

IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Case 12.645

TYRONNE DA COSTA CADOGAN

Alleged victim

AND

BARBADOS

000319

State Party

ALLEGED VICTIM'S WRITTEN SUBMISSIONS TO THE
PRELIMINARY OBJECTIONS BY THE STATE

INTRODUCTION

1. The State of Barbados has raised in its submissions preliminary objections to the jurisdiction and admissibility of this case on the grounds 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.

SUBMISSIONS ON ADMISSIBILITY

THE EXHAUSTION OF DOMESTIC REMEDIES

2. The alleged victim submits that the preliminary objection raised by the State of Barbados that the alleged victim has not exhausted domestic remedies must be rejected for the following reasons:
 - i) **Estoppel:** this Court has consistently held that a State may not seek to challenge the admissibility of an application on grounds of non-exhaustion of domestic remedies in circumstances where it had every opportunity to raise such objection before the Commission, but failed to do so in a timely fashion¹;

¹ Herrera-Ulloa, Judgment of July 2, 2004, C Series No.117, para.83; The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53; Castillo Petruzzi et al. Case. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 56; Loayza Tamayo Case. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, paras. 40-44

"26. ... [U]nder the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies 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. The requirement is thus considered a means of defense and, as such, waivable, even tacitly. A waiver, once effected, is irrevocable. (Eur. Court H. R., De Wilde, Ooms and Versyp Cases ("Vagrancy" Cases), judgment of 18th June 1971)."

8. The subsequent case law² has clearly established that in a case brought under Article 44 of the 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 times in the proceedings before the Commission.
9. In the case of Herrera-Ulloa, Judgment of July 2, 2004, C Series No. 117, the Court stated:

"80. Article 46(1)(a) of the Convention provides that for the Commission to admit a petition or communication lodged in accordance with Articles 44 or 45, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.

81. The Court has established criteria that have to be taken into account in the instant case. Firstly, the Respondent State may expressly or tacitly waive invocation of the rule requiring exhaustion of domestic remedies. Secondly, in order to be timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceedings or, to the contrary, it will be presumed that the interested State has waived its use

² 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 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.

Or alternatively:

ii) There are **no effective domestic remedies** which remain to be exhausted.

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(i) Estoppel

3. Article 37 does not allow a State to raise objections based on non-exhaustion of domestic remedies where those objections had not previously been raised before the Commission.

4. Article 46 of the American Convention on Human Rights ("the American Convention") sets out the admissibility criteria for petitions or communications. The criterion of exhaustion of domestic remedies is contained in Article 46(1)(a), which states:

"Article 46

1. Admission by the Commission of a petition or communication lodged in accordance with Article 44 or 45 shall be subject to the following requirements:

- (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
- (b) ..."

5. Article 47 states that the Commission shall consider inadmissible any petition or communication submitted if, *inter alia*, the requirements indicated in Article 46 have not been met.

6. The purpose behind the requirement to exhaust domestic remedies before petitioning the Inter American Commission is designed for the benefit of the State. It ensures that the State has an opportunity to provide redress for an alleged violation of the Convention prior to it being considered by an international body. As it is a requirement for the benefit of the State it has been found to be a requirement that can be waived, either expressly or impliedly, by the State and once waived is irrevocable.

7. In the Matter of Viviana Gallardo et al. Series A No. G 101/81, the Inter American Court stated that:

tacitly. Thirdly, in previous cases the Court has held that non-exhaustion of domestic remedies is purely an admissibility issue and that the state that alleges non-exhaustion of domestic remedies must indicate which domestic remedies should have been exhausted and provide evidence of their effectiveness”

10. In that case the respondent State belatedly sought to raise a preliminary objection before the Court that the domestic remedies of Constitutional review and habeas corpus had not been exhausted, the Court expressly found:

“in as much as the State did not allege a failure to exhaust the remedies of review and habeas corpus during the proceedings before the Inter-American Commission, it implicitly waived one means of defense that the American Convention creates in its favor, and tacitly admitted that such remedies either do not exist or were exhausted in a timely manner. Therefore, the principle of estoppel prevents the State from raising this argument, for the first time, in its brief answering the application and its observations on the written brief of pleadings, motions and evidence.”

11. In the present case, the State of Barbados first raised the issue of the exhaustion of domestic remedies in its Response dated 9th July 2008. This was not done in the time allotted by the Commission as the Commission had requested the State’s response on admissibility within two months from the 23 January 2007, the date the request was transmitted. Thus the Commission concluded in their Report on the Merits of the instant case :

“30. [T]he State did not provide observations regarding admissibility of Mr Cadogan’s claims in the time allotted. According to Article 48(1)(a) of the Inter-American Convention on Human Rights in conjunction with article 30(3) of the Commission’s Rules of Procedure, The State is requested to submit its response on admissibility within two months counted from the date the request is transmitted. In the instant case, on January 23, 2007 the Commission transmitted to the State the pertinent parts of the petition and requested that it provide observations on the admissibility of the petition within two months from the date of transmission. Given that the State did not respond within this timeframe, the State thereby tacitly waived its right to object to the admissibility of claims in the petition based on the exhaustion of domestic remedies requirement. According to the Court, the requirement is thus considered a means of defence and, as such, waivable, even tacitly. On this point the Court has found that, a waiver, once effected, is irrevocable...”
(Report No. 60/08, 25 July 2008)

12. It is respectfully submitted that the Commission’s conclusion is wholly consistent with the findings of this Court in the cases cited above. The Commission were therefore correct to declare the Application admissible.

(ii) Burden of proof

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13. Further or alternatively, the respondent State is wrong to argue that the Commission was required to declare the petition inadmissible on grounds of non-exhaustion of domestic remedies, notwithstanding the State's own failure to raise its present objections in the allotted time. Such a contention overlooks the consistent case law of this Court in respect of the burden of proving the existence of effective domestic remedies:

"in previous cases the Court has held that non-exhaustion of domestic remedies is purely an admissibility issue and that the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness."³

14. The respondent State wholly failed to discharge this burden before the Commission in the allotted time. There were therefore no grounds on which the Commission could properly have concluded that effective domestic remedies remained to be exhausted. It ill behoves the respondent State to argue that the Commission erred in failing to reach such a conclusion, when it provided neither evidence nor argument to support it.

(iii) Domestic remedies have been exhausted.

15. Alternatively, it is submitted that all domestic remedies have been exhausted in respect of (i) the mandatory death penalty, (ii) the savings clause and (iii) the complaint that there was a failure by the State party to cause a comprehensive psychiatric/psychological examination of the alleged victim to be carried out, or that such remedies would be wholly ineffective.
16. The State's case that there has been a failure to exhaust domestic remedies is based upon two propositions. Firstly, that there is no outstanding issue in relation to the mandatory death penalty to be determined by the Court and that accordingly, the only remaining issues raised by the alleged victim relate to diminished responsibility, adequate psychiatric expertise, the adequacy of legal aid and the effectiveness of legal representation. Secondly, in relation to those remaining issues, that "although

³ In the case of Herrera-Ulloa, op. cit. para 81; The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53; Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.

the alleged victim pursued substantially the same claims in Barbados domestic courts, his appeal was against conviction alone” and he did not raise in any domestic proceedings “the potential violation of his right to a fair trial as protected by section 18 of the Constitution, which is the central claim in the current Petition.” In short, the State contends that the alleged victim ought to have raised these complaints by way of a constitutional motion before the Barbados courts, but he failed to do so.

17. The State of Barbados successfully argued quite the opposite proposition before the Judicial Committee of the Privy Council in *Hinds v Attorney General of Barbados* [2002] 1 AC 854. In that case, the Appellant was charged with arson, an offence in respect of which he was not entitled to legal aid. He applied to the High Court judge for a legal aid certificate but this was refused. The Court of Appeal of Barbados dismissed his appeal against conviction holding that the denial of legal representation at his trial did not infringe his constitutional rights. The Appellant then brought a constitutional motion before the High Court alleging that the denial of legal aid at his trial infringed his right to a fair trial. Queens Counsel for the State of Barbados argued that the Appellant was not entitled to any relief in constitutional proceedings, irrespective of the merits of his claim. The Privy Council recorded his arguments as follows (at para 22):

“He submitted that the applicant was making what amounted to a collateral attack on his criminal conviction on constitutional grounds. If he had wanted to attack his conviction on constitutional grounds the proper route was by appeal against his conviction when all such grounds were open to him. In fact, he had exercised his right of appeal and had relied on constitutional grounds, but had done so unsuccessfully. If he wanted to pursue that appeal the only proper route was by further appeal to this Board. If, for whatever reason, he did not or could not pursue that further appeal, it was not open to him to return to the High Court of Barbados and advance arguments which had been advanced (as the applicant's complaint of denial of legal aid had been) or could and should properly have been advanced at an earlier stage. The proviso to section 24(2) of the Constitution applied to just such a case.”

18. Section 24(2) of the Barbados Constitution to which Queens Counsel referred provides that:

"Provided that the High Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

19. Having reviewed the relevant authorities the Privy Council held that, on the facts of the case, there was no answer to Queens Counsel's submissions. The Board said (at para 24):

"It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The applicant's complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on section 24."

20. In his petition before the Caribbean Court of Justice for leave to appeal, the alleged victim argued inter alia, that his constitutional right to a fair hearing was infringed because⁴ i) he was not given and/or was deprived of the assistance psychiatric expert; ii) he did not have and/or was deprived of the effective assistance of an Attorney at Law; and iii) his Attorney at Law was incompetent. More particularly, he submitted that "because of a lack of legal aid he was deprived of the opportunity to present evidence as to whether he was suffering from mental illness."⁵ Moreover, the alleged victim applied to the CCJ to adduce further evidence from a psychiatrist concerning the alleged victim's mental health to supplement what was admitted to be the unsatisfactory Report of Dr Mahy or at least that the appeal be stayed so as to permit the alleged victim the opportunity to be further examined by a psychiatric expert.⁶
21. The CCJ denied the alleged victim leave to appeal against conviction and therefore rejected his constitutional complaints.
22. In the premises, on the authority of *Hinds v Attorney General of Barbados*, the alleged victim is prima facie barred from pursuing his complaints of a breach of his fair trial rights by way of a fresh attack under the constitution of Barbados.
23. In respect of what constitutes an effective remedy the Inter-American Court has established that:

⁴ See Appendices B. 3 to the Alleged victim case, paras 3 and 30-61.

⁵ Ibid, para 37.

⁶ See paras 12 and 13 of the judgment of the CCJ, Appendix

"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 in a democratic society, in the sense set forth in the Convention." ⁷

24. Furthermore, the Court has also stated that 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. In Las Palmeras Case, Judgment of December 6, 2001. Series C No. 90, para. 58 the Court stated:

"58. It is the *jurisprudence constante* of this court that it is not enough that such recourses exist formally, they must be effective; that is they must give results or responses to the violations of rights established in the Convention. This Court has also held that remedies that, due to the general situation in the country or even the particular circumstances of any given case, prove illusory cannot be considered effective. This may happen when, for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions; or any other situation in which justice is being denied, such as cases in which there had been an unwarranted delay in rendering a judgement."

25. In this case, the availability of redress by constitutional motion after the fair trial complaint has already been raised and rejected by the CCJ is dubious at best and the case law indicates that, far from being an effective remedy, it is not available at all.

⁷ 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.

26. In any event, it is worth noting that legal aid for a constitutional challenge is only available for applications to the High Court and appeals to the Court of Appeal. Legal Aid is not available for any appeal from the Court of Appeal to the Caribbean Court of Justice when the alleged victim's appeals were extant.
27. The onus is on the State of Barbados to establish that there is a domestic remedy which the alleged victim has failed to pursue. In light of the above, the State has failed to discharge this burden.
28. For reasons which are given below, the issues surrounding the mandatory death penalty, the infringement of the alleged victim's Convention rights arising therefrom and the reparation which he should be afforded are still live, contrary to the submissions made by the State. The State of Barbados has not argued that there are domestic remedies in relation to the mandatory death penalty and the savings law clause which have not been pursued and rightly so since it has been authoritatively determined by the Privy Council in *Boyce v The Queen* [2005] 1 AC 400 that the mandatory death penalty in Barbados is immune from challenge on constitutional grounds. The State's objection on the ground of non-exhaustion of domestic remedies is in relation to the other complaints made by the alleged victim in these proceedings but for reasons just given this objection is not sustainable.

SUBMISSIONS ON JURISDICTION

(i) Breach of Fourth Instance Rule

29. The alleged victim accepts the summary of the Court's jurisprudence on the Fourth Instance Rule as set out in paragraph 26 of the State's response. However, the alleged victim contends that its complaints go far beyond the simple allegation that the CCJ's decision was wrong or unjust. Indeed, as has been made clear in his case, the alleged victim contends that the alleged victim's treatment during the course of his trial in relation to the defence of diminished responsibility and the inadequacy of his legal representation constitute violations of his Convention rights. He asks the Court to determine whether the State of Barbados is responsible for the violation of

the American Convention, a matter which clearly falls within the jurisdiction *ratione materiae* of the Court.⁸

30. In addition, it is submitted that the *fresh* evidence of Dr Timothy Green casts the alleged victim's complaint in a wholly new light and it cannot be said that the Written Submissions of the alleged Victim replicate the case presented to the Caribbean Court of Justice.
31. In relation to the complaint that there was a failure by the State party to cause a comprehensive psychiatric/psychological examination of the alleged victim, it is noted that there is an absence of legal aid for the purpose of independent psychological assessment in Barbados. The only psychiatric report produced in the domestic courts was the admittedly unsatisfactory report of Dr Mahy who, it was conceded, established no more than that there was the need to have the victim examined more comprehensively. Dr Mahy had assessed the alleged victim on a *pro bono* basis and expressly stated in his report that due to time constraints he was not in a position to give a definitive opinion. Dr Mahy's report was unsatisfactory because he was only able to examine the victim on one occasion. The alleged victim has now been further and more comprehensively examined by Dr Timothy Green (also on a *pro bono* basis) who has concluded that the victim "suffers from a Personality Disorder as well as Alcohol Dependence...[and that] this would have had a direct bearing on Mr Cadagon's conviction and sentence".
32. In the instant case, the Commission declined to find that absence of adequate psychological assessment at trial resulted in a violation of the alleged victim's rights under Article 8 essentially on the grounds identified by the Caribbean Court of Justice ("CCJ"), namely that there was at that time no medical evidence of an abnormality of mind substantially impairing the alleged victim's mental responsibility [see Commission Report No.60/08 para. 115]. However, the Court is now presented with evidence of such abnormality in the form of Dr Green's report. The alleged victim's complaint of violations of Article 8 and 5 therefore fall to be considered afresh in light of that new evidence.

⁸ Cesti Hurtado v Peru (Preliminary Objections). Inter-Am. Ct. HR, 26 January 1999, Ser. C No. 49, para 47; Villagran Morales et al v Guatemala (the Street Children Case)(Preliminary Objections 1997), paras 15-18; Castillo Petruzzi et al v Peru (Preliminary Objections, 1998) para 100-102.

33. It is respectfully submitted that the new evidence materially undermines the reasoning of the CCJ, and consequently of the Commission, on this issue. Further, as stated above, it has not been possible for the alleged victim to obtain this evidence prior to this point due to an absence of legal aid for the purpose of independent psychological assessment.
34. In the result, there is now before the Court evidence in respect of which the organs of the Inter-American system have not had the benefit of any fact-finding or decision making by domestic courts.⁹ Indeed, the reason why a more comprehensive report of a psychiatrist was not available to the domestic courts for evaluation was precisely because the CCJ denied the alleged victim the opportunity of staying his appeal so that he could obtain such further evidence. It is such treatment which the alleged victim now complains has violated his Convention rights and ask the Court to rule on. Far from asking the Court to act as a fourth instance tribunal, the alleged victim invokes the jurisdiction of the Court to vindicate his Convention rights.

(ii) **Complaint no longer involves Commission as a Party**

35. The State of Barbados submits that Commission should withdraw the case from the Court pursuant to Article 48(1)(c) of the American Convention and Article 34(c) of the Rules of Procedure of the Inter-American Commission on Human Rights or that the Court itself should strike out the Commission's case pursuant to Article 53(1) of the Rules of Procedure of the Court. This submission is based upon the proposition that all of the complaints in the present case identified by the Commission, except that in relation to commutation, have been resolved by the State. In relation to the issue of commutation, the State points out that the alleged victim may himself initiate the process for such relief before the Barbados Mercy Committee. In the result, the State submits, "the only complainant with juridical personality to appear before the Court no longer has any substantive basis of complaint under the Inter-American human rights norms."
36. The alleged victim submits that the contention that there are no longer any live substantive issues concerning the mandatory death penalty before the Court is erroneous.

⁹ See Jo M. Pasqualucci – The Practice and Procedure of the Inter-American Court of Human Rights, p. 93.

37. Firstly, while the State of Barbados has undertaken to take steps to comply with the order of the Court in the *Boyce et al v Barbados*, the fact is that it has not yet done so. The alleged victim welcomes the State's decision to abolish the mandatory aspect of the death penalty and looks forward to receiving evidence of the relevant legislative changes once available. It will be highly relevant for the present proceedings to have information from the State on how the proposed measures will be codified in law and the practice that will be adopted. For example, the State have in no way confirmed whether the proposed legislative amendments will apply retrospectively so that the alleged victim will have his death sentence quashed and that he will be entitled to re-sentence hearing.
38. Secondly, while the State of Barbados is bound by the Court's decision in *Boyce et al v Barbados* to concede that the alleged victim's rights under the Convention have been violated by the failure to accord him the right to an individualised sentencing hearing, that by itself does not bring an end to the proceedings since the alleged victim is now entitled to reparation of his own for the violation of his rights. The fact is that there is as yet no order from this Court in relation to the alleged victim with which the State of Barbados can comply. In this regard, it is important to note even despite the Commission's recommendation that the alleged victim's sentence of death be commuted, the State of Barbados has not taken any steps to give effect to that recommendation, even though the Commission's recommendation post-dated the Court's decision in *Boyce et al v Barbados*. Rather, the State of Barbados has only now, in its Response, signalled its intention to put before his Excellency the Governor General the material which might persuade him to commute the alleged victim's sentence of death.¹⁰ But even so, the State of Barbados has not said when it will do so nor has it given any undertaking that the death sentence imposed on the alleged victim will be commuted as the Commission has recommended. Furthermore, its closing suggestion that the process leading to commutation "may be initiated at any time at the request of the Petitioner himself"¹¹, leaves the alleged victim with little confidence that the State intends itself to invoke the commutation process at any time soon. In the meantime, the alleged victim remains under the sentence of death in violation of his Convention rights.
39. In addition, the State's suggestion that the alleged victim may apply to the Governor-General at any time to exercise the prerogative of mercy and its assurance that it has

¹⁰ Para 14 of the Response.

already put all relevant documentation before his Excellency the Governor General is clear evidence that the State intends to deal with the question of commutation by way of the mercy procedure. It is submitted that this is not the appropriate and natural relief for the imposition of the mandatory death penalty on the alleged victim as *“the mercy procedure is not an adequate substitute for a judicial process that determines the appropriate sentence after conviction for murder”*. (Paragraph 88 of the Inter-American Commission’s Application before the Court in **Boyce et al –v-Barbados [Case 12.480]**). Whilst the alleged victim respects the solemn commitments of Barbados to this Honourable Court, it is not accepted that *“the commitments and understandings fully satisfy every aspect of the Commission’s case against the State except for the Commutation.”* (emphasis added).

40. In any event, the question whether the commitments and undertakings given by the State of Barbados satisfies the order made by the Court in **Boyce et al v Barbados** is still moot. Both the Commission and the alleged victim in that case have submitted observations suggesting that the State of Barbados’ commitments and undertakings will not result in full compliance with the Court’s order. Of relevance are the alleged victim’s observations that the commutation of the victim Huggins’ sentence to imprisonment “for the remainder of his natural life” may still violate the victim’s Convention rights. The alleged victim there has also queried whether the abolition of the mandatory death penalty will result in persons already sentenced to death being entitled to the sentencing hearing which they were denied.¹² Similarly, the Commission noted in its observations that the mercy procedure adopted by the State of Barbados to commute the victim’s sentence of death in that case “is not an adequate substitute for a judicial process that determines the appropriate sentence after a conviction for murder.”¹³
41. To the extent therefore that the State of Barbados intends to comply with the Commission’s recommendation of commutation by invoking the mercy procedure to commute the alleged victim’s sentence of death to imprisonment for the remainder of his natural life, there are yet issues which remain to be resolved. Most importantly is the question whether such commutation is to occur via a judicial process.

¹¹ Ibid.

¹² Observation on the Report of Barbados on Measures Adopted to Comply with the Judgment of the Inter-American Court on Human Rights in the case of Boyce et al v Barbados, paras 1-8 and 10. – see Appendix A hereto.

¹³ Observation to the State’s Compliance with the Judgment March 24th 2009, p. 2.

- 42. For the above reasons, the alleged victim submits that the issue of the mandatory death penalty is yet to be satisfactorily and completely determined.
- 43. In any event, the Commission is not empowered by Article 48(1)(c) of the American Convention or Article 34(c) of the Rules of Procedure of the Inter-American Commission on Human Rights to withdraw the case from the Court. Those Articles apply only to the admissibility of a Petition or communication not to the withdrawal of a case from the Court. Further, the Court's power to strike out a case under Article 53(1) of the Rules of Procedure of the Court applies only where the parties to a case inform the Court of the existence of a friendly settlement, compromise, or any other occurrence likely to lead to a settlement of the dispute. Neither the alleged victim nor the Commission, as far as the alleged victim is aware, has informed the Court of any such matters. And although the State of Barbados has informed the Court of its intention to comply with the orders in *Boyce et al v Barbados*, this does not amount either to a friendly settlement or compromise or even an occurrence likely to lead to a settlement, having regard in particular to the matters referred to above.
- 44. What the State of Barbados has done is to inform the Court of its acquiescence to the claims of the Commission and the alleged victim in relation to their complaints concerning the mandatory death penalty. Accordingly, the Court must now proceed under Article 52(2) of the Rules of Procedure of the Court to determine "whether such acquiescence and its juridical effects are acceptable" and "the appropriate reparations and indemnities" which it should issue.
- 45.

CONCLUSION

- 46. For all the above reasons it is submitted that the preliminary objections raised by the State of Barbados in its submissions of 17 March 2009 must be rejected.

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Douglas Mendes SC

Alair Shepherd QC

Tariq Khan

Ruth Brander

Alison Gerry

Legal Representatives of alleged victim

28 April 2009