

INTER-AMERICAN COURT OF HUMAN RIGHTS

PETER BENJAMIN - CASE NO.12.148
KRISHENDATH SEEPERSAD - CASE NO.12.149
ALLAN PHILLIP - CASE NO.12.151
NARINE SOOKLAL - CASE NO.12.152
AMIR MOWLAH - CASE NO.12.153
MERVYN PARRIS - CASE NO.12.156
FRANCIS MANSINGH - CASE NO.12.157

AGAINST

**THE REPUBLIC OF
TRINIDAD AND TOBAGO**

PRELIMINARY OBJECTION BY THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO

Preliminary Objection by The Government of The Republic of Trinidad and Tobago

The Government of the Republic of Trinidad and Tobago (hereinafter "the State") objects to the jurisdiction of the Inter-American Court of Human Rights (hereinafter "the Court") in the application of Peter Benjamin *et al* on the grounds that:

- I. The Commission did not refer the case to the Court and the Court did not accept jurisdiction in respect of the matter within the three months period stipulated under article 51 of the American Convention on Human Rights.
- II. The State's second reservation precludes any jurisdiction of the Court in this case.
- III. Alternatively, the State has never recognised the jurisdiction of the Court.

Notice that the raising of this preliminary objection by the State must in no way be construed as constituting an acceptance by the State of the jurisdiction of the Court to examine the merits of these cases.

The State notifies the Court that the raising of this preliminary objection by the State must in no way be construed as constituting an acceptance by the State of the jurisdiction of the Court to examine the merits of these cases. The State will not participate in any proceedings concerning the merits of the cases of Peter Benjamin *et al* so long as the preliminary objection remains undecided. The State reserves its decision as to what course it will follow if the preliminary objection were to be rejected by the Court.

I. The Commission did not refer the case to the Court and the Court did not accept jurisdiction in respect of the matter within the three months period stipulated under article 51 of the American Convention on Human Rights.

Article 51(1) of the American Convention on Human Rights provides that:

If within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

Article 51(1) of the American Convention on Human Rights provides that for the Court to have jurisdiction the report of the Commission must not only have been submitted to the Court within three months of the date of transmittal of the report of the Commission to the State concerned, but the Court must also have accepted jurisdiction in respect of the matter within the said three months period.

Confidential (Consolidated) Report No. 53/00 pursuant to Article 50 of the American Convention on Human Rights was submitted to the State and dated July 5, 2000. The three months time period stipulated in article 51(1) expired therefore on October 4, 2000. For the Court to accept jurisdiction in respect of this matter, under article 51(1), such acceptance should have been before October 4, 2000. In fact the case was not referred by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights until 5 October, 2000 and jurisdiction was accepted by the Court on 19 October, 2000. As neither the referral of the case by the Commission to the Court nor the acceptance of jurisdiction by the Court in respect of the case fell within the three months period stipulated in article 51(1), the Court has no jurisdiction in respect of this matter.

II. The State's second reservation precludes any jurisdiction of the Court in this case.

Article 62 of the American Convention on Human Rights provides:

1. A State Party, may upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognises as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organisation, who shall transmit copies thereof to the other member states of the Organisation and to the Secretary of the Court.
3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Covenant that are submitted to it, provided that the States Parties to the case recognise or have recognised such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

The Instrument of Adherence to the American Convention on Human Rights deposited by the Republic of Trinidad and Tobago on 28th May, 1991 and dated 3rd April, 1991, recognises the compulsory jurisdiction of the Court subject to a reservation. The State's reservation reads:

As regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago, recognises the compulsory jurisdiction of the Inter-American Court of Human Rights, as stated in the said article, only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.

Article 75 of the American Convention on Human Rights declares that it is subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969. In this respect Article 19 of the Vienna Convention provides:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- a) the reservation is prohibited by the treaty;
- b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty".

As the Court stated in *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)* (I/A Court H.R., Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2), the reference in article 75 to the Vienna Convention was intended to be a reference to paragraph (c) of Article 19 of the Vienna Convention and

... makes sense only if it is understood as an express authorisation designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they can be said to be governed by article 20(1) of the Vienna Convention and, consequently, do not require acceptance by any other State party.

It follows that Article 75 must be deemed to permit States to ratify or adhere to the Convention with whatever reservations they wish to make, provided only that such reservations are not 'incompatible with the object and purpose' of the Convention. Consequently, the question which arises when interpreting a reservation is whether it is compatible with the object and purpose of the treaty.

The reservation in question relates exclusively to article 62 of the Convention viz the acceptance by the State of the compulsory jurisdiction of the Inter-American Court of Human Rights. This is an optional provision of the Convention which States are free to accept or reject. Those States that accept and make a declaration under article 62 are expressly permitted to do so subject to conditions. It is envisaged by the Convention itself that restrictions may be placed by a State on its acceptance of the jurisdiction of the Court under article 62. This in no way acts as a restriction to suppress the enjoyment or exercise of the rights and freedoms recognised in the Convention. Article 62 can be severed from the Convention without affecting the enjoyment of the rights contained therein. It is an optional declaration and failure to accept the compulsory jurisdiction of the Court cannot therefore be held incompatible with the object and purpose of the Convention. Similarly a reservation, the effect of which is to deny jurisdiction to the Court in a particular case, is likewise not incompatible with the object and purposes of the Convention. Accordingly, since the reservation does not deny the right to any of the rights in the Convention, it cannot be considered to be incompatible with the object and purpose of the Convention.

In accordance with established and universally recognised principles of international law the exercise of jurisdiction by an international court in respect of a State is not a right but a privilege only exercisable with the express consent of the State. Article 62 of the Convention reflects this position.

The State submits that the jurisdiction of the Court to entertain this application depends entirely on the consent of the State. This is supported by Article 62(3) of the Convention. The consent of the State to recognise the jurisdiction of the Court as binding *ipso facto* was given on the 28th May, 1991, but it was given subject to a reservation. The State's reservation provides that the State "recognises the compulsory jurisdiction of the Court only to the extent that such recognition is consistent with the relevant sections of the Constitution". Although the State's reservation does not specify any provisions of the Constitution there is no provision in the Vienna Convention on the Law of Treaties expressly prohibiting reservations of a general nature.

The State submits that the reservation of the State precludes the assertion of jurisdiction by the Court in these cases. In the absence of any special agreement on the part of the State recognising the jurisdiction of the Court in these specific cases the Court can exercise no contentious

jurisdiction in these matters. The exercise of compulsory jurisdiction by the Court would not be consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago. The exercise of compulsory jurisdiction by the Court in this case in favour of the applicants would create rights for private citizens which do not exist under the laws of Trinidad and Tobago.

As regards the permissibility of the instant reservation the State submits that there is no question of the State failing to perform its treaty obligations in these cases. In the view of the State since the provisions of its Constitution are, and were at the date of ratification of this Convention, compatible with the provisions of the Convention, the State's reservation cannot be seen as an impermissible reservation contrary to the object and purpose of the Convention. Furthermore the reservation relates only to the optional procedure contained in article 62 of the Convention. It in no way affects the enjoyment of the substantive rights contained in the Convention. The State submits that there is no evidence that its reservation in its present form in any way limits the obligations undertaken by the State under this Convention in relation to individuals within its jurisdiction.

III. Alternatively, the State has never recognised the jurisdiction of the Court

In the event that the Court declares that the State's reservation in respect of article 62 of the Convention is impermissible or incompatible with the object and purpose of the Convention it is the State's submission that the effect of such a determination will be to nullify *ab initio* the declaration made under article 62 of the Convention by the State in which it accepted the compulsory jurisdiction of the Court.

In the Reservations to the Genocide Convention Case, which preceded the Vienna Convention, the International Court of Justice advised as follows:

... that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider the reserving State is not a party to the Convention ...

Under article 21(1)(a) of the Vienna Convention on the Law of Treaties the effect of a reservation is to modify 'for the reserving state in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation.' Thus, a State that objects to the reservation of another State party has no power to "override the reservation" or demand from such other party, the application of the clause excluded by the reservation. The objecting State can either choose to accept that the treaty has entered into force between them (with the provisions to which the reservation relates being modified, in their mutual relations, to the extent of the reservation) or consider that the treaty has not entered into force between them. Article 75 of the American Convention provides clearly that the Convention

"shall be subject to reservations in conformity with the provisions of the Vienna Convention".

In the submission of the State if, as in this case, acceptance of the declaration under article 62 was clearly dependent on a reservation subsequently declared to be inadmissible, the failure of the reservation will invalidate the acceptance of the jurisdiction of the Court and thus nullify the State's participation in the Convention.

The State rejects any contention that a reservation which has been considered by the Court to be incompatible with the object and purpose of the Convention may be separable from the expression of consent to be bound and the State thus become a party to the Convention in its integrity. Any contention that the reservation will be severable, is rejected by the State.

Under the laws and Constitution of the Republic of Trinidad and Tobago the Legislative arm of the State is responsible for the making of law. The Executive cannot, by entering into a treaty, alter the laws of the land or cause the Constitution to be breached. It is for this reason that the Executive, in acceding to the American Convention on Human Rights and accepting the jurisdiction of the Court under article 62 entered the reservation. The reservation is therefore a constitutional requirement that cannot be waived. It must be a precondition to the acceptance of the jurisdiction of the Court. It cannot be severed from the acceptance of jurisdiction of the Court under article 62.

It was because of this necessity to observe the provisions of the Constitution that the State denounced the American Convention on Human Rights in May 1999.

Accordingly, the State rejects the proposition that the Court is empowered to sever or override the reservation of the State and to regard the Convention as subsisting in its integrity. A State cannot be said to be a party if its proposed reservation has not been accepted. This is in accordance with the Vienna Convention. The reservation, which is in effect a caveat to the Court's jurisdiction, prohibits the Court from treating the State's acceptance of the jurisdiction of the court as unqualified.

In the present case more than eight years after ratification the validity of the State's reservation is being challenged. The Commission argues in its application that the State's second reservation is invalid and on this basis submits that the reservation should be severed from the State's declaration of acceptance of the Court's compulsory jurisdiction. The State finds this submission to be wrong. The State saw fit to make a declaration when ratifying the Convention with regard to its construction of (submission to the jurisdiction of the Court under) Article 62. If the State's reservation is for some reason invalid, it does not follow that the State should be treated as having given unqualified consent to the Court's jurisdiction. On the contrary, it is clear that the State never intended to give its unqualified consent to the Court's jurisdiction. If the qualification was invalid, the consent was invalid and the State gave no consent at all.