IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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Case 12.480

LENNOX BOYCE — First alleged victim

JEFFREY JOSEPH — Second alleged victim

FREDERICK ATKINS (Deceased) — Third alleged victim

MICHAEL HUGGINS — Fourth alleged victim

AND

BARBADOS — State Party

SUPPLEMENTARY WRITTEN SUBMISSIONS OF THE ALLEGED VICTIMS

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[1] INTRODUCTION

1. The purpose of these supplementary submissions is to indicate the nature of the alleged victims' response to two specific issues raised for the first time in the written submissions of the State party:
   (i) the State's contention that its status as a persistent objector to any prohibition on the mandatory death penalty is relevant to the task this Court is called on to perform, and
   (ii) the State's submissions in relation to the international legal rules of treaty interpretation and their effect on the interpretation of articles 4, 5 and 8 of the American Convention.

2. The alleged victims do not seek at this stage to provide supplementary submissions on any other issue raised in the State's written submissions. This is in no way an indication that the other aspects of the State's written submissions are accepted by the alleged victims: their

position remains as set out in their previous written submissions to this Court dated 17th October 2006 and in their petition to the Commission dated 3rd September 2004. 0000471

[2] THE IRRELEVANCE OF THE STATE PARTY'S CLAIM TO BE A PERSISTENT OBJECTOR

3. At paragraph 175 of its written submissions, the State party seeks to argue that "no evidence has been presented, and ... in fact *no such evidence could be presented*, to support either a global or regional customary international legal rule that prohibits either mandatory capital punishment or the death penalty *per se*." At paragraph 198, the State party submits: "In the alternative, even if such a customary rule prohibiting mandatory capital punishment had come into being – which the State expressly denies – such a rule nevertheless would not affect Barbados as she has persistently objected to being bound by any such rule."

4. It is respectfully submitted that the above submissions, developed at pages 68-89 of the State party's document, wholly miss the point of what this Court is being asked to decide. Neither the Commission, nor the alleged victims have sought any declaration or other relief from this Court in respect of breaches of customary international law; their complaints are of violations of articles1, 2, 4, 5 and 8 of the American Convention.

5 The breaches of the Convention complained of do not depend on there having been breaches of customary international law: the Convention is an instrument, to which State parties, including the State of Barbados, have voluntarily acceded, specifically to secure "the protection of the basic rights of individual human beings"[1]; this is not dependent on such individual rights already subsisting as a matter of customary international law.

6 This Court is the authoritative body in respect of the meaning and content of the rights enshrined in the American Convention [Article 62 of the Convention and Article 1 of the Statute of the Inter-American Court of Human Rights]. The State of Barbados, as it accepts at paragraph 33 of its written submissions, has both ratified the American Convention[2] and accepted the jurisdiction of this Court[3]. The consequence of these steps, as article 62(1) of the Convention makes clear, is that the State party "recognizes as binding, ipso facto, and

[1] *The Effect of Reservations on the Entry into Force of the American Convention* (arts. 74 and 75) I/A Court HR, Advisory Opinion OC-2/82 of September 24, 1982. Series A No 2. para 29
[2] On 27 November 182.
[3] On 4 June 2000

not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention."

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7. The question as to whether this provision automatically precludes the State party from challenging, as it has sought to do, the Court's approach to the interpretation or application of the Convention on grounds of *ultra vires* is considered below. However, in relation to the issue of "persistent objection", it is clear that there is no provision of either the Convention or the Charter of the Organization of American States which provides for a State party lawfully to avoid its obligations under those instruments on the basis of persistent breach.

8. In these circumstances, while the State Party's arguments in respect of the status of the mandatory death penalty in customary international law are not accepted by the alleged victims[4], it is submitted that this is not an issue that this Court is presently required to resolve: the issue in this case is whether the mandatory death penalty in Barbados contravenes articles 4, 5 and 8 of the American Convention[5]. The alleged victims respectfully submit that it does, for all of the reasons set out in their previous written submissions; in the application of the Commission in this case; and in the previous jurisprudence of this Court and of the Commission[6]. The matter of the State party's persistent objection to any rule of customary international law is irrelevant to this issue.

[3] THE INTERNATIONAL LEGAL RULES OF TREATY INTERPRETATION AND THEIR APPLICATION IN THE PRESENT CASE

9. At paragraphs 108 of its written submissions, the State party submits that:

> "...according to the internationally recognised rules of treaty interpretation the mandatory death penalty remains legally permissible under the Charter of the Organization of American States (as interpreted by the American Declaration of the

[4] An affidavit sworn by Professor Roger Hood is served with these submissions setting out evidence in rebuttal of the State party's claims in respect of global state practice concerning the death penalty.

[5] And whether the State party's failure to amend its laws to avoid such breaches is in contravention of articles 1 and 2 of the Convention.

[6] *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)); *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; *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).

> Rights and Duties of Man), and the American Convention on Human Rights. To the extent that this Honourable Court and the Inter-American Commission on Human Rights have suggested otherwise in their jurisprudence in the past, Barbados respectfully submits that these decisions are incorrect as a matter of law."

10. The State party founds this submission on the contention that the Court and the Commission have "applied improper standards in the past when interpreting the *OAS Charter* and *American Convention*."[7] In short, Barbados contends that the Court and the Commission, in their previous jurisprudence on the subject of the death penalty, have failed to apply the international legal rules of treaty interpretation and as such have been *ultra vires* their competence as treaty-based organs. The State sets out its submissions as to the nature of these international legal rules at paragraphs 54-101 of its written submissions.

11. The alleged victims submit that the State's argument is manifestly unfounded for the following reasons.

12. First, it is well established that this Court "as with any other international organ with jurisdictional functions, has the inherent authority to determine the scope of its own competence."[8] It is therefore only if the Court, in the previous decisions which the State party seeks to impugn, had failed to address itself to the requirements of the international legal rules of treaty interpretation that any argument could arise as to the vires of those decisions. However, it is absolutely plain from the text of those decisions that, not only did the Court consider the rules on which the State party purports to rely, but it expressly applied them.

In its *Advisory Opinion on Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*[9] this Court expressly states:

> "48. The manner in which the request for the advisory opinion has been framed reveals the need to ascertain the meaning and scope of Article 4 of the Convention, especially paragraphs 2 and 4, and to determine whether these provisions might be interrelated. To this end, the Court will apply the rules of interpretation set out in the Vienna Convention, which may be deemed to state the relevant international law principles applicable to this subject. [emphasis added]

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[7] Written submissions of the State party at paragraph 109

[8] *Hilaire, Constantine and Benjamin et al. v Trinidad and Tobago*, Judgment of June 21, 2002, paras. 17-19 and the footnotes thereto.

[9] OC-3/83 of September 8, 1983

> 49. These rules specify that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." [Vienna Convention, Art. 31(1)] Supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of the foregoing provisions, or when it leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. (Ibid. Art. 32)"

13. It is in light of its acknowledgement of these principles of interpretation and not in spite of them, as the State party contends, that this Court went on to conclude that.

> "52. The purpose of Article 4 of the Convention is to protect the right to life. But this article, after proclaiming the objective in general terms in its first paragraph, devotes the next five paragraphs to the application of the death penalty. The text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned "

14. Similarly, in the case of *Hilaire, Constantine and Benjamin*[10], the Court referred to "the general rules of treaty interpretation enshrined in Article 31(1) of the [Vienna Convention]"[11]. It is right that this reference was expressly in relation to the Court's function in interpreting the scope of its own jurisdiction under article 62 of the Convention, rather than in relation to its interpretation of article 4. However, it is inconceivable that, in the course of the same judgment, the Court would have expressly acknowledged its interpretative obligations in respect of one article of the Convention and then disregarded their application in respect of another.

15. In any event, it is plain from the Court's analysis of articles 4(1) and (2) of the Convention, that it based its reading of those provisions squarely on the duty to interpret "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose": the *ratio* of the Court's decision in respect of article 4 is at paragraphs 103-106 of the judgment. This establishes that the mandatory death penalty in Trinidad and Tobago "compels the indiscriminate imposition of the same punishment for conduct that can be vastly different."[12] This is contrary to the provisions of article 4(2) of the Convention, because it means that there is no lawful mechanism for ensuring that the death penalty is "imposed only for the most serious crimes". Further, since the imposition of the mandatory death penalty is contrary to article 4(2), it is also "arbitrary"

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[10] Op. Cit.
[11] At para. 19.
[12] Ibid. para. 103

within the meaning of article 4(1), because it is not in accordance with law (in this case, international law)[13].

16. It is submitted that it is perfectly consistent with an ordinary reading of the phrase limiting the death penalty to the "most serious crimes" to require that individual consideration must be given to whether a particular set of facts indeed constitutes the "most serious of crimes", rather than defining the phrase in accordance with a pre-determined legal class which admits of widely varying degrees of seriousness. Further, it is submitted that it is entirely consistent with the plain meaning of the words of article 4(2) to read the subsequent text: "pursuant to a final judgment rendered by a competent court..." as requiring that the determination of seriousness be conducted by a judicial rather than an executive body

17. As for the interpretation of the word "arbitrary", as meaning "not in accordance with the law", *viz* article 4(2) of the Convention, the alleged victims note that this is in fact one of the very definitions of the term cited by the State party, at paragraph 248 of its written submissions, as one of the "several authoritative dictionary definitions". It cannot therefore sensibly be argued that this reading of the word does any violence to the text of article 4(1)[14].

18. Similarly in respect of articles 5 and 8 of the Convention, when a case is properly before this Court for a ruling as to whether there has been a breach of those provisions, the questions as to what constitutes "inhuman or degrading punishment or treatment" and "the right to a hearing, with due guarantees" is squarely within the competence of this Court: there is nothing in the text of either of those articles, or in the Convention as a whole, which prevents them from being read, as this Court and the Commission have consistently done, as precluding the mandatory application of the death penalty. Indeed, such an interpretation accords with the consistent jurisprudence of other international bodies[15] and with the decisions of domestic courts in respect of similarly worded provisions around the world[16]

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[13] Ibid. para. 106

[14] Of course, the alleged victims rely, in addition, on the consistent jurisprudence of the Inter-American Commission, the United Nations Human Rights Committee and the decisions of domestic courts around the world to like effect – as set out in paragraphs 9 and 20 and 21 of their written submissions to the Court dated 17 October 2006

[15] *Lubuto v Zambia* (Case No. 390/1990; 17th November 1995); *Thompson v. Saint Vincent and the Grenadines* (Case No. 806/1998, decision of 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

19. This is the case even on the primarily textual approach to interpretation advocated by the State party in its written submissions. The position is yet further confirmed when the teleological approach to interpretation is given its proper role and the interpretation given to articles 4, 5 and 8 by the Court is considered in light of the "object and purpose" of the Convention.

20. It is respectfully submitted that the State party is wrong in its submission that the other forms of interpretation set out in article 31 of the Vienna Convention, including the need to consider textual meaning "in light of [the treaty's] object and purpose", are secondary to that of textual interpretation. This contention was expressly rejected by the International Law Commission in its commentary on (what became) article 31 (at the time of the Commentary it was article 27; the text of this article remained unchanged when the numbering of the Treaty was altered).

> "Having regard to certain observations in the comments of Governments the Commission considered it desirable to underline its concept of the relation between the various elements of interpretation in article 27... Those observations appeared to indicate a possible fear that the successive paragraphs of article 27 might be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article. The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled "General *rule* of interpretation" in the singular, not "General rules" in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule."
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> ...
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> "[The Commission] considered that <u>the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties.</u> The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not in any

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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)

[16] *Furman v Georgia* (1972) 408 US 238, *Woodson v North Carolina* (1976) 428 US 280 and *Roberts v Louisiana* (1977) 431 US 633; *Mithu v State of Punjab* [1983] 2 SCR 690; *Reyes v the Queen* [2002] 2 AC 235, *R v Hughes* [2002] 2 AC 259 and *Fox* [2002] 2 AC 284; *S v Makwanyane* (1995) (3) SA 391); Hungary (Constitutional Court decision No. 23/1990 (X 31)AB)

obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article "[17] [emphasis added].

21. It may be that the State party does not like the interpretation reached by the Court, but it cannot argue that the Court in the passages from its judgments cited above was ignoring the international legal rules of treaty interpretation.

22. In conclusion, given that the Court, in its earlier decisions, manifestly considered and applied the international legal rules of treaty interpretation, it is submitted that the Court was acting squarely within its competence.

23. Further, in any event, the effect of article 62(1) of the Convention is such as to bind the State party to its acceptance of the competence of the Court on all matters relating to the interpretation or application of the Convention.

The effect of Barbados' reservation in respect of the death penalty

24. At paragraphs 50-53 of its written submissions, the State party seeks to argue that because, at the time of ratification of the Convention, it entered a reservation in respect of certain aspects of its death penalty, there can be no challenge to the mandatory nature of the penalty nor to the method of execution (death by hanging), even though neither of these factors was expressly reserved within the text of the reservation.

25. The alleged victims submit that this is clearly wrong.

26. The terms of Barbados' reservation are set out at paragraph 50 of the State party's written submissions. As can be seen from the text, the aspects of its death penalty which the State expressly sought to exempt from the application of the Convention are:

(i) the imposition of the death penalty for treason in so far as in certain circumstances this offence might be regarded as political and thus falling within in the terms of article 4(4);

(ii) the execution of offenders under the age of 18 and over the age of 70 years;

(iii) the fact that Barbadian law does not provide as a minimum guarantee in criminal proceedings any inalienable right to be assisted by counsel provided by the state.

[17] Report of the International Law Commission to the General Assembly, printed in the Yearbook of the

27. No reservation was made in respect of the mandatory application of the death penalty, indeed the text of the reservation states "the criminal code of Barbados provides for death by hanging as a penalty for murder and treason.", i.e. not the penalty. Further, although death by hanging is mentioned as the method of execution, this is not expressed as being one of the factors in respect of which the reservation is entered.

28. The alleged victims accept the submission of the State party at paragraph 52 of its written submissions that "a state's reservations become part of the treaty itself with respect to that state." However, it is not accepted that Barbados' reservation in respect of the death penalty in anyway precludes a finding (i) that its mandatory death penalty is contrary to articles 4, 5 and 8 of the Convention; or (ii) that its method of application, i e death by hanging, is contrary to article 5.

29. In *Advisory Opinion on Restrictions to the Death Penalty*, this Court made it plain that.

> "Article 29 [of the Convention] compels the conclusion that a reservation may not be interpreted so as to limit the enjoyment of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself."[18] ..."it must be remembered above all, that a State reserves no more than what is contained in the text of the reservation itself."[19]

30. The text of Barbados' reservation reserves only the three factors set out at paragraph 26 above. The fact that the text of the reservation, in explaining the context of the three factors to be reserved, makes reference to the method of execution being death by hanging, does not convert such reference into an additional ground of reservation. Such an interpretation would be contrary to article 29 of the Convention, as was made clear in *Advisory Opinion on Restrictions to the Death Penalty*.

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International Law Commissions, 1966, Vol II p 219-220

[18] *Advisory Opinion on Restrictions to the Death Penalty* at para. 66

[19] Ibid para. 69

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