SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS OF SEPTEMBER 24, 2009, IN THE CASE OF *DACOSTA CADOGAN* (BARBADOS)

1. The case of *DaCosta Cadogan,* to which I attach this opinion, provides the Court another opportunity to repudiate the obligatory or compulsory death penalty, still included in some domestic legal systems, which is contrary – for reasons that the Court has set out on numerous occasions – to the provisions of Article 4 of the American Convention. Indeed, this domestic legal concept does not restrict capital punishment to the most serious offenses, as established in said Article, as it attributes the same degree of seriousness to unlawful acts that should be typified as different offenses and give rise to different punishments.

2. It is worth mentioning that this does not mean merely individualizing punishments in specific cases arising from the same legal offense, but entails the inadequate typification of punishable conduct. In other words, the requirement of Article 4 extends to both the typification of the conduct and selection of the punishment, and to judicial individualization for the purposes of a conviction. This duality has not always been highlighted. Analysis is usually focused on the second aspect, leaving the first at the margins.

3. Taking this observation into account, it seems pertinent to examine the possible violation of Article 9 of the American Convention, in relation to Articles 2 and 4. Criminal legality – both formal and material, and included in the concept of law supported by the Inter-American Court – is not satisfied by the mere typification, in terms that are reasonably clear and unambiguous, of punishable conduct. This typification must meet all the provisions of the Convention that legitimate or provide grounds for an incriminating norm. For that reason, the domestic legislator has an obligation not to criminalize conduct that should not constitute an offense, to typify conduct whose typification arises from norms of international human rights law (for example, genocide, torture, and forced disappearance), and must separate the different types of unlawful acts that should not receive the same treatment (including offenses of the same kind with different degrees of severity, such as simple homicide, manslaughter, and aggravated homicide) into different types of crimes with different punishments. All this is significant from the point of view of international human rights law and its projection on domestic criminal law, which must be "re-thought," as some scholars have said, in light of the former and of the jurisprudence of the Inter-American Court, which has already ruled on this matter specifically in relation to the obligatory or compulsory death penalty.

4. I will not make further reference to the reasons on which the Court's clear and constant position on the so-called obligatory or compulsory death penalty is based, since it has been set out, as I mentioned, on several occasions, leading the Court to decline responding to the advisory opinion requested by the Inter-American Commission on this issue, as stated in the Court's Order of June 24, 2005.

5. However, the *DaCosta Cadogan* judgment allows the Court to observe the promising signs that are appearing on the horizon of domestic legislation on capital punishment. Evidently, the goal should be the total and definitive abolishment of this sanction, which many people – myself included – have considered and consider unlawful, as well as proven to be ineffective for achieving its proposed objective: reducing crime. The day must come when universal consensus – which for now does not appear to be near – establishes the

prohibition of capital punishment within the framework of *jus cogens*, as in the case of torture.

6. Nevertheless, abolition is not included in the provisions of the American Convention on Human Rights, which tends towards this, but does not eliminate the punishment; it merely reduces, minimizes, and conditions it. The penalty is limited, as much as it was possible to do so at the 1969 Conference of San José, through different kinds of restrictions: (a) substantive, regarding the offenses to which it applies (the point at which the issue of the obligatory or compulsory death penalty appears); (b) procedural, regarding the characteristics of the proceedings and the means of objection, appeal or substitution that should be observed therein; (c) subjective, regarding persons – groups or categories of persons – to which this punishment cannot be applied or who cannot be executed even if it has been imposed on them, and (d) for reasons of progressive development, inasmuch as the death penalty may not be re-introduced once it has been abolished.

7. The abolition sought by the fourteen States that signed an abolitionist declaration presented during the 1969 Conference (even by some that delayed excluding it from their domestic law or that have still not done so), has again been proposed in a specific protocol on the matter. It should be said that it does not, as of yet, involve complete abolition, as would be desirable: only relative abolition, inasmuch as the possibility of retaining the death penalty remains open for very serious alleged offenses in a situation of war. Also, it is remarkable, in a negative sense, that this protocol has been ratified by the least number of States of all the instruments that make up the Inter-American human rights *corpus juris:* only 11 States have ratified it, in contrast, for example, to the 24 that have ratified or adhered to the American Convention itself (still a very reduced number; the aspiration continues to be the universalization of rights and their guarantees: *rights and courts for everyone*), or in contrast to the Convention for the Elimination of Violence against Women (Belem do Para), which has been ratified by 32 States, the greatest number in our regional experience, in the same way that a large number of States are parties to CEDAW.

8. In any case, we must observe what I have called the promising signs on the horizon that are materializing in recent developments in the Caribbean countries. We should welcome these developments and encourage their continuation. They are part of the indispensable national appropriation of international human rights law, and, specifically, Inter-American human rights law, which is fortunately increasing. This appropriation has been occurring in recent years, as I have often stated, through different effective means: constitutional, legal, jurisdictional, political, and cultural. It must continue. We should not lose sight of the fact that the international system for the protection of human rights is subsidiary or complementary to national systems of protection. It is at the national level where the greatest battle in favor of human rights must be won, encouraged by the domestic forces that militate for human rights and supported by international bodies – such as the Inter-American Court – that are called on to perform their tasks in accordance with their nature and attributions.

9. In some countries of the Caribbean, capital punishment has remained in force despite provisions which disfavor them in constitutional texts. Secondary provisions in criminal matters, specifically those that include obligatory capital punishment, have enjoyed a sort of immunity from the new constitutions. This is the case in Barbados, with regard to Section 2 of the Offenses Against the Person Act, the constitutionality of which cannot be contested because it is prohibited by the “savings clause” contained in Article 26 of the Constitution. In other words, capital punishment prevails even when it collides with values and principles contained in the Constitution. Of course, the Inter-American Court has ruled against secondary provisions that prevent constitutional norms that are more favorable to

the respect and protection of human rights from having full effect. Fortunately, some rulings of the Caribbean domestic courts or of the Privy Council have gone in that direction.

10. Important legislative changes have been made on the subject in Jamaica, which has initiated a new era. Also important is the decision announced by the Government of Barbados, embracing decisions of the Inter-American Court, that it will reform its criminal law and adapt it to constitutional principles so as to exclude the obligatory or compulsory death penalty. It is true that these reforms are still pending – and the Inter-American Court notes this in the *DaCosta Cadogan* judgment when considering that there has been a violation of Article 2 of the American Convention – but it is also true that an explicit political will can be observed, formally expressed and with broad commitment, which allows us to suppose that greater changes will soon be adopted in the laws of Barbados.

11. In this opinion, I wish to refer to an issue that is important, in my view, and which the Inter-American Court has also noted in this judgment, that is, the failure of the State to ensure the most thorough defense of the accused who confronts the death penalty due to the nature of the offense committed and in consideration of particular personal circumstances. This relates to how due process was understood and applied in this case, and further, in my opinion, in any similar case. This involves the restriction on the death penalty arising from procedural issues, in addition to its restriction based on substantive issues to which I referred in the preceding paragraphs.

12. According to the law in force in Barbados (or, more broadly, the norms of Barbados, in order to include the provisions of formal statutes, practice, and jurisprudence, under the framework of the common law), the death penalty is not applicable in the case of individuals who have committed offenses sanctioned with this punishment but who, at the time they committed them, suffered from mental health problems or other situations (alcohol or drug addiction) with which this normative associates the same juridical consequence. Thus, there are hypotheses for excluding the death penalty which, logically, constitute presumptions to be considered when conducting proceedings and delivering the judgment. The presence or absence of these exclusions influences the alternative that looms over the individual: life or death, as stated in the Court's judgment.

13. It is not merely a question of the ability of the individual to undergo the trial lucidly, or of his competence to take part in the oral proceedings and understand the charges against him. Although this is significant, it is not everything. It is a question of the pertinence or irrelevance of undertaking proceedings and formulating claims – both the State's responsibility – that will lead to the death penalty or, in contrast, undertaking proceedings which have consequences that do not entail this very serious punishment. In this regard, one can speak of the relevance of the definition adopted as a basis for the State's punitive action.

14. In these circumstances, it seems evident that the State should take into account the regime of international human rights law on the trying of individuals that may be sentenced to capital punishment. It is clear that very demanding standards exist in this regard, as can be seen from the 1984 United Nations Safeguards, which require the most complete defense of the accused – points 4 and 5 – and as can be seen from Article 4 of the American Convention. Criminal proceedings should be particularly careful about guaranteeing rights, and the State's criminal action should proceed in the same direction – and in the same spirit – through the different public agents who intervene in these matters: the police, prosecutors, courts, among others. No State body can exempt itself from these essential requirements.

15. The tribunal is charged with guaranteeing the human rights of the accused, and this responsibility may not be evaded. Thus, the tribunal's first concern in a case such as that before the Court should be the precise verification that the conditions on which the trial was based were satisfied; in other words, that the factors necessary for the initiation of a trial that would culminate in the death penalty really existed. This required the tribunal to verify that it had reasonably exhausted, if applicable, the possibility of the exclusion of the death penalty due to the mental health of the accused at the time that the crime was committed, and not merely at the time of the trial.

16. In view of the judge's function as guarantor, and of the very high procedural standards in the application of the death penalty, the judge could not depend, nor should he have depended, on the diligence and professional expertise of the defense counsel – also a State official – but should have himself verified that possibility, ordering an appropriate psychiatric examination to that end. This does not rule out the defense lawyer's obligations, but the latter's obligations do not relieve the court of those that are inherent to its elevated responsibility.

17. It should be recalled that the judge instructs the jury to consider the mental situation of the accused as an important element in establishing the verdict. How can the jury – a group of laymen – do this if they have not received sufficient and clear information – necessarily professional, qualified information – on this point? It cannot be left to the discretion of citizens or even of the judge, who is not a psychiatrist.

18. I cannot endorse the idea that, according to the strict rules of the accusatory criminal procedural system, the judge should abstain from assuming probative initiatives and wait for the parties to request essential measures. I refer to the production of evidence on points on which much more than a secondary procedural advantage depends: the determination of the pertinence of a trial that must necessarily culminate in the death penalty. I consider it unacceptable for a judge to act passively in such a case – the omission referred to in the *DaCosta* judgment – which can lead to the most serious violation of the applicable norms and lead to an injustice. In this situation, the court – a body that "administers justice" – should take upon itself the effective protection of the legal order and not limit itself to waiting for the other participants in the proceedings to do so. Clearly, the requirement for judicial initiative is not limited to one case, but should be a general rule applicable to all cases in which elements exist to justify it.

19. I agree with my fellow members of the Inter-American Court on the advance implied by the judgment in the case of *DaCosta Cadogan* in relation to the equivalent decision in the *Boyce* case. To rectify the violation committed in this case, the punishment imposed must be modified – at the very least. A court should be charged with determining this modification – by its nature a judicial act – through a judicial proceeding. It is worth insisting that the application of punishments – and consequently the modification of punishments that have been applied – is clearly part of the judicial function. The administrative procedure of commutation (if this were the case) or the remedy of pardon, with its component of "mercy," is not sufficient. When international courts have dealt with the rectification of very serious violations of due process, they have decided that it should proceed through judicial channels, with a hearing and the defense of the individual involved. The Inter-American Court has ruled similarly.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Registrar