

INTER-AMERICAN COURT OF HUMAN RIGHTS

NEIRA ALEGRIA ET AL. CASE

PRELIMINARY OBJECTIONS

JUDGMENT OF DECEMBER 11, 1991

In the case of Neira Alegría *et al.*,

the Inter-American Court of Human Rights, composed of the following judges:

Héctor Fix-Zamudio, President
Thomas Buergenthal, Judge
Rafael Nieto-Navia, Judge
Julio A. Barberis, Judge
Jorge E. Orihuela-Iberico, *ad hoc* Judge;

also present,

Manuel E. Ventura-Robles, Secretary and
Ana María Reina, Deputy Secretary

delivers the following judgment pursuant to Article 27(4) of the Rules of Procedure of the Court (hereinafter "the Rules") in force for matters submitted to it prior to July 31, 1991, on the preliminary objections interposed by the Government of Peru (hereinafter "the Government" or "Peru").

I

1. The Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted the instant case to the Inter-American Court of Human Rights (hereinafter "the Court") on October 10, 1990. It originated in petition N° 10.078 against Peru.

2. In filing the application with the Court, the Commission invoked Articles 51 and 61 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 50 of its Regulations, and requested that the Court determine whether the State in question had violated Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 4 (Right to Life), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the Convention, to the detriment of Messrs. Víctor Neira-Alegría, Edgar Zenteno-Escobar and William Zenteno-Escobar. The Commission also asked the Court "*to adjudicate this case in accordance with the terms of the Convention, and to fix responsibility for the violation described herein and award just compensation to the victim's next of kin.*" The Commission named the following as its Delegates: Edith Márquez-Rodríguez, Executive Secretary; David J. Padilla, Assistant Executive Secretary; and Osvaldo N. Kreimer, Specialist of the Executive Secretariat.

3. On October 22, 1990, the Secretariat of the Court transmitted the Commission's application and the material annexed thereto to the Government.

4. On November 8, 1990, the Government appointed Minister Counselor Eduardo Barandiarán as its Agent. Subsequently, on January 2, 1991, it named a new Agent, Dr. Sergio Tapia-Tapia.

5. By Order of November 12, 1990, the President of the Court (hereinafter "the President"), in agreement with the Agent of Peru and the Delegates of the Commission and in consultation with the Permanent Commission of the Court (hereinafter "the Permanent Commission"), set

March 29, 1991, as the deadline for the Commission's submission of the memorial provided for in Article 29 of the Rules and June 28, 1991, as the deadline for submission by the Government of the counter-memorial provided for in the same article.

6. On December 10, 1990, Peru appointed Dr. Jorge E. Orihuela-Iberico as *ad hoc* Judge.

7. The Commission submitted its memorial on March 28, 1991, and the Court received Peru's counter-memorial on June 27, 1991.

8. On June 26, 1991, the Agent for Peru interposed preliminary objections alleging "*lack of jurisdiction of the Commission*" and "*expiration of the time-limit for filing of the petition.*" The President fixed July 31, 1991, as the deadline for the submission by the Commission, in writing, of its observations and conclusions on the preliminary objections. This communication was received at the Secretariat of the Court on July 31, 1991.

9. After consultation with the Permanent Commission, the President directed that a public hearing be convened for December 6, 1991, at 15:00 hours, at the seat of the Court, for the presentation of oral arguments on the preliminary objections.

10. On August 3, 1991, the President, at the request of the Government, ordered the Commission to transmit to the Court the relevant portion of the summary minutes of its Meeting 1057, held on May 14, 1990, at which the Commission resolved to declare as concluded the examination of the case and adopted Report N° 43/90. The Commission was also requested to provide the pertinent parts of the summary minutes of its 78th Session, at which it decided to submit the case to the Court, and to specify the date of the relevant meeting.

On October 18, 1991, the Secretariat of the Commission replied that

the Commission was consulted about this order at its 80th regular session and resolved that this Commission's summary minutes are of a confidential and reserved nature. Nevertheless, the Commission places itself at the disposal of that Honorable Court and will provide it with such specific information as the Court deems necessary to order.

1991 (*supra* 10 and 11). Mr. Fappiano stated: “[. . .] *I formally declare that the decision was adopted on October 5th and that the relevant portion of the minutes reads as follows: to confirm the decision to submit the case to the Court because the deadline has expired and the declarations of the Government of Peru are not satisfactory.*” He also stated:

[. . .] Mr. President, the Commission’s report was delivered on May 14, 1990, as recorded in the minutes for that day and for the following day, May 15. The relevant portion of the minutes repeats what is contained in the concluding part of the report itself: to submit the case to the consideration, to the jurisdiction of the Court, unless the Government of Peru resolves the matter within the three months indicated in the previous paragraph. All this we acknowledge.

II

14. According to the petition filed with the Commission, on June 18, 1986, Víctor Neira-Alegría, Edgar Zenteno-Escobar and William Zenteno-Escobar were being held in detention at the San Juan Bautista penal establishment, also known as “El Frontón”, having been charged with the commission of alleged terrorist acts. On that date, a mutiny occurred in the prison. In order to quell the uprising, the Government, by Supreme Decree Number 006-86-JUS, placed the prison under the control of the Joint Staff of the Armed Forces. The penitentiary thus became a restricted military zone. Since that time, that is, the date on which the Armed Forces took action to put down the mutiny, the persons listed above have disappeared; their next of kin have never seen or heard from them again.

15. The June 18, 1986 record drawn up by the authorities of the National Penitentiary Institute, whose powers over that prison were suspended pursuant to the aforementioned Supreme Decree, certifies that on that date there were 152 detainees in the San Juan Bautista Prison, all of them alive. The three detainees identified in the petition were among this number.

3. To declare that the Government of Peru has not fulfilled its obligations with respect to human rights and the guarantee imposed by Articles 1 and 2 of the Convention.

4. To declare that the Government of Peru has violated the right to life recognized in Article 4, the right to personal liberty enshrined in Article 7, the judicial guarantees of Article 8, and the right of judicial protection found in Article 25, all from the American Convention of Human Rights, as a consequence of the acts which occurred in the San Juan Bautista Prison, in Lima, on June 18, 1986, that led to the disappearance of Víctor Neira-Alegría, Edgar Zenteno-Escobar, and William Zenteno-Escobar.

5. To formulate the following recommendations for the Government of Peru (Convention Article 50(3) and Article 47 of the Inter-American Commission on Human Rights' Regulations):

a. Peru must fulfill Articles 1 and 2 of the Convention adopting an effective recourse that guarantees the fundamental rights in the cases of forced or involuntary disappearance of individuals;

b. Conduct a thorough, impartial investigation into the facts object of the complaint, so that those responsible may be identified, brought to justice and receive the punishment prescribed for such heinous acts, and determine the situation of the individuals whose disappearance has been denounced;

c. Adopt the necessary measures to prevent similar acts from occurring in the future;

d. Make necessary reparations for the violations of rights previously indicated and pay just indemnity to the victims' families.

6. To transmit the present report to the Government of Peru so that the latter may make any observations it deems appropriate within 90 days from the date it is sent. Pursuant to Art. 47(6) of the Commission's Regulations, the parties are not authorized to publish the present report.

7. To submit the present case to the Inter-American Court of Human Rights unless the Government of Peru solves the matter within the three months allotted in the previous paragraph.

20. The Commission transmitted the resolution to the Government on June 11, 1990, and informed it that the time-limit specified therein commenced on the aforementioned date.

21. By a note dated August 14, 1990, the Government requested of the Commission, *"because of the few days that have elapsed since the new Administration of Peru assumed power and pursuant to Article 34, paragraph 6, of the Regulations of the IACHR [. . .], a 30-day extension to enable it to fully comply with the Commission's recommendations."*

In a note dated August 20, 1990, the Commission granted the requested 30 day extension, to commence on September 11, 1990.

22. By note of September 24, 1990, the Government informed the Commission that, in its judgment, the exhaustion of domestic remedies in the instant case had occurred on January 14, 1987. On that date, the judgment of the Court of Constitutional Guarantees denying the petitioners' claim was published in the Official Gazette "El Peruano." Peru therefore asserted that when the petition was filed with the Commission, more than six months had elapsed since the exhaustion of domestic remedies, which is the time-limit fixed in Article 46 of the Convention for lodging petitions or communications with the Commission. The aforementioned note states the following:

[. . .] Consequently, the Government of Peru is of the opinion that the Commission, *motu proprio (sic)*, should have declared the petition inadmissible, pursuant to Article 47 paragraph a. of the Convention on Human Rights, which provides that the Commission shall act accordingly when:

'Any of the requirements indicated in Article 46 has not been met.'

23. The Commission analyzed the Government's note during its 78th Session and agreed to confirm its decision to submit the case to the Court.

III

24. The Court has jurisdiction to hear the instant case. Peru has been a State Party to the Convention since July 28, 1978. It accepted the contentious jurisdiction of the Court, to which Article 62 of the Convention refers, on January 1, 1981.

IV

25. The Court will now examine the preliminary objections interposed by the Government.

26. In its first objection, the Government contends that, pursuant to Article 46, paragraph 1 (b) of the American Convention, one of the requirements for admissibility of a petition by the Commission is that it be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment of the domestic courts. If this requirement were not met, the Commission would lack jurisdiction to pursue the case.

27. In the instant case, the petition was filed with the Inter-American Commission on September 1, 1987, according to the Peruvian Government, and on August 31 of that year, according to the Commission's memorial. This one-day discrepancy in the assertions of each of the parties is legally irrelevant to the resolution of the instant case. The Court does not deem it necessary, therefore, to address this issue.

28. The Government contends in its preliminary objections and reiterated at the hearing of December 6, 1991, that the domestic remedies interposed by the petitioners were exhausted when they received notice of the judgment of the Court of Constitutional Guarantees through its

publication in the Official Gazette, that is, on January 14, 1987. The Government adds that under Article 46 of Law N° 23385, which governs the activities of that tribunal, a judgment rendered by it has the effect of exhausting domestic remedies.

The foregoing assertion by the Peruvian Government is not consistent with its prior statement to the Commission, contained in its note of September 29, 1989 (*supra* 18).

29. It follows from the above that on September 29, 1989, Peru contended that domestic remedies had not been exhausted, but that a year later, on September 24, 1990, it asserted the contrary to the Commission, as it now does to the Court. 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.

It could be argued in this case that the proceedings before the Special Military Tribunal do not amount to a real remedy or that that tribunal cannot be deemed to be a court of law. Here neither of these assertions would be relevant. What is important, however, is that as far as concerns the exhaustion of domestic remedies the Government has made two contradictory statements about its domestic law. Regardless of the veracity of either of these statements, that contradiction affects the procedural situation of the other party.

30. This contradiction has a direct bearing on the inadmissibility of petitions lodged after the "*period of six months from the date on which the party alleging violation of his rights was notified of the final judgment*" (Art. 46(1)(b) of the Convention) with regard to the exhaustion of domestic remedies.

In fact, since that period depends on the exhaustion of domestic remedies, it is for the Government to demonstrate to the Commission that the period has indeed expired. Here, again, the Court's earlier decision regarding the waiver of non-exhaustion of domestic remedies is relevant:

Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implica-

tion, by the State having the right to invoke it, as this Court has already recognized (see **Viviana Gallardo et al.**, Judgment of November 13, 1981, No. G 101/81. Series A, para. 26). 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. (**Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 88; Fatrén Garbí and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2, para. 87; and, Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 90.**)

31. For the above reasons, Peru cannot validly interpose in these proceedings the objection of lack of jurisdiction based on Article 46, paragraph (1)(b) of the Convention.

32. The Government has interposed another preliminary objection based on the fact that the Commission submitted the case to the Court after the expiration of the term specified in Article 51, paragraph (1), of the American Convention. Under that provision, the Commission has a period of three months from the date of the transmittal of the report to the Government concerned in which to submit a case. After that period, the Commission no longer has the power to do so.

In the instant case, Report N^o.43/90 was transmitted to Peru on June 11, 1990. The case was referred to the Court on October 10 of that same year. Peru contends that since the three month period which commenced on June 11 had elapsed, the Commission no longer had the right to submit the case.

33. There exists no disagreement between the parties as to the dates mentioned above. Since Report N^o 43/90 was transmitted to the Government of Peru on June 11, 1990, the Commission should have submitted the matter to the Court within the period of three months following that date.

On August 14, 1990, before that period had expired, Peru requested a 30 day extension from the Commission (*supra* 21). By note of August 20, 1990, the latter granted the requested extension as of September 11, 1990.

34. It follows that the original period of three months was extended by the Commission at the request of Peru. In accordance with elementary principles of good faith that govern all international relations, Peru cannot invoke the expiration of a time-limit that was extended at its own behest. Therefore, the Commission's submission of the case cannot be deemed to have been untimely; on the contrary, the matter was submitted within the period granted to the Government at its own request (See *Velásquez Rodríguez Case, Preliminary Objections, supra* 30, para. 72; *Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra* 30, para. 72; and, *Godínez Cruz Case, Preliminary Objections, supra* 30, para. 75).

35. Peru cannot now also assert, as it did at the hearing, that the Commission lacked jurisdiction to grant the extension of the three month period which the Government itself had requested, since principles of good faith dictate that one may not request something of another and then challenge the grantor's powers once the request has been complied with.

V

Now, therefore,

THE COURT,

by four votes to one,

rejects the objections interposed by the Government of Peru.

Jorge E. Orihuela-Iberico, *ad hoc* Judge, dissenting.

Done in Spanish and English, the Spanish text being authentic. Read at the public hearing held at the seat of the Court in San Jose, Costa Rica, on December 11, 1991.



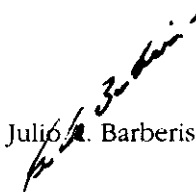
Héctor Fix-Zamudio
President



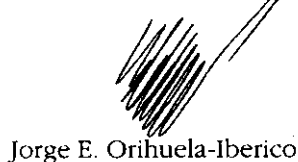
Thomas Buergenthal



Rafael Nieto-Navia



Julio A. Barberis



Jorge E. Orihuela-Iberico



Manuel E. Ventura-Robles
Secretary

So ordered,



Héctor Fix-Zamudio
President



Manuel E. Ventura-Robles
Secretary

Although Judge Sonia Picado-Sotela took part in the public hearing held on December 6, 1991, her signature does not appear on this judgment because she was absent from the seat of the Court when it was signed.