



OBSERVATIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
TO THE PRELIMINARY OBJECTION SUBMITTED BY THE STATE OF BARBADOS
IN CASE 12.480
BOYCE ET AL. V. BARBADOS
BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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I. INTRODUCTION

1. On January 22, 2007, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission", "the Commission", or "the IACHR") received from the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," or "the Court,") the answer to the application in the present case by the State of Barbados (hereinafter "the State," or "Barbados"). In its submission, the State objected to the admissibility of the application filed by the Commission on the basis that domestic remedies have not been exhausted¹.

2. The Commission avails itself of the opportunity to submit written briefs on the preliminary objection submitted by the State as provided for by Article 37.4 of the Court's Rules of Procedure. As the IACHR will demonstrate, the application filed in the present case is admissible and the preliminary objection should be dismissed. The Commission decided in Report No. 03/06 of February 28, 2006, that Barbados had "implicitly or tacitly waived any challenge with regard to the exhaustion of remedies"² considering the fact that the State had provided no observations regarding the exhaustion of domestic remedies in the case of Messrs Boyce and Joseph, and given the absence of any observations from the State regarding precisely which domestic remedies had not been exhausted by Messrs Huggins and Atkins. This decision should not be reviewed by the Court.

II. PRELIMINARY OBJECTION OF NON-EXHAUSTION OF DOMESTIC REMEDIES SUBMITTED BY THE STATE OF BARBADOS

3. In its answer to the application, the State objected to the admissibility of the application filed by the Commission on the basis that certain domestic remedies have not been exhausted. Barbados objected to the admissibility "of any claim regarding the alleged violation of Article 5 or any other article of the American Convention"³ claiming that the victims have not exhausted domestic remedies in relation to, *inter alia*,

¹ State of Barbados, "Submissions of the State", Boyce et al v Barbados, 18 December 2006, [hereinafter "answer to the application"], p. 6-8.

² See Annex E.1 to the Application, IACHR, Report 03/06, Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins. Barbados, adopted February 28, 2006, para. 68.

³ Answer to the application, p. 7.

- the alleged conditions of their detention,
- the alleged cruelty of hanging as form of execution⁴,
- and the alleged cruelty involved in reading warrants of execution

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4. Barbados did not argue that domestic remedies had not been exhausted in relation to the mandatory imposition of the death penalty. The fact that domestic remedies have been exhausted in this regard is therefore not in dispute before the Court.

5. In relation to the alleged conditions of the victims' detention, the alleged cruelty of hanging as form of execution, and the alleged cruelty involved in reading warrants of execution, Barbados argues that adequate remedies exist for those alleged violations under at least two distinct processes under the laws of Barbados: 1) under the Prison Rules, 1974 and the Prisons Act; 2) under Sections 15 and 24 of the Constitution of Barbados. The State claims that there is no evidence that the alleged victims have had recourse to these processes or filed any claims in this regard⁵.

6. Moreover, the State claims that none of the exceptions to the rule regarding exhaustion of domestic remedies, including those found in Article 46(2) of the American Convention, are applicable⁶.

7. As a result, the State submits that the application of the Commission "should be struck in its entirety as inadmissible and not in satisfaction of the

⁴ The Commission notes that the claim regarding the alleged cruelty of hanging as a form of execution was brought up by the victims in their written brief containing pleadings, motions and evidence, as allowed by the Court's jurisprudence (i.e. *Case of the Five Pensioners v. Peru*, Judgment of February 28, 2003, C Series No 98, paras 155-156). See "Written submission of the alleged victims", p. 2 and pp 21-24. In its merits report in the present case, the Commission had decided not to determine whether the method of execution employed in Barbados constitutes cruel, inhuman or degrading punishment or treatment contrary to Article 5(2) of the Convention in the following terms:

112. The Petitioners have also contended that execution by hanging constitutes cruel, unusual or degrading punishment or treatment contrary to Article 5(2) of the Convention and claim that hanging is therefore inconsistent with the requirements under Article 4(2) of the Convention governing the implementation of capital punishment. Given its conclusions in Part IV C 2 of this Report that the alleged victims' death sentence contravenes Articles 4, 5 and 8 of the Convention so as to render any subsequent execution unlawful, the Commission does not consider it necessary to determine for the purpose of this complaint whether the method of execution employed in Barbados constitutes cruel, inhuman or degrading punishment or treatment contrary to Article 5(2) of the Convention. The Commission nevertheless reserves its competence to determine in an appropriate case in the future whether hanging is a particularly cruel, inhuman or degrading punishment or treatment in comparison with other methods of execution.

See Annex E 1 to the Application, IACHR. Report O3/06, Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins, Barbados, adopted February 28, 2006

⁵ Answer to the application, p. 7-8

⁶ Answer to the application, p. 8.

requirements of the American Convention". In the alternative, Barbados submits that "all claims regarding the alleged conditions of their detention, the alleged cruelty of hanging as form of execution, and the alleged cruelty involved in reading warrants of execution, must be severed from the application"⁷.

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III. OBSERVATIONS OF THE COMMISSION

8. The Commission contends that the State's objection to the admissibility of the present case should be prohibited from consideration by this Court because the Commission already decided in Report No. O3/O6 that Barbados had "implicitly or tacitly waived any challenge with regard to the exhaustion of remedies" and this decision should not be reviewed by the Court. Because the State waived its right to object to the admissibility of this case at the permissible stage, it is barred by the well established doctrine of *estoppel*⁸ from availing itself of this defense at a later stage in the proceedings.

9. Since its very first cases, the Court has consistently maintained that article 46 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") establishes the scope and meaning of the rule concerning prior exhaustion of remedies under domestic law, in accordance with generally recognized principles of international law. The Court has noted that, in the light of these principles and of international practice, the rule concerning prior exhaustion of remedies under domestic law is designed for the benefit of the State, "for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means"⁹.

10. Accordingly, the Inter-American Court has determined that this rule, being designed as a defensive measure, "can be waived, either expressly or by implication" and that once it has been waived by the State concerned, this waiver is irrevocable.¹⁰ The Court has further stated that, because the issue concerns the requirements for the admissibility of a complaint before the Inter-American Commission, it is up to the latter "in the first place to pass on the matter."¹¹

⁷ Answer to the application, p. 8

⁸ As the Court has determined: "International practice indicates that when a party in a case adopts a position that is either beneficial to it or detrimental to the other party, the principle of estoppel prevents it from subsequently assuming the contrary position. Here the rule of *non concedit venire contra factum proprium* applies." Inter-Am Ct. H.R., Neira Alegria *et al.*, Preliminary Objections, Judgment of December 11, 1991, Ser. C No. 13, para. 29

⁹ Inter-Am. Ct. H.R., *In the matter of Viviana Gallardo et al.* Series A No. G 101/81, Decision of November 13, 1981, para. 26. See Inter-Am. Ct. H.R., *Velásquez Rodríguez Case. Preliminary Objections*, Judgment of June 26, 1987, Series C No. 1, paras. 33 and 34.

¹⁰ Inter-Am. Ct. H.R., *In the matter of Viviana Gallardo et al.* Series A No. G 101/81, Decision of November 13, 1981, para. 26

¹¹ *Id.*, para. 27.

11. This initial interpretation by the Court has been reflected in its evolving case law, which has established that, in a case brought under Article 44 of the American Convention, the State will be presumed to have waived any objection based on non-exhaustion of domestic remedies that it has not submitted at the appropriate time in the proceedings before the Inter-American Commission. In this respect, the Court has indicated that:

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Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized. Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.¹²

12. In other words, in accordance with international law and the interpretation of the Inter-American Court regarding exhaustion of domestic remedies, the State invoking this rule not only has to do so in the early stages of the proceedings before the Commission, but has to state what domestic remedies remain to be exhausted and show, in view of their aptness, that these remedies are appropriate and effective. By way of illustration, the Inter-American Court has established on this issue that

it is not enough for remedies to exist formally, they must give results or responses to violations of human rights if these rights are to be considered effective. In other words, everyone must have access to a simple and rapid remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights. This guarantee "is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law

¹² Inter-Am. Ct. H.R. *Velásquez Rodríguez Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 88; Inter-Am. Ct. H.R. *Fairén Garbí and Solís Corrales Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, para. 87; Inter-Am. Ct. H.R. *Godínez Cruz Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 90; Inter-Am. Ct. H.R. *Gangaram Panday Case. Preliminary Objections*. Judgment of December 4, 1991. Series C No. 12, paras. 38-40; Inter-Am. Ct. H.R. *Neira Alegria et al. Case. Preliminary Objections*. Judgment of December 11, 1991. Series C No. 13, para. 30; Inter-Am. Ct. H.R. *Caballero Delgado and Santana Case. Preliminary Objections*. Judgment of January 21, 1994. Series C No. 17, para. 63; Inter-Am. Ct. H.R. *Castillo Páez Case. Preliminary Objections*. Judgment of January 30, 1996. Series C No. 24, para. 40; Inter-Am. Ct. H.R. *Loayza Tamayo Case. Preliminary Objections*. Judgment of January 31, 1996. Series C No. 25, para. 40; Inter-Am. Ct. H.R. *Cantoral Benavides Case. Preliminary Objections*. Judgment of September 3, 1998. Series C No. 40, para. 31; Inter-Am. Ct. H.R. *Castillo Petrucci et al. Case. Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, para. 56; Inter-Am. Ct. H.R. *Durand and Ugarte Case. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, para. 33; Inter-Am. Ct. H.R. *The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections*. Judgment of February 1, 2000. Series C No. 66, para. 53; Inter-Am. Ct. H.R. *Constitutional Court Case*. Judgment of January 31, 2001. Series C No. 71, paras. 89, 90 and 93; Inter-Am. Ct. H.R. *Las Palmeras Case*. Judgment of December 6, 2001. Series C No. 90, para. 58; Inter-Am. Ct. H.R. *"Five Pensioners" Case*. Judgment of February 28, 2003. Series C No. 98, para. 126 and Inter-Am. Ct. H.R. *"Juan Humberto Sánchez" Case*. Judgment of 7 June, 2003. Series C No. 99, para. 69.

in a democratic society, in the sense set forth in the Convention."¹³ Furthermore, as the Court has also stated, "remedies that, due to the general situation of the country or even the particular circumstances of any given case, prove illusory cannot be considered effective."¹⁴

13. The Court has also stated that:

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Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable¹⁵.

14. Thus, Articles 46 and 47 of the American Convention state that it is up to the Commission to determine the admissibility or otherwise of a petition, and therefore objections to the exhaustion of domestic resources should be lodged with the IACHR and not be reviewed by the Inter-American Court¹⁶.

¹³ Inter-Am. Ct. H.R., *"Juan Humberto Sánchez" Case* Judgment of 7 June, 2003. Series C No. 99, para. 121; Inter-Am. Ct. H.R., *Cantos Case* Judgment of November 28, 2002. Series C No. 97, para. 52 and Inter-Am. Ct. H.R., *The Mayagna (Sumo) Awas Tingni Community Case* Judgment of August 31, 2001. Series C No. 7, para. 112

¹⁴ Inter-Am. Ct. H.R., *"Juan Humberto Sánchez" Case* Judgment of 7 June, 2003. Series C No. 99, para. 121; Inter-Am. Ct. H.R., *"Five Pensioners" Case* Judgment of February 28, 2003. Series C No. 98, para. 126 and Inter-Am. Ct. H.R., *Las Palmeras Case* Judgment of December 6, 2001. Series C No. 90, para. 58. See also: Inter-Am. Ct. H.R., *Velásquez Rodríguez Case. Preliminary Objections* Judgment of 26 June, 1987. Series C No. 1; Inter-Am. Ct. H.R., *Fairén Garbí and Solís Corrales Case. Preliminary Objections* Judgment of 26 June, 1987. Series C No. 2; Inter-Am. Ct. H.R., *Godínez Cruz Case. Preliminary Objections* Judgment of 26 June, 1987. Series C No. 3; Inter-Am. Ct. H.R., *Gangaram Panday Case. Preliminary Objections* Judgment of December 4, 1991. Series C No. 12; Inter-Am. Ct. H.R., *Neira Alegría et al Case. Preliminary Objections* Judgment of December 11, 1991. Series C No. 13; Inter-Am. Ct. H.R., *Caballero Delgado and Santana Case. Preliminary Objections* Judgment of January 21, 1994. Series C No. 17; Inter-Am. Ct. H.R., *Castillo Páez Case. Preliminary Objections* Judgment of January 30, 1996. Series C No. 24; Inter-Am. Ct. H.R., *Loayza Tamayo Case. Preliminary Objections* Judgment of January 31, 1996. Series C No. 25; Inter-Am. Ct. H.R., *Cantoral Benavides Case. Preliminary Objections* Judgment of September 3, 1998. Series C No. 40; Inter-Am. Ct. H.R., *Castillo Petruzzi et al Case. Preliminary Objections* Judgment of September 4, 1998. Series C No. 41; Inter-Am. Ct. H.R., *Durand and Ugarte Case. Preliminary Objections* Judgment of May 28, 1999. Series C No. 50; Inter-Am. Ct. H.R., *The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections* Judgment of February 1, 2000. Series C No. 66 and Inter-Am. Ct. H.R., *Constitutional Court Case* Judgment of January 31, 2001. Series C No. 71

¹⁵ Inter-Am. Ct. H.R., *Velásquez Rodríguez Case, Judgment of July 29, 1988* Series C No. 4, paras. 63-64; Inter-Am. Ct. H.R., *Godínez Cruz Case, Judgment of January 20, 1989*. Series C No. 5, paras. 66-67; Inter-Am. Ct. H.R., *Fairén Garbí and Solís Corrales Case, Judgment of March 15, 1989*. Series C No. 6, paras. 87-88

¹⁶ The basis for this is the procedural principle of preclusion, whereby the stages of the proceedings take place successively and each is definitively closed before the next begins, so that there can be no return to stages and points in the proceedings that have been completed and extinguished. Preclusion is the extinction, termination or expiration of the right to carry out a procedural act because the opportunity to do so has passed.

15. Applying the principles set forth above, the Commission noted in Report No. 03/06, adopted on February 28, 2006, that the State's position on admissibility had been the following:

56. On December 16, 2004, the State submitted that Messrs Huggins and Atkins had not yet exhausted their domestic remedies because no order has been transmitted from the Judicial Committee of the Privy Council relating to their domestic appeals. The State did not elaborate, nor has it done so since, on what other domestic appeals were pending, and what other legal remedies could have been exhausted

57. The State provides no observations regarding the exhaustion of domestic remedies in the case of Messrs Boyce and Joseph¹⁷

16. Therefore, the Commission stated that:

68. Given the absence of any observations from the State regarding precisely which domestic remedies have not been exhausted by Messrs Huggins and Atkins, and considering the fact that the State has provided no observations regarding the exhaustion of domestic remedies in the case of Messrs Boyce and Joseph, the Commission finds that the State implicitly or tacitly waived any challenge with regard to the exhaustion of remedies by the alleged victims in domestic proceedings¹⁸.

17. The State was given ample opportunity by the Commission to contest the admissibility of the petition, from its transmission to the State by communication dated September 17, 2004, to the adoption of the admissibility decision in Report No. 03/06 on February 28, 2006. In that report, the Commission considered the position of both parties and made a decision on admissibility that the Court should not reexamine, because the Commission's reasoning "is completely consistent with the relevant provisions of the Convention"¹⁹.

18. Barbados objected to the admissibility of the case on new grounds in its answer to the application of December 18, 2006. The State had not presented those arguments during the procedural opportunity it was provided with by the Commission. Therefore, Barbados tacitly waived its right to object to noncompliance with such requirements as exhaustion of domestic remedies under Article 46 of the Convention, and is estopped from attempting to do so extemporaneously.

¹⁷ See Annex E.1 to the Application. IACHR, Report 03/06. Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins, Barbados. adopted February 28, 2006, paras. 56-57.

¹⁸ See Annex E.1 to the Application. IACHR, Report 03/06, Lennox Boyce, Jeffrey Joseph, Fredrick Benjamin Atkins and Michael Huggins, Barbados. adopted February 28, 2006, para. 68

¹⁹ Inter-Am Ct. H.R., Case of Herrera-Ulloa. Judgment of July 2, 2004, C Series No. 117, para. 87.

IV. CONCLUSIONS

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19 The Commission, based on the foregoing considerations of law, requests the Court to conclude that the application filed in the present case is admissible and that the preliminary objection of non-exhaustion of domestic remedies must be dismissed. The Commission decided in Report No. 03/06 of February 28, 2006, that Barbados had "implicitly or tacitly waived any challenge with regard to the exhaustion of remedies" and this decision should not be reviewed by the Court

20 Also, as a procedural matter, the Commission requests the Court to hear arguments on the preliminary objection and the merits of the case in a single hearing and to decide them in a single judgment as provided for by Article 37.6 of the Court's Rules of Procedure.

Washington, D.C.,
February 21, 2007.