

DISSENTING OPINION OF JUDGE CARLOS VICENTE DE ROUX-RENGIFO

I must dissent from the decision of the Court as to six of the seven preliminary objections raised by the Peruvian State, because I believe they have a close relationship with the merits of the case and should have been joined to the merits.

It is well known that for a petition or communication to be admitted by the Commission, Article 46(1) of the Convention requires,

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

There are exceptions to this rule, among which are those set forth in Articles 46(2)(a) and 46(2)(b), which come into effect when "the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated," and when "the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them."

That being established, it is important to examine the content of the litigation initiated by the Inter-American Commission before the Court. To this end, I am going to summarize the arguments of that organ, without prejudging their truthfulness or validity.

In the application, the Commission asks the Court to declare that the Peruvian State has violated Articles 5, 7, 8, and 25 of the Convention, and in the statement of the facts it emphasizes three types of circumstances:

First: the illegal and arbitrary detention to which Luis Alberto Cantoral-Benavides was subjected;

Second: the totally groundless proceedings to which Luis Alberto Cantoral-Benavides was subjected in the Exclusive Military Jurisdiction and the civilian courts from the date of February 6, 1993;

Third: the cruel and degrading treatment with which he was treated by the agents of DINCOTE.

(Application to the Inter-American Court, pg. 3).

As can be seen, the application of the Commission disputes all the actions and omissions of the State which began with the detention of Luis Alberto Cantoral-Benavides and extended to the conclusion of the second criminal proceeding that which took place in the civilian courts.

The claims of condemnation made in the application are very broad. They lead to declarations that the following rights have been violated:

- A. The right to be heard by an independent and impartial tribunal...
- B. The right to the presumption of the innocence of the accused...
- C. The right of defense...
- D. The right not to be compelled to be a witness against himself and to confess without coercion of any kind.
- E. The judicial guarantee [...] which prohibits that someone be subjected to two criminal trials for the same events.

(Application before the Inter-American Court, pg. 34).

In more specific terms, the general opposition to the criminal procedures to which Luis Alberto Cantoral-Benavides was subjected include accusations such as the following:

- a. That he was detained without an arrest warrant issued by a competent authority (pg. 21).
- b. That some weeks after his detention he was exhibited before the mass media dressed in a "striped uniform," as a member of the "Shining Path" and the perpetrator of the crime of treason against the fatherland (pg. 43).
- c. That the criminal charge for which Luis Alberto Cantoral-Benavides was tried—a decision which determined the applicable jurisdiction and proceedings—, was made by the Peruvian National Police (more specifically DINCOTE) and not by an independent tribunal (Pg. 37).
- d. That he was tried, both in the exclusive military jurisdiction and in the civilian jurisdiction by "faceless judges," lacking in independence and impartiality (pg. 34) and who could not be asked by the accused to recuse themselves when they were "prejudiced" or "partial" (pg. 37).
- e. That he was tried by judges from the Exclusive Military Jurisdiction, who pursuant to the Organic Law of Military Justice of Peru are a part of the Ministry of Defense and who, as a consequence, are subordinate to the Executive branch. Moreover, for the Commission, the Peruvian Armed Forces have as an essential function the fight against irregular armed groups. The application asserts that the Peruvian Armed Forces assume the function of judging those accused of belonging to those groups, they assume a function of the judiciary and cast serious doubt on the impartiality of the military courts, which become both judge and party to the proceedings (pg. 36).
- f. That the courts that tried him admitted as partial evidence of his guilt a confession obtained by coercion; based their decisions on the value of testimony and experts' reports that the accused did not have the opportunity to adequately examine

and on evidence that did not possess sufficient characteristics of gravity, precision, and consistency; and deemed the accused's refusal to accept his guilt (when he renounced his initial confession) to be evidence against him (pgs. 40, 42, 45, 46, and 47).

g. That Luis Alberto Cantoral-Benavides could not, because it was prohibited by Decree-Laws 25,475 and 25,744, request the appearance, in the role of witnesses, of the members of DINCOTE who participated in his arrest and who wrote up the police affidavit that charged him with the crime of aggravated terrorism in the form of treason against the fatherland and which subsequently served as the basis upon which to convict him of the crime of terrorism (pg. 44).

h. That the three judgments that convicted Luis Alberto Cantoral-Benavides in the military jurisdiction and "the fourth judgment rendered by the civilian jurisdiction" (the Commission is referring to the first conviction rendered in the proceeding that took place before this final jurisdiction) lack a rational basis and ignore the fundamental arguments of the defense (pg. 43).

i. That he was not released despite having been absolved of one of the judgments in the military court, because of the mistake of the judge charged with the execution of the judgment, who released his twin brother Luis Fernando Cantoral-Benavides in his stead.

j. That Luis Alberto Cantoral-Benavides was judged and absolved of the facts specified in the sworn police affidavit of DINCOTE by the exclusive military jurisdiction and subsequently was judged and sentenced in the regular jurisdiction to twenty years in prison based on the same facts (pgs. 47, 48, 52, 53, and 54).

The accusations made in the application of the Inter-American Commission on Human Rights against the Peruvian State for the pro-

ceedings of the State against Luis Alberto Cantoral-Benavides, and, in particular, for the criminal trials to which he was subjected, have, as is clear from the aforementioned, a broad basis. There is practically no aspect of those proceedings that has not been the subject of criticism and censure.

The State responded by vigorously defending itself against the Inter-American Commission's charges of alleged violations of due process. It did so before the Commission itself (application to the Inter-American Court, pgs. 12 and 13) and also before the Court. In its brief in answer to the application, the State particularly set forth factual and legal reasons in defense of the legality of the arrest of Luis Alberto Cantoral-Benavides (pgs. 22 to 24) and his prosecution in the military courts for the crime of treason against the fatherland (pgs 26 to 30). It also employed that type of reasoning to maintain that Cantoral-Benavides was tried by an independent court (pgs. 30 to 34) that he was given guarantees of the presumption of innocence (pgs. 34 to 41) and the right of a defense (pgs. 42 to 46), and that in general his right to legal due process was respected (pgs 46 and 47). The State also refuted the assertions of the Commission as to alleged torture and other illegal treatment (pgs. 24 to 26).

From all of the above it arises, quite clearly, that the question of due process is at the very center of this contentious case.

In more specific terms, I should emphasize the following:

- a. The very proceedings which would constitute "remedies of the domestic jurisdiction" for the purpose of this case, are being questioned in the application, and at the same time are being defended by the respondent.
- b. There is disagreement between the parties as to the conformity of all the judgments that can be understood to be "final judgments" or "judgments that exhaust domestic remedies" to the American Convention and to the Constitution and the laws of Peru.

c. In relation to the motions interposed by the parties against the judicial sentences rendered in the proceedings, the respective opposing party had made objections of illegality and irrelevance.

d. At this stage of the proceedings the evidence has not been collected or evaluated so as to permit the proper clarification of the contents, legality, and constitutionality of the aforementioned judicial decisions and the motions filed against them and of their conformity to the American Convention.

Accordingly, what was required was not to undertake an investigation of the criminal proceedings to which Luis Alberto Cantoral-Benavides was subjected in search of a judicial decision that would have exhausted the domestic remedies and after which the period of time specified in Article 46(1)(b) would have begun to run. It would have been appropriate to have joined these issues to the questions on the merits, taking recourse in Articles 46(2)(a) and 46(2)(b) of the Convention. This is for two reasons:

1. Because on having established the conditions for the non existence of legal due process (proof of which is a subject for the merits), the claimant is excused from the obligation to exhaust domestic remedies, and

2. Because beneath those conditions of the non existence on due process (which, I insist, in no way can be verified at the present stage of the case) the Court's identification of the proceeding and the "final judgment" that would have exhausted domestic remedies, is subject to too many shadows of uncertainty for the Court presently to be able to arrive at a decision that offers security and certainty.

Consequently, my vote is as follows:

1. Join the first, second, third, fourth, sixth, and seventh preliminary objections raised by the Peruvian State to the merits.

2. Dismiss the fifth preliminary objection raised by the Peruvian State.

3. Continue with the consideration of the merits of the case.



Carlos Vicente de Roux-Rengifo
Judge



Manuel E. Ventura-Robles
Secretary



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