

DISSENTING OPINION OF JUDGE FERNANDO VIDAL-RAMÍREZ

I dissent from the decision adopted in the judgment that dismisses the preliminary objections interposed by the agent of the Government of Peru for reasons which I will now explain.

1. The period of six months provided for in Article 46(b) of the American Convention had expired when the petition was lodged with the Commission.

1.1. The judgment that terminated the proceedings in the military jurisdiction was rendered on September 24, 1993, acquitting citizen Luis Alberto Cantoral-Benavides of the crime of treason against the fatherland and declining to try him for the crime of terrorism, because that crime fell to the regular jurisdiction.

This judgment declared null the judgment revised in the lower court that ordered the immediate release of citizen Cantoral-Benavides, and for that reason the case was removed to the regular jurisdiction.

1.2. The writ of review interposed by citizen Cantoral-Benavides before the Supreme Court of Justice of the Republic of Peru, dated October 22, 1993, is an extraordinary remedy, not preclusive, which according to the Peruvian Code of Criminal Procedure may be interposed without a deadline and at any time. It does not have the potential or legal effectiveness to be considered as a remedy of exhaustion of the domestic jurisdiction.

The norms that regulate the writ of review exhaustively list the grounds that can support it, as an extraordinary means of challenge, since it is directed against a final judgment which had acquired such authority and would result in the revision of the very basis of that judgment because of new facts and circumstances. It is decided by the plenary Supreme Court.

Although neither the resolution of the Supreme Court that decided the inadmissibility of the writ nor the writ itself are in the file, I accept the certainty of its filing from the statements of the parties and insist that this remedy does not have the potential nor the effectiveness to interrupt the running of the time period before lapse, as it is a remedy limited to convictions for crime, since its culmination is the elimination of the mistake in the judgment that put an end to the criminal proceedings, as a means of correcting said mistake.

1.3. Consequently, even though it is accepted that the stated writ of review was interposed, the time period was not interrupted.

Thus, from September 24, 1993, the date of the judgment of the Supreme Court of Military Justice, to April 18, 1994, the date of the complaint before the Inter-American Commission, more than the six months set forth in Article 46(b) of the American Convention had elapsed, and the dispositions of Article 46 were not applicable inasmuch as citizen Cantoral-Benavides was already subjected to the regular jurisdiction, and he had access to the remedies of the domestic jurisdiction which had been initiated by means of a writ of *habeas corpus* which was declared inadmissible.

2. The remedies of the domestic jurisdiction have not been exhausted.

2.1. Pursuant to the Supreme Council of Military Justice's September 24, 1993 final judgment, citizen Cantoral-Benavides was subjected to the regular jurisdiction with the commencement of an investigation on the date of October 8, 1993.

2.2. Some days before the beginning of the regular criminal trial, citizen Cantoral-Benavides filed a writ of *habeas corpus* that was declared inadmissible, precisely because he was under arrest in the regular jurisdiction and as a consequence of the criminal proceeding that had been established. Citizen Cantoral-Benavides did not interpose the writ of appeal and the resolution denying *habeas corpus* remained in effect.

The Political Constitution of Peru and the laws on the subject determine the remedies that can be exercised to exhaust the domestic jurisdiction.

Thus, it is evident that as to the writs of guarantee there was no exhaustion of national jurisdiction.

2.3. Following the proceedings to their final determination, the regular criminal trial initiated against citizen Cantoral-Benavides terminated with the judgment of the Supreme Court of the Republic of Peru on the date of October 6, 1995, which upheld the sentence of imprisonment that had been imposed by the Criminal Court.

2.4. Consequently, on having submitted the complaint to the Inter-American Commission on April 18, 1994, the requirements of Article 46(1)(a) of the American Convention were not fulfilled, as the criminal proceedings were in progress and the domestic jurisdiction had not been exhausted.

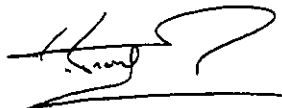
3. I dissent from the decision to continue with the consideration of the merits for the reasons that I will explain.

3.1. By means of Supreme Resolution No. 078-97-JUS of June 24, 1997, citizen Cantoral-Benavides was granted a reprieve, for which reason the Agent of the Government of Peru requested the dismissal of the case that is being tried by the Court.

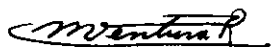
By means of the June 18, 1998 Resolution of the Court, the request for dismissal was rejected because, among other reasons, the Agent of the Government of Peru maintained the preliminary objections that he had raised.

3.2. With the reprieve and the release of citizen Cantoral-Benavides there has been a removal of the justiciable issues to be dealt with by this Court. Thus, the right to compensation set forth in Article 10 of the American Convention and in Article 139(7) of the Political Constitution of Peru is the only remaining issue in the case.

3.3. Consequently, my dissent from the decision to continue with the consideration of the merits, is based on the above stated reasons and therefore is not limited only to the compensatory aspects.

A handwritten signature in black ink, appearing to read 'Fernando Vidal-Ramírez', written over a horizontal line.

Fernando Vidal-Ramírez
Judge *ad hoc*

A handwritten signature in black ink, appearing to read 'Manuel E. Ventura-Robles', written over a horizontal line.

Manuel E. Ventura-Robles
Secretary