]

24. Equally, in determining whether the Parliament is impermissibly interfering with the character of a court as a Ch III court or with the exercise of judicial power, developments in the national and international context may provide meaning to the proper judicial process and function.

25. These principles mark the proper limits within which international law is brought to bear upon the interpretation and application of constitutional principles: that is, with a view to determining the validity or otherwise of an exercise of legislative power, rather than giving effect to human rights.

(b) Relevance of international law to the development of the common law

26. Accordingly, in the circumstances outlined above, it is appropriate for the court to have regard to developments in international law in interpreting the meaning of terms in the Constitution and as a legitimate influence upon the common law, notwithstanding that the common law relevantly here

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20 See also *Mulholland v Australian Electoral Commissioner* (2004) 220 CLR 181 at 261 [232]-[233] (Kirby J).

21 *Singh v Commonwealth* (2004) 222 CLR 322 at [6] (Gleeson CJ).

22 See also *Singh v Commonwealth* (2004) 222 CLR 322 at [37] (McHugh J); [249] (Kirby J); cf. Callinan J at [295].

determines the content of judicial power and proper judicial process protected by Ch III of the Constitution.

27. Thus, it has long been recognised that the development of common law principles is susceptible to the influence of international customary law and treaty obligations.[23] As Brennan J stated in *Mabo v Queensland [No 2]*:[24]

> The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

28. In *R v Greer*, Kirby P stated that the basic rights expressed in the ICCPR are rights that the common law in Australia will ordinarily respect.[25] Those rights are of significance in determining what the common law provides.[26]

29. Recognising the impact of the modern development of human rights on constitutional standards is not unfamiliar to common law countries. In the context of considering the effect of the prohibition on cruel and unusual punishment in the Eighth Amendment to the Constitution to invalidate

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23 *Dietrich v The Queen* (1992) 177 CLR 292 at 306-307 (Mason CJ and McHugh J: the approach at international law was similar to that which the Australian common law must take); 319-321 (Brennan J: responsibility for keeping common law consonant with contemporary values); 337 (Deane J: trial will be unfair if does not accord with Covenant right); 360 (Toohey J: where the common law is unclear, an international instrument may be used by a court as a guide to that law); 373-374 (Gaudron J: drawing upon comparative law on the question of legal representation); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 499 (Mason CJ and Toohey J).

24 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (Brennan J, with whom Mason CJ and McHugh J agreed). His Honour held (at 42) that a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration as it is contrary both to international standards and to the fundamental values of the common law to entrench such a discriminatory rule. It has also been said that where the common law is uncertain, the Court should prefer an answer in conformity with international norms: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 688E (Gleeson CJ), 699D, 709F (Kirby P). It would be incongruous that Australia should adhere to the Covenant unless Australian courts recognise the entitlements contained therein: *Dietrich v The Queen* (1992) 177 CLR 292 at 321 (Brennan J).

25 *R v Greer* (1992) 62 A Crim R 442 at 450. In *Australian National Industries Ltd v Spedley Securities & Ors* (1992) 26 NSWLR 411 at 418E, Kirby P stated that the High Court evidenced a clear tendency to uphold the very high standards of manifest neutrality and impartiality which are to be observed by every judicial officer in the courts of Australia, but that such instruction does no more than to reflect a "*fundamental principle of the international law of human rights*", namely Article 14(1) of the Covenant (see below).

26 See *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540 at 558C (Kirby P). His Honour also refers to the common law as "*illuminated by international principles of human rights*" (*Director of Public Prosecutions for the Commonwealth v Saxon* (1992) 28 NSWLR 263 at 274D).

legislative provisions requiring the imposition of mandatory minimum sentences that are grossly disproportionate to the gravity of the conduct, the United Supreme Court has had regard to international human rights standards:

> The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But '[t]he climate of international opinion concerning the acceptability of a particular punishment' is also 'not irrelevant'. [27]

30. Similarly, in *Miller v Alabama*, Kagan J delivering the opinion of the Court held: [28]

> The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions'. ... That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense. ... As we noted the last time we considered life-without-parole sentences imposed on juveniles, "[t]he concept of proportionality is central to the Eighth Amendment." ... And we view that concept less through a historical prism than according to "the evolving standards of decency that mark the progress of a maturing society".

31. The sentencing exercise prescribed by s 236B(3) (in its application to offences committed under s 233C) of the *Migration Act* raises issues relating to human rights in relation to which Australia, as a result of ratifying a number of international human rights treaties (including the ICCPR) has assumed obligations to "*respect and to ensure*" to all individuals within its territory and subject to its jurisdiction (article 2(1) of the ICCPR). In this regard, consistently with the submissions earlier made, it is accepted that ratification of an international treaty does not *per se* translate directly into municipal law. Rather the point is that, the ensuing international obligations may influence the common law.

(c) Consideration of relevant human rights in international jurisprudence

32. International human rights principles encompass the prohibition of arbitrary detention, and of cruel, inhuman or degrading treatment or punishment, as well as the guarantee of fair hearing. These principles are concerned both

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27 *Graham v Florida* 560 US __ (2010); 130 S.Ct. 2011 at 2033, 2034 (2010) (citations omitted) (Kennedy J, in a joint judgment with Stevens, Ginsburg, Breyer and Sotomayor JJ, Roberts CJ concurring). In that case, the Supreme Court held that the Eighth Amendment prohibits the imposition of a sentence of life imprisonment without parole on a juvenile who did not commit a homicide.

28 *Miller v Alabama* 567 US __ (2012) at 6; 132 S.Ct. 2455, 183; L.Ed.2d 407 (2012) (citations omitted) (Kagan J, in a joint judgment with Kennedy, Ginsburg, Breyer and Sotomayor JJ). The Court held that the Eighth Amendment prohibits the imposition of a mandatory sentence of life imprisonment without parole (for any offence); cf. *Graham v Florida* 560 US __ (2010); 130 S.Ct. 2011.

with the appropriate body to determine sentence, as well as the (rational or proportionate) correlation of the sentence with the circumstances of the offence and the offender. As the Court below acknowledged, there is symmetry between common law norms inhering in the exercise of judicial power and norms that now characterize international human rights.[29] The application of those norms by foreign and international bodies suggests that the imposition of a mandatory minimum sentence is inconsistent with the principles that safeguard the rule of law.

(i) Prohibition of cruel, inhuman or degrading treatment or punishment

33. The assessment of proportionality in sentencing is informed by consideration of the prohibition in article 7 of the ICCPR, namely that:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*[30]

34. A review of international authority reveals that a mandatory sentence has the inherent potential to be "*grossly disproportionate*" to the gravity of the crime at the moment of its imposition where it does not permit the sentencing judge to consider mitigating factors indicating a significantly lower level of culpability on the part of the defendant (that is, those factors are disregarded to the extent that they might reduce the level of culpability below the statutory minimum). This was considered recently by the European Court of Human Rights in *Vinter & Ors v United Kingdom* [2012] ECHR 61 in the context of article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (**European Convention**)[31] which prohibits inhuman or degrading punishment (the equivalent of article 7 of the ICCPR) "*or equivalent constitutional norms*" to article 3.[32]

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29 *Karim v R* [2013] NSWCCA 23 at [119] (per Allsop P) [AB 77].

30 In *R v Boyd* (1995) 81 A Crim R 260, in determining the question of severity of sentence, Gleeson CJ considered (at 260-269) that, while the prohibition of cruel and unusual punishment was to be found in the *Bill of Rights 1688* (UK), which was in force in New South Wales as a result of the *Imperial Acts Application Act 1969* (NSW), if the punishment in question were cruel and unusual, then the appellant would be entitled to succeed on ordinary principles, without resort to the Bill of Rights.

31 *Convention for the Protection of Human Rights and Fundamental Freedoms*, commonly referred to as the European Convention on Human Rights, opened for signature by the member States of the Council of Europe 4 November 1950, entered into force 3 September 1953.

32 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012). The *Criminal Justice Act 2003* (UK) directed the trial judge to determine the minimum non-parole term for a prisoner receiving a life sentence. Schedule 21 contained three different 'starting points' based on characteristics of the offence that could be increased or decreased based on the presence of aggravating or mitigating factors. This was an appeal from three people who had been given 'whole of life' terms, meaning that they could not be released from prison, other than at the discretion of the Home Secretary on compassionate grounds (such as terminal illness or serious disability) (at 2 [8]). In the circumstances of the instant case, the imposition of a mandatory life sentence without the possibility of parole was found not to violate Article 3 of the European Convention. It was held that the sentences were

35. The European Court of Human Rights noted that "*gross disproportionality*" is a widely accepted and applied test for determining when a sentence will amount to inhuman or degrading punishment (or equivalent constitutional norms).[33] The same formulation has been used in Canada, South Africa, the United States and other common law countries.[34] While it will only be on rare occasions that the test will be met,[35] the Court indicated that:

> The vice of any mandatory sentence is that it deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court.[36]

10 36. The Court considered that a mandatory sentence of life imprisonment without the possibility of parole is not *per se* incompatible with the European Convention.[37] Rather, such a sentence is:

> *...much more likely to be grossly disproportionate than any of the other types of life sentences, especially if it required the sentencing court to disregard mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant.*

37. Notwithstanding that, in the present case, we are not concerned with a mandatory sentence of life imprisonment, the point remains that the

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effectively discretionary (rather than mandatory) life sentences and it could not be said (nor was it submitted by the applicants) that the sentences were grossly disproportionate to the gravity of their crimes (at 29 [94] and 30 [95]).

33 The European Court of Human Rights surveyed the relevant international and comparative law at [55]-[73].

34 The test of "*gross disproportionality*" is applied by the Supreme Court of Canada (in application of s 12 of the Canadian Charter of Rights and Freedoms, which provides that everyone has the right not to be subjected to cruel and unusual treatment or punishment): see, for example, *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 (a mandatory minimum sentence of 7 years imprisonment for a narcotics offence was found to be grossly disproportionate); *R v Latimer* [2001] 1 SCR 3 (a mandatory minimum sentence of life imprisonment without eligibility for parole for 10 years for murder was not considered grossly disproportionate). See also the Constitutional Court of South Africa in, for example, *Dodo v The State* 2001 (3) SA 382 (5 April 2001) (Ackerman J) (statutory provision which required High Court to impose life sentence for murder in certain aggravated circumstances unless "*substantial and compelling circumstances*" existed did not infringe the separation of powers principle). The US Supreme Court has followed a similar approach in consideration of the Eighth Amendment (prohibiting cruel and inhuman punishment) in, for example, *Harmelin v Michigan* 501 US 957 (1991) (imposition of mandatory term of life in prison without possibility of parole for cocaine possession was not unconstitutional); *Solem v Helm* 463 US 277 (1983) (mandatory life sentence without the possibility of parole for a seventh non-violent felony, viz. knowingly passing a bad cheque for $100, amounted to cruel and unusual punishment). The principle has been applied by the High Court of Namibia, for example: *S v Vries* [1996] NAHC 20 (A mandatory minimum sentence of 3 years imprisonment for a second or subsequent conviction for theft of a goat was "*disturbingly inappropriate*" where in the particular circumstances a sentence of 6 months was appropriate (and which circumstances did not, in any event, warrant a sentence in excess of 9 months), and where such disparity was "*likely to arise commonly*". The provision was read down; that is, declared to be of no force and effect in relation to a particular class of cases.).

35 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [88]-[89].

36 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [93].

37 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [93].

imposition of a mandatory minimum sentence offends the norm or right protected in article 7 of the ICCPR to the extent that such a law deprives the defendant of the opportunity to put (and deprives the sentencing judge of the power to give proper effect to) mitigating circumstances of the offence and the offender which might otherwise reduce the sentence of imprisonment or non-parole period below the statutory minimum, or perhaps have led to the imposition of a non-custodial sentence.

38. Courts applying the statutory or constitutional equivalents to article 7 of the ICCPR have held a mandatory minimum sentence of seven years for narcotics offences,[38] and 3 years for a first time firearms offence, to be grossly disproportionate constituting cruel and inhuman punishment, and otherwise an arbitrary deprivation of life (contrary to statutory equivalents of article 9(1) of the ICCPR, see further below).[39]

39. In *R v Smith*, the Supreme Court of Canada struck down s 5(2) of the *Narcotic Control Act* which provided for a mandatory minimum sentence of seven years imprisonment for the importation of narcotic drugs.[40] The case was decided on the basis of the application of s 12 of the *Canadian Charter of Rights and Freedoms* (the right not to be subjected to any cruel and unusual treatment or punishment).

40. The majority considered that a mandatory minimum sentence could contravene s 12 of the Charter where there was disproportionality between

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38 *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 (a mandatory minimum sentence of 7 years imprisonment for a narcotics offence was found to be grossly disproportionate).

39 **Section 12 Canadian Charter of Rights and Freedoms**: Provisions of the *Criminal Code of Canada* have been found to be invalid, including s 95(2)(a)(i) (which provided for a three year minimum sentence in the case of a first offence for possession of a loaded prohibited firearm or restricted firearm): *R v Smickle* [2012] ONSC 602 (the trial judge found that the defendant found a gun in his cousin's apartment and was 'showing off' by taking a photograph using his laptop of himself holding the gun 'for the benefit of his friends on Facebook' when a raid of the apartment was conducted by police). This judgment was followed in *R v TAP* [2013] ONSC 797, which involved an offence against the same provision of the code (the mandatory minimum was not imposed; the court imposed a sentence of 90 days imprisonment, to be served intermittently on weekends, followed by three years of probation, including a strong element of community service). An appeal against *R v Smickle* has been heard by the Court of Appeal for Ontario. Judgment is reserved. Section 99(2)(a) of the *Criminal Code* (which provided for a three year minimum sentence for weapons trafficking in the case of a first offence) has also been held to be invalid: *R v Lewis* [2012] ONCJ 413 (the trafficking charge involved an offer by the defendant to sell a gun to an undercover police detective when he did not have a gun to sell). **Eighth Amendment to the US Constitution**: The principle of proportionality has also been held to be available in the United States in the context of sentences for a term of years: See *Harmelin v Michigan* 501 US 956 (1991) at 998. However, outside the context of capital punishment cases, successful challenges in the United States based on proportionality are exceedingly rare: See *Harmelin v Michigan* 501 US 957 (1991) at 1001, citing *Solem v Helm* 463 US 277 (1983) at 289-90 and *Rummel v Estelle* 445 US 263 (1980) at 272.

40 *R v Smith* [1987] 1 SCR 1045 (Dickson CJ and Lamer J, with whom Wilson, Le Dain and La Forest JJ agreed). This decision has been reaffirmed in a unanimous judgment of the Supreme Court in *R v Ferguson* [2008] 1 SCR 96.

the mandatory sentence and the gravity of the range of conduct described by the offence. Dickson and Lamer J considered that the phrase "*cruel and unusual*" was a "*compendious expression of a norm*",[41] which encompassed the notion of the arbitrary imposition of a sentence.[42] It was held that s 5(1) of the *Narcotic Control Act* cast a 'wide net' in that it covered numerous substances of varying degrees of dangerousness, and totally disregarded the quantity of the drug imported, the purpose for which it was imported and whether or not the offender had any prior convictions.[43] As such, it was "*inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate*".[44] Their Honours continued: "*This is what offends s 12, the certainty, not just the potential.*" That is to say, while it is possible that a proportionate sentence may be imposed in the individual case, a sentencing regime that mandates a minimum sentence in relation to a broad range of conduct may lead to disproportionate outcomes. That result is envisaged by the regime itself.

41. The Constitutional Court of South Africa in *S v Dodo* considered the validity of a law that provided for imprisonment for life for particular offences unless the court was satisfied that "*substantial and compelling circumstances*" existed.[45] Justice Ackermann (delivering the judgment of the court) had regard to the guarantees of fundamental rights in the South African Constitution,[46] and also to the principle of the separation of powers and the requirements of the rule of law. On that basis, the court held that, while both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences, the concomitant authority of the other branches of government in the field of sentencing must not infringe the authority of the courts.[47] In that regard:

> In the field of sentencing ... it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state. It would *a fortiori* be

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41 *R v Smith* [1987] 1 SCR 1045 at 1067, citing the Court's decision in *Miller and Cockriell v The Queen* [1977] 2 SCR 680. See also *S v Dodo* 2001 (3) SA 382 (CC) at [35].

42 *R v Smith* [1987] 1 SCR 1045 at 1068 (& 1074), citing Professor Tarnopolsky, 'Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?' (1978) 10 *Ottowa Law Review* 1 at 32-33.

43 *R v Smith* [1987] 1 SCR 1045 at 1078 (Dickson CJ and Lamer J).

44 *R v Smith* [1987] 1 SCR 1045 at 1078 (Dickson CJ and Lamer J).

45 *S v Dodo* 2001 (3) SA 382 (CC).

46 The rights considered relevant to this analysis were the right not to be treated or punished in a cruel, inhuman or degrading way (s 12(1)(e) of the Constitution); the right to a fair trial (s 35(3)); and the right not to be deprived of freedom arbitrarily or without just cause (s 12(1)(a)): *S v Dodo* 2001 (3) SA 382 (CC) at [26] and footnote 30. These rights are the equivalent of articles 7, 9 and 14 of the ICCPR.

47 *S v Dodo* 2001 (3) SA 382 (CC) at [33.2], [33.3].

> so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights.[48]

42. The court held that "*the concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading*":[49]

> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed.[50]

43. Even in the absence of 'gross disproportionality', the European Court of Human Rights in *Vinter & Ors v United Kingdom* considered that an issue will arise for the purpose of the prohibition of cruel, inhuman or degrading punishment, if it can be shown that: (i) the applicant's continued sentence can no longer be justified on any penological ground; and (ii) the sentence is irreducible *de facto* and *de iure.*[51]

44. Consequently, notwithstanding the Court's assessment of 'gross disproportionality' on a case-by-case basis, the Court indicated that the article 3 prohibition may nevertheless be contravened where the sentence cannot be justified and that sentence is irreducible. In any event, the assessment of proportionality in the context of the article 3 prohibition related exclusively to the impact upon the offender,[52] such as to warrant cruel or inhuman punishment. It does not limit the assessment of proportionality in

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48 *S v Dodo* 2001 (3) SA 382 (CC) at [26].

49 *S v Dodo* 2001 (3) SA 382 (CC) at [36].

50 *S v Dodo* 2001 (3) SA 382 (CC) at [38].

51 *Vinter & Ors v United Kingdom* [2012] ECHR 61(17 January 2012) at [93]. This approach is followed in the United Kingdom: see, for example, *R (Wellington) v Secretary of State for the Home Department* [2009] 1 AC 335 (House of Lords) (a mandatory life sentence without possibility of parole was *de jure* reducible where the governor had the power to pardon a prisoner or commute the sentence to one of imprisonment with the possibility of parole).

52 See the Joint Partly Dissenting Opinion of Judges Garlicki, David Thor Bjorgvinsson and Nicolaou in *Vinter & Ors v United Kingdom* [2012] ECHR 61, who held that there was a "*procedural infringement*" by reason of the absence of some mechanism that would remove the hopelessness inherent in a sentence of life imprisonment from which, independently of the circumstances, there is no possibility whatsoever of release while the prisoner is still well enough to have any sort of life outside of prison. While this assessment focuses on the impact on the offender, as warranted by consideration of violation of article 3 of the European Convention, their Honours suggested a systemic violation of the provision (at the point of imposition of the sentence) where the individual circumstances of the offender bear no relevance to continuity of punishment.

other cases referred to above, or in the context of *other* international human rights, which are considered below.

(ii) Prohibition of arbitrary detention

45. The assessment of proportionality is also informed by the right enshrined in article 9(1) of the ICCPR, which provides that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

46. The core notion in article 9(1) is that of the *arbitrary* deprivation of liberty. The United Nations Human Rights Committee has taken the view that the 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include such elements as inappropriateness, injustice and lack of predictability.[53] This Court has affirmed this interpretation,[54] and has also accepted the operation of the judicial process as a necessary safeguard against arbitrary outcomes.[55]

47. This is where the notion of proportionality is critical. Thus, in terms of the exercise of judicial discretion, where there is no rational or proportionate correlation between the deprivation of liberty (in the present case, in terms of the imposition of a custodial sentence) and the circumstances of the offence and the offender (relevantly by virtue of the fact that no such assessment is permitted by the statutory sentencing regime in relation to the minimum sentence and non-parole period), it can be said that the deprivation of liberty is arbitrary. This is to be distinguished from the imposition of a mandatory maximum penalty, where the court will never be directed to negate or diminish an offender's liberty where the court does not see it as warranted (that is, as rational or proportionate to the offence committed). The right to liberty and security of person is well known to the common law, having been described as "*the most elementary and important of all common law rights*".[56]

48. Moreover, the deprivation may be characterised as arbitrary at the point of the statutory imposition of the minimum sentence. In other words, the question of proportionality or 'arbitrariness' need not be assessed on a case-by-case basis in terms of the severity of the particular sentence imposed, but can in this context be determined *a priori*.[57]

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53 *Val Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 (1990) at [5.8]; *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (1997) at [9.2].

54 *Mabo v Queensland* (1988) 166 CLR 186 at 217 (Brennan, Toohey and Gaudron JJ)

55 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496-497 (Gaudron J).

56 *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J).

57 *R v Ferguson* [2008] 1 SCR 96 at [73]-[74], where the Supreme Court of Canada eschewed a case-by-case approach and held that, if a law providing for a mandatory minimum sentence is found to violate the *Charter*, it should be declared inconsistent with

(iii) Guarantee of a fair hearing and equality before the law

49. The assessment of equal justice and the characterisation of the court as "*independent and impartial*" is informed by the stipulation in article 14(1) of the ICCPR, that:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

50. In providing its general comment on article 14, the United Nations Human Rights Committee stated that:[58]

> The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguarding the rule of law.

51. The right to equality before the law and a fair trial is enshrined in many international human rights instruments,[59] and is essential to the maintenance of a free and democratic society based on the rule of law.[60] For example, article 2.02 of the Universal Declaration on the Independence of Justice (cited *inter alia* by Gleeson CJ in *Northern Aboriginal Legal Aid Service Inc v Bradley)*[61] states that:

> Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

52. It has been held that this human right requires both a rational or proportionate correlation between the sentence and the circumstances of the offence and offender:

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the *Charter* and hence of no force and effect under s 52 of the *Constitution Act, 1982*. However, in the instant case, the mandatory minimum sentence was found *not* to constitute cruel and unusual punishment.

58 United Nations Human Rights Committee, General Comment No. 32, CCPR/C/GC/32 (23 August 2007), para 2.

59 For example, article 10 of the 1948 Universal Declaration of Human Rights (UN Doc. A/811) provides: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."* See *Johnson v Johnson* (2000) 201 CLR 488 at [38]-[39] (Kirby J).

60 *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 at [34]; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at [9]-[10].

61 (2004) 218 CLR 146 at [3]. See also *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 at [35].

a. so as to provide for equal justice, which requires identity of outcome in cases that are relevantly identical, and a different outcome in cases that are relevantly different; and

b. so as to ensure that the *judiciary* determines the appropriate custodial sentence in accordance with the requirement of a fair hearing by an independent and impartial tribunal, the sentencing function being a classical exercise of judicial power.

53. Thus, in the context of the discretionary imposition by the Home Secretary of a minimum non-parole period for murder ('the tariff') pursuant to s 29 of the *Crime (Sentences) Act 1997* (UK), the House of Lords has held that, notwithstanding that the Constitution of the United Kingdom has "*never embraced a rigid doctrine of separation of powers*",[62] article 6(1) of the European Convention on Human Rights[63] (the equivalent of article 14(1) of the ICCPR) "*requires effective separation between the courts and the executive, and further requires that what can in shorthand be called judicial functions may only be discharged by the courts*".[64]

54. To that end, the House of Lords considered that in fixing the tariff, the Home Secretary "*assesses the term of imprisonment which the offender should serve as punishment for his crime*". The Court concluded that this was a "*classical sentencing function*" and could not be performed by the Home Secretary as a member of the executive.[65] Accordingly, s 29 of the *Crime (Sentences) Act* was held to be incompatible with article 6(1) of the European Convention.[66] Lord Steyn said that:

> ...it has long been settled in Australia that the power to determine responsibility for a crime, and punishment for its commission, is a function which belongs exclusively to the courts. ... The underlying idea, based on the rule of law, is a characteristic feature of democracies. It is the context in which article 6(1) of the ECHR should be construed.[67]

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62 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 886 [39] (Lord Steyn).

63 Article 6(1) of the European Convention provides that: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

64 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 886 [40] (Lord Steyn).

65 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 876E [13] (Lord Bingham). See also at 892C-D [52] (Lord Steyn); 899F [76] and 900D [78] (Lord Hutton).

66 This led to the enactment of Chapter 7 of the *Criminal Justice Act 2003* (UK) and schedules 21 and 22 to that Act, which were the subject of the consideration of the European Court of Human Rights in *Vinter & Ors v United Kingdom* [2012] ECHR 61 (17 January 2012).

67 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 891C-D [50] (Lord Steyn).

55. The finding of incompatibility in that case was based on the determination by the Home Secretary of the minimum period of a sentence following conviction (albeit taking into account the circumstances of the offender). Equally, it must follow that the determination by the legislature of a minimum period of sentence *prior to* conviction in circumstances that deny the sentencing court the power to determine a minimum sentence based on the individual circumstances of the offence and the offender offends the separation of powers and is contrary to the human right enshrined in article 14(1) of the ICCPR.

(f) Conclusion

56. A consideration of relevant international jurisprudence leads to the conclusion that a sentencing exercise that prevents a court from giving proper effect to the individual circumstances surrounding the offence and the offender in determining an appropriate sentence constitutes a violation of the rights guaranteed by articles 7, 9(1) and 14(1) of the ICCPR. These articles enshrine rights that equally form part of the common law of Australia, and receive constitutional protection against legislative impairment to the extent that they speak to the guarantee of liberty, the independence of Ch III courts, and, more broadly, the rule of law. As such, the assessment of proportionality undertaken by foreign and international bodies in the context of articles 7, 9 and 14 of the ICCPR, is instructive in determining the application of those constitutional principles.

Part VI: Timing of oral submissions

57. The Commission seeks leave to file written submissions and to supplement those submissions with oral argument of approximately 10-15 minutes. In the alternative, it seeks leave only to file written submissions.[68]

Dated: 5 August 2013

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[68] The Commission originally intimated that leave was sought only to file a written submission as *amicus curiae*, and if the Court considered it may be of assistance, to supplement those submissions with oral argument: Affidavit of Gillian Triggs sworn 26 June 2013, para 3 [AB 96]. On reflection, however, it was considered that it would be of assistance briefly to address the Court, as is now indicated in these submissions.