

REASONED CONCURRING VOTE OF JUDGE SERGIO GARCÍA RAMÍREZ

1. I join the majority of the judges of this Court in the reasoning and decision on the preliminary objections in the Las Palmeras case (judgment of February 4, 2000). However, I believe it is advisable to expand on the reasoning with regard to the second preliminary objection filed by the State (the lack of competence of the Commission, paras. 16, second, and 34, and the third ruling), which the Court admitted. This decision is consistent with the one adopted on the third objection (the lack of competence of the Court, paras. 28-33, and the second ruling), which is extensively reasoned in the judgement.

2. In this Concurring Opinion, I set forth some specific considerations on the third objection, without detriment to the shared concepts that underlie the decision made by the Court with regard to both objections.

3. It is possible to discuss the nature of the assertions filed by the State as preliminary objections. When examining this point, it is necessary to take into account that the method of defense characterized as preliminary objections serves to prevent, detain or restrict the exercise of jurisdiction. To the contrary, exceptions or defenses of a substantive nature relate to the merits of the case, seek to adversely affect the claim of the plaintiff and are aimed at sustaining a judgement for dismissal.

4. In my opinion – and with the greatest respect for other points of view – the procedural defenses filed by the State have the characteristics mentioned in the first instance, independent of their legal basis and of the possibility that the problem they pose could be approached from another perspective under some circumstances. The purpose of the objection to the competence of the Commission was to detain a procedure that had been initiated, in the State's opinion, beyond the attributions of the respective organ. The fact that, to this end, it could have been sufficient to file the objection of the incompetence of the Court does not deprive the argument submitted regarding the competence of

the Commission of its nature of preliminary objection. The Court considered it thus, and proceeded to decide on both objections.

5. In the second preliminary objection examined in the judgment, the State maintained – and the Court accepted – that the Commission did not have competence to apply international humanitarian law and other international treaties. Here, the allusion is to competence in its broadest sense, synonymous with terms of reference or power of an authority, not in the strict sense, as an ambit within which jurisdiction is exercised; the latter would only be applicable to a jurisdictional organ, which is the case of the Court, but not of the Commission.

6. In view of the foregoing, it is pertinent to examine briefly the Commission's terms of reference with regard to the instant case. This important organ of the inter-American system has an essential function with a generic scope: "to promote respect for and defense of human rights" (Article 41, initial paragraph, of the American Convention on Human Rights (hereinafter "the Convention")).

7. Within these generic terms of reference, the Commission has different specific powers, which constitute other expressions or perspectives of its "competence." It is useful to distinguish between: a) the functions that the Commission performs for the respect for and defense of human rights, *in genere*, that do not terminate in a contentious jurisdictional proceeding with an application filed before the Inter-American Court (Article 41, subparagraphs a, b, c, d and g, of the Convention); and b) the function that does culminate in an application before the Inter-American Court (*idem*, subparagraph f). Each of these functions has its own nature, regulation and effects, in the terms of the Convention.

8. With regard to the power or "competence" mentioned *sub b*), subparagraph f) of Article 41 sets out a specific task which must be considered in order to establish the corresponding legal assumptions, characteristics and consequences: "to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention."

9. As may be seen, the competence assigned to the Commission in subparagraph f) of Article 41 covers the different acts that culminate in the submission of an application before the Court in order to receive from this a jurisdictional decision. Consequently, it refers to an ambit in which the powers of the Commission and the Court are adjusted, at their respective times.

10. The first provision expressly mentioned in subparagraph f) of Article 41 encompasses two fundamental issues, one of a subjective nature (giving legal standing to the procedure) and the other objective (material competence): a) the legal standing to take action on petitions and thus set in movement the procedure that will culminate in the deployment of the contentious jurisdiction of the Court; and b) the subject-matter of these petitions, which is also that of the respective procedure before the Commission and before the Court: behavior that constitutes "a violation of this Convention by a State Party." The same consideration exists in Article 45.1, which regulates the hypothesis of a complaint by one State Party against another, due to "a violation of a human right set forth in this Convention."

11. The same indication with regard to the subject-matter of the petition, the procedure that this sets in motion and the possible application that the Commission will submit to the Court appears in various parts of Article 48.1, initial paragraph, which refers to "a petition or communication alleging violation of any of the rights protected by this Convention;" and subparagraph f) which alludes to friendly settlement on the basis of "respect for the human rights recognized in this Convention."

12. Throughout the body of regulations applicable to the Commission there are other provisions which are relevant for the matter in hand, such as Articles 1 and 23.1 of the Statute and 31, 41.b and 45.1 of the Regulations.

13. In this way, exercise of the contentious jurisdiction of the Court is initiated. According to the Convention, this jurisdiction extends to interpretation or application of the American Convention (Article 62.1 and 3), which, in this regard, is implemented in matters relating to the "violation

of a right or freedom protected by this Convention" (Article 63.1). Thus the ambit of the Court's material competence on contentious matters is also established.

14. Evidently, preparatory activities for the contentious proceeding before the Court and participation in these in no way exhaust the powers of the Commission and the Court. The former can and does carry out other activities of great importance for the promotion and defense of human rights, and even endeavors to expand the inter-American regime of protection; this may be inferred from the last subparagraphs of Article 19 of its Statute, in particular. Likewise, the advisory competence of the Court covers both the American Convention and "other treaties concerning the protection of human rights in the American States" (Article 64.1).

15. Once the rule for the intervention of the Commission and the Court in matters to be heard under contentious proceedings has been posed in this way, it is in order to indicate that there are exceptions to this limitation of material competence. These exceptions are to be found in other instruments of our human rights protection system.

16. An exception of this nature appears in the Inter-American Convention to Prevent and Punish Torture. Article 8, *in fine*, authorizes access "to international fora whose competence has been recognized by (that) State" to whom the violation of the said treaty has been attributed. The Court has had the opportunity to make a pronouncement on this point in the *Paniagua Morales et al. case* (Judgment of March 8, 1998, para. 136 and the third ruling, and the *I'llagrán Morales et al. case* (Judgment of November 19, 1999, paras. 247-252 and the seventh ruling).



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Sergio García Ramírez
Judge