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**OBSERVATIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
TO THE PRELIMINARY OBJECTIONS SUBMITTED BY THE STATE OF BARBADOS
IN CASE 12.645
DACOSTA CADOGAN V. BARBADOS
BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

I. INTRODUCTION

1. On March 27, 2009, 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 response to the application in the instant case presented by the State of Barbados (hereinafter "the State," or "Barbados".) In its submission, the State objected to the admissibility of the case on the basis that domestic remedies have not been exhausted, that there is a breach of the fourth instance rule, and that the complaint no longer involves the Commission as a party in the case.¹

2. At this time, the Commission avails itself of the opportunity to submit its memorial on the preliminary objections submitted by the State as provided for by Article 38(4) of the Court's Rules of Procedure.

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

3. In its response to the application, the State submitted that the "Court should reject the Petition as inadmissible for failure to exhaust domestic remedies." Barbados indicated that the issue "was raised by the Acting Minister of Foreign Affairs, Foreign Trade and International Business in his letter to the Commission of 4 July 2008" and raised again by the State on 9 July, 2008.²

4. The Commission considers that this objection to the admissibility of the case should be deemed inadmissible because it already decided in Report No. 7/08 of March 4th, 2008, that Barbados had "not provided observations regarding the admissibility of Mr. Cadogan's claims [during the procedural opportunity given for that purpose], and [had] thereby tacitly waived its right to object to the admissibility of claims in the petition based on the exhaustion of domestic remedies requirement. The information before the Commission indicates that he in fact exhausted the ordinary remedies applicable in this case."³ Indeed, the letters referred to by the State in its response are dated July 4th and July 9th, 2008, and the Admissibility Report was issued on March 4, 2008. Accordingly, the State waived its right to object to the admissibility of this case at the permissible stage, and it should be barred by the well established doctrine of *estoppel*⁴ from availing itself of this defense at a later stage in the proceedings.

¹ State of Barbados, "Response of the State of Barbados", Tyrone DaCosta Cadogan v. Barbados, 17 March 2009, [hereinafter "response to the application"], pp. 8-13.

² Response to the application, para.19.

³ IACHR, Admissibility Report N° 7/08, adopted March 4, 2008, para. 34.

⁴ 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.

5. 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."⁵

6. 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.⁶ 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."⁷

7. 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:

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.⁸

8. 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 first stages of the proceedings before the Commission, but has to state what domestic remedies remain to be exhausted and show that these remedies are appropriate and effective.

⁵ 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.

⁶ 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.

⁷ *Id.*, para. 27.

⁸ 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 Alegría 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 Petruzzi 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 June 2003. Series C No. 99, para. 69.

9. Thus, Articles 46 and 47 of the American Convention indicate that it corresponds to the Commission to determine the admissibility or inadmissibility of a petition, and therefore objections to the exhaustion of domestic remedies should be lodged with the IACHR and should generally not be reviewed by the Inter-American Court.⁹

10. 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 January 23, 2007, to the adoption of the admissibility decision on March 4th, 2008. As accredited in the Admissibility report, the Commission considered, as part of its preliminary considerations, the silence from the State and established the following:

20. The Commission notes that the State at no time has responded to the Petitioner's allegations or questioned the petition's admissibility. The Commission recalls that Barbados is responsible for the international obligations it assumed under the terms of the American Convention of Human Rights. Article 48(1)(a) of the Convention is of particular relevance in that it establishes procedures to be followed when a petition or communication is referred to the Commission. The IACHR shall "request information from the government of the state indicated as responsible for the alleged violations" and "(t)his information shall be submitted within a reasonable period." The provisions of Article 48(1)(e) stipulate that the Commission "may request the states concerned to furnish any pertinent information." This obliges State parties to the Convention to provide the Commission with such information as it may require when analyzing individual petitions.

21. The Commission stresses the importance it accords to the information it requests as it provides a basis for the Commission's decisions on submitted petitions. Indeed, the Inter-American Court of Human Rights has affirmed that cooperation of the States represents a fundamental obligation within the international procedural framework established by the Inter-American System [...]

22. The Commission and the Inter-American Court of Human Rights have also stated that "the silence of the defendant or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations; so long the contrary is not indicated by the record or is not compelled as a matter of law". Bearing that in mind, the Commission reminds the State of Barbados of its obligation to cooperate with various agencies of the Inter-American system of human rights in order to facilitate their efforts to protect individual rights.¹⁰

11. The Commission made a finding on admissibility that the Court should not reexamine, because the Commission's reasoning was "completely consistent with the relevant provisions of the Convention"¹¹ and the State waived its right to object to any presumed noncompliance with the requirement of prior exhaustion of domestic remedies in this case at the appropriate stage.

III. PRELIMINARY OBJECTION OF BREACH OF THE FOURTH INSTANCE RULE SUBMITTED BY THE STATE OF BARBADOS

12. Barbados objected to the admissibility of the case on the basis of two aspects raised by the representatives related to "Grounds 1 (diminished responsibility) and 4 (effectiveness of legal representation)"¹² and indicated that the "State submits that the complaints in Grounds 1 and 4 raised by

⁹ 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.

¹⁰ IACHR, Admissibility Report N° 7/08, adopted March 4, 2008, paras. 20-22.

¹¹ Inter-Am. Ct. H.R. Case of Herrera-Ulloa, Judgment of July 2, 2004, C Series No. 117, para. 87.

¹² Response to the application, para. 25.

the Petitioner amount to a thinly disguised attempt to use the Inter-American processes as a fourth instance of appeal and are therefore inadmissible."¹³

13. In this respect, the Commission considers that the arguments submitted by the State do not give rise to the need for observations from it on this matter.

IV. PRELIMINARY OBJECTION OF EXCLUSION OF THE COMMISSION AS A PARTY

14. The State drew "to the attention of the Court the fact that all of the complaints in the present case which are identified by the Commission in its Application, except one aspect of relief requested, have been resolved by the State"¹⁴ and "[a]s a result, the State submits that [...] the only complainant with juridical personality to appear before the Court no longer has a substantive basis of complaint under Inter-American human rights norms."¹⁵ Barbados concluded that the Court "should exercise its discretion and refuse to accept jurisdiction over Case 12.645, or deem it inadmissible."¹⁶

15. The Commission understands this argument to be grounded in Barbados' statements related to the "consequences of the binding decision in *Boyce et al. v. Barbados*" and the measures taken to comply with said judgment informed in its first report on compliance submitted to the Court in the *Boyce et al.* Case. In that report, Barbados stated that it "has decided that the mandatory aspect of the death penalty should be abolished"¹⁷ and that it "has decided that section 26 of the Constitution should be repealed."¹⁸

16. On the other hand, the State reported that in "the present case, the Barbados Privy Council has not met to consider the prerogative of mercy in relation to Mr. Cadogan, [...] because no final decision has been taken by [the] Honorable Court."¹⁹

17. Regarding petitions 2²⁰ and 3²¹ of the application, as expressed in the *Boyce* case, the Commission welcomes the efforts made by the State of Barbados to comply with the judgment issued by the Court and considers the State's decision to be a positive and important development. The Commission considers that the willingness expressed by the State to abolish mandatory sentencing and to repeal the "savings clause" represents an important step forward in the process of bringing domestic law and practice into compliance with the standards of the American Convention. However, as will be analyzed in the merits stage, and was decided in the *Boyce* case

the State misunderstands the moment in time in which the alleged violations would have occurred [...] Without addressing the merits of the issues at this point, the Court considers that the alleged violations with regard to the issue of mandatory death penalty in this case would have occurred at the sentencing stage, when the alleged victims were sentenced to death by hanging pursuant to laws that allegedly contravene the American Convention.²²

¹³ Response to the application, para. 27.

¹⁴ Response to the application, para. 30.

¹⁵ Response to the application, para. 33.

¹⁶ Response to the application, para. 36.

¹⁷ Response to the application, Appendix 1, p. 3 (iii).

¹⁸ Response to the application, Appendix 1, p. 4 (iv).

¹⁹ Response to the application, para. 13.

²⁰ Adopt such legislative or other measures as may be necessary to safeguard against any imposition of the death penalty not in conformity with the terms of Articles 4, 5 and 8 of the American Convention.

²¹ Adopt, within a reasonable time, such legislative or other measures necessary to ensure that the Constitution and laws of Barbados are brought into compliance with the American Convention, and specifically, remove the immunizing effect of section 26 of the Constitution of Barbados in respect of "existing laws"

²² I/A Court H.R., Case of *Boyce et al. v. Barbados*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, para. 21.

18. In addition, when analyzing an analogous argument concerning the merits of a case²³, the Court considered that it

must call to mind that the international responsibility of the State arises immediately when the internationally illegal act attributed to it is committed, although it can only be [brought before the Court] once the State has had the opportunity to correct it by its own means. Possible subsequent reparation under domestic legal venue does not inhibit the Commission or the Court from hearing the case that has already begun under the American Convention. Therefore, the Court cannot accept the position of the State [...]²⁴

19. Also, while recognizing the importance of the decisions reported by the State, the Commission observes that they must be codified in law and implemented in practice before they can be considered to have an effect on the resolution of the instant case. The willingness to address these matters, although important, is not sufficient to resolve the central claims raised.

20. With regards to the commutation of the sentence, the Commission refers to the Court's jurisprudence in the Boyce case where it established the following:

In this regard, the Court observes that Mr. Huggins' death sentence has not been formally commuted. Furthermore, the Court has no way to confirm, nor will it assume, that the Barbados Privy Council, which is the entity of the executive branch charged with recommending commutations of death sentences, will choose to follow the judicial precedent established in Pratt and Bradshaw and commute Mr. Huggins' sentence. There is always the possibility that an attempt may be made to challenge the applicability of the time limit for carrying out the death penalty established in Pratt to Mr. Huggins. Thus, the Court considers that Mr. Huggins has no legal certainty that he will not face execution unless and until his sentence is formally commuted.²⁵

21. As in the Boyce case, Mr. Cadogan still has no legal certainty that he will not face execution unless and until his sentence is formally commuted. In conclusion, this aspect of relief has not been resolved by Barbados.

V. CONCLUSIONS

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 objections must be dismissed. On one hand, the Commission decided in Report No. 07/08 of March 4, 2008, that Barbados had "implicitly or tacitly waived any challenge with regard to the exhaustion of remedies" and submits that this decision should not be reviewed by the Court. On the other hand, the undertaking reported by the State to take positive measures to modify its legislation and practice have yet to be effectuated, and thus their potential effect cannot be evaluated at this time.

Washington, D.C.,
April 28, 2009.

²³ In the Gómez Paquiyauri Case the State argued that the human rights violations committed by its agents against the Gómez Paquiyauri brothers had been duly punished and, therefore, it asked the Court to find that there has been no violation by Peru. See: I/A Court H.R., Case of the Gómez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 74.

²⁴ I/A Court H.R., Case of the Gómez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 75.

²⁵ I/A Court H.R., Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, para. 20.