

**Dissenting Opinion of Judge *ad hoc*
Dr. Jorge E. Orihuela-Iberico**

**on the Preliminary Objection of Lack
of Jurisdiction of the Commission**

In the Case of Neira Alegria *et al.*

- I. Facts**
- II. Normative Provisions**
- III. Case Law**
- IV. Conclusions and Vote**

I. Facts

A) The petition or complaint

1. Prior to presentation of the complaint to the Commission:

1.1. Petition for habeas corpus processed in three stages before the Judiciary, starting on July 16, 1986, and concluding on August 25, 1986.

1.2. Appeal before the Court of Constitutional Guarantees processed between September 22, 1986, and December 5, 1986.

Notified in the Official Gazette "El Peruano" on January 14, 1987.

2. Point 1 above shows that the petitioner fulfilled the requirement stipulated in Article 46(1)(a) of the Convention.

3. The main case file contains repeated statements regarding the exhaustion of domestic remedies by the petitioners:

3.1. On page 246 they state "*whereupon domestic remedies were exhausted*" after the decision of the Court of Constitutional Guarantees; and

3.2. On page 208 "*whereupon domestic remedies were exhausted.*"

B) The presentation of the petition or complaint to the Commission.

Submitted in a document dated Washington, August 31, 1987, and received by the Commission on September 1, 1987, as shown on page 252 of the main case file. Acknowledged to be true in point one of the Index of Attachments compiled by the Commission together with the submission to the Court of October 16, 1990, which appears on page 254 of that same case file.

II. Normative Provisions

1. Convention

PREAMBLE

[. .]

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters [. .]

[. .]

Article 29. Restriction Regarding Interpretation

No provision of this Convention shall be interpreted as:

- a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict

them to a greater extent than is provided for herein;

[. . .]

Section 3. Competence

Article 46

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

- 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 is 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;

[. . .]

Article 47

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

- a) any of the requirements indicated in Article 46 has not been met;

[. . .]

- c) the statements of the petitioners or of the state indicate that the petition or communication is manifestly groundless or obviously out of order [. . .]

2. Statute of the Commission

IV. FUNCTIONS AND POWERS

[. . .]

Article 19

With respect to the States Parties to the American Convention on Human Rights, the Commission shall discharge its duties in conformity with the powers granted under the Convention and in the present Statute, and shall have the following powers in addition to those designated in Article 18:

- a. to act on petitions and other communications, pursuant to the provisions of Article 44 to 51 of the Convention;

[. . .]

3. Regulations of the Commission

Article 14. Functions of the Secretariat

[. . .]

2. The Secretariat shall receive petitions addressed to the Commission and, when appropriate, shall request the necessary information from the governments concerned and, in general, it shall make the necessary arrangements to initiate any proceedings to which such petitions may give rise.

[. . .]

TITLE II PROCEDURES

CHAPTER I GENERAL PROVISIONS

[. . .]

Article 30. Initial Processing

1. The Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the

Commission and that fulfill all the requirements set forth in the Statute and in these Regulations.

2. If a petition or communication does not meet the requirements called for in these Regulations, the Secretariat of the Commission may request the petitioner or his representative to complete it.

3. If the Secretariat has any doubt as to the admissibility of a petition, it shall submit it for consideration to the Commission or to the Chairman during recesses of the Commission.

CHAPTER II
PETITIONS AND COMMUNICATIONS REGARDING
STATES PARTIES
TO THE AMERICAN CONVENTION ON HUMAN RIGHTS

Article 31. Condition for Considering the Petition

The Commission shall take into account petitions regarding alleged violations by a state party of human rights defined in the American Convention on Human Rights, only when they fulfill the requirements set forth in that Convention, in the Statute and in these Regulations.

[. . .]

Article 33. Omission of Requirements

Without prejudice to the provisions of Article 29, if the Commission considers that the petition is inadmissible or incomplete, it shall notify the petitioner, whom it shall ask to complete the requirements omitted in the petition.

[. . .]

Article 38. Deadline for the Presentation of Petitions

1. The Commission shall refrain from taking up those peti-

tions that are lodged after the six-month period following the date on which the party whose rights have allegedly been violated has been notified of the final ruling in cases where the remedies under domestic law have been exhausted.

[. . .]

III. Case Law

1. 34. [. . .] The Court must, likewise, verify whether the essential procedural guidelines of the protection system set forth in the Convention have been followed. Within these general criteria, the Court shall examine the procedural issues submitted to it, in order to determine whether the procedures followed in the instant case contain flaws that would demand refusal **in limine** to examine the merits of the case. (*Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 34; Fairén Garbí and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2, para. 39; and, Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 37.*)
2. 37. Article 46(1) of the Convention lists the prerequisites for the admission of a petition [by the Commission] [. . .] (*Velásquez Rodríguez Case, supra 1, para. 37; Fairén Garbí and Solís Corrales Case, supra 1, para. 42; and, Godínez Cruz Case, supra 1, para. 40.*)
3. 39. There is nothing in this procedure that requires an express declaration of admissibility, either at the Secretariat stage or later, when the Commission itself is involved. In requesting information from a government and processing a petition, the admissibility thereof is accepted in principle, provided that the Commission, upon being apprised of the action taken by the Secretariat and deciding to pursue the case (Arts. 34(3), 35 and 36 of the Regulations of the Commission), does not expressly declare it to be inadmissible (Art. 48(1)(c) of the Convention). (*Velásquez Rodríguez Case, supra 1, para. 39; Fairén Garbí and Solís*

Corrales Case, supra 1, para. 44; and, Godínez Cruz Case, supra 1, para. 42.)

4. 45. [. . .] the Commission enjoys discretionary, but by no means arbitrary, powers to decide in each case [. . .] (**Velásquez Rodríguez Case, supra 1, para. 45; Fairén Garbí and Solís Corrales Case, supra 1, para. 50; and, Godínez Cruz Case, supra 1, para. 48.**)

5. 29. [. . .] In exercising these powers, the Court is not bound by what the Commission may have previously decided; rather, its authority to render judgment is in no way restricted. The Court does not act as a court of review, of appeal or other similar court in its dealings with the Commission. Its power to examine and review all actions and decisions of the Commission derives from its character as sole judicial organ in matters concerning the Convention. This not only affords greater protection to the human rights guaranteed by the Convention, but it also assures the States Parties that have accepted the jurisdiction of the Court that the provisions of the Convention will be strictly observed. (**Velásquez Rodríguez Case, supra 1, para. 29; Fairén Garbí and Solís Corrales Case, supra 1, para. 34; and, Godínez Cruz Case, supra 1, para. 32.**)

IV. Conclusions and Vote

1. That the petitioner complied with the exhaustion of domestic remedies requirement by presenting a writ of habeas corpus, the final decision on which was communicated to him on January 14, 1987.
2. That the period of six months referred to in Article 46(1)(b) of the Convention expired on July 14, 1987.
3. That the Commission received the petition on September 1, 1987, to wit, more than a month after the expiration of the six-month period.
4. That, according to the Convention and the Statute of the Commission, this six-month period is not of a procedural nature since it is contained in the part of the Convention relating to II. Means of

Protection - Chapter VII. Inter-American Commission on Human Rights - Section 3. Competence. Consequently, I reiterate that this period has been established in order to determine the jurisdiction of the Commission, an aspect that, according to the Preamble of the Convention, constitutes the essential purpose of the treaty and cannot be modified by the organs entrusted with its implementation, that is to say, by the Commission and the Court.

5. The Commission did not observe and, in fact, failed to comply with the Convention, its Statute and its Regulations, none of which grant it arbitrary or discretionary powers in the area of jurisdiction, as can be seen from the applicable normative provisions transcribed above.

6. That in view of the fact that the Commission admitted the petition or complaint outside of the period established by the Convention, a situation that no declaration of the parties can validate since it is a matter of nonobservance of an express norm of the Convention, there is no basis for the Court to attach the importance it does to the note of the Government of Peru dated September 29, 1989, appearing on page 194 of the main case file, in its judgment on the preliminary objections in the instant case, which was adopted by majority vote.

7. That this irregularity is alleged by the Government of Peru on September 24, 1990, in a report appearing on pages 168 to 172 of the main case file before the Commission, as follows:

[. . .]

1. The first observation that the Government of Peru must make with regard to the resolution in questions relates to point 1 of same, which states:

'To admit the petition bringing the instant case.'

It should be pointed out here that, according to the text of that resolution, the complaint bears the date August 1, 1987 (even so, there is room for doubt as to whether the text of the resolution contains a material error, since information provided would indicate that the complaint was not brought until September 1).

The Commission admitted the petition on the assumption that domestic remedies had been exhausted. As a matter of fact, on December 5, 1986, the Court of Constitutional Guarantees decided on appeal the petition of habeas corpus that had been initially submitted to the Trial Judge for Lima on July 16, 1986. The decision of the Court of Constitutional Guarantees was published in the Official Gazette "El Peruano" on January 14, 1987, thus concluding the exhaustion of domestic remedies.

When the petition was lodged, assuming it was on August 1, 1987, more than six months had elapsed since the exhaustion of domestic remedies, that being the period fixed in paragraph (b) of Article 46 of the Inter-American Convention on Human Rights governing the jurisdiction of the Commission. Consequently, the Government of Peru considers 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 proceed thus when:

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

NOW, THEREFORE:

I vote that the Court hold:

First. The preliminary objection of lack of jurisdiction on the part of the Commission interposed by the Government of Peru to be well-founded, given that the petition or complaint was admitted after the expiration of the period established in Article 46(1)(b) of the Convention; and

Second. That the Neira Alegría *et al.* case be dismissed.

**Dissenting Opinion of Judge *ad hoc*
Dr. Jorge E. Orihuela-Iberico**

**on the Preliminary Objection of
Expiration of the Time Limit for Submission
of the Commission's Application**

In the Case of Neira Alegria *et al.*

- I. Facts**
- II. Normative Provisions**
- III. Case Law**
- IV. Conclusions and Vote**

I. Facts

1. The Commission approved Report 43/90 during its 77th Session, at its Meeting N° 1057 of May 14, 1990.

2. By note of June 11, 1990, the Commission transmitted the report to the Government of Peru, indicating that the time-limits set out in the report would begin to run on the date of that communication.

3. By note of August 14, 1990, the Government of Peru requested the Commission to extend that period for 30 days in order to enable it to fully comply with the Commission's recommendations and in view of the fact that it had ordered the immediate preparation of a report on all actions taken in this case. The Government based its request on Article 34(6) of the Regulations of the Commission.

4. On August 20, 1990, the Commission advised the Government that it had granted the extension request for a period of 30 additional days, beginning on September 11, 1990.

In making this decision, the Commission:

[. . .] took special note of the following:

- a) The grant of an extension of 30 days would in no way impair the international protection of human rights; rather, it might open the possibility of a 'settlement in this case,' as contemplated in Article 51(1) of the Convention;
- b) The extension was for a reasonable length of time and had been requested within the time-limit specified in the Convention and in Report 43/90;
- c) The request was reasonable and was based on weighty circumstances that warranted consideration, such as the short time that the new Administration had been in power and the promise of an immediate report on all actions taken in this case.

5. On September 24, 1990, in response to the Commission's Report 43/90, the Government transmitted to the Commission a report with three attachments.

In the aforementioned report, the Government of Peru requested that the Commission set aside Report 43/90, due to the lack of jurisdiction of the Commission. (This fact has already been evaluated and is addressed in point IV. 7 of the preceding vote, which finds the objection of lack of jurisdiction of the Commission to be well-founded.)

6. At Meeting 1085 of October 5, 1990, held during its 78th Session, the Commission "*decided to reconfirm its original decision to submit the case to the obligatory jurisdiction of the Court*" (page 21 of the Preliminary Objections file) because it considered the Government's reply to be unsatisfactory.

7. On October 10, 1990, the Commission submitted Case 10.078 to the Court.

II. Normative Provisions

1. The Convention

CHAPTER VII-THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

[...]

Section 4. Procedure

[. . .]

Article 51

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

[. . .]

2. Statute of the Commission

IV. FUNCTIONS AND POWERS

Article 19

With respect to the States Parties to the American Convention on Human Rights, the Commission shall discharge its duties in conformity with the powers granted under the Convention and in the present Statute, and shall have the following powers in addition to those designated in Article 18:

- a. to act on petitions and other communications, pursuant to the provisions of Articles 44 to 51 of the Convention;

[. . .]

3. Regulations of the Commission

CHAPTER II

PETITIONS AND COMMUNICATIONS REGARDING STATES PARTIES TO THE AMERICAN CONVENTION ON HUMAN RIGHTS

Article 34. Initial Processing

[. . .]

6. The government of the State in question may, with justifiable cause, request a 30 day extension, but in no case shall extensions be granted for more than 180 days after the date on which the first communication is sent to the government of the State concerned.

[. . .]

Article 47. Proposals and Recommendations

[. . .]

2. If, within a period of three months from the date of the transmittal of the report of the Commission to the States concerned, the matter has not been settled or submitted by the Commission, or by the State concerned, to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

[. . .]

Article 50. Referral of the Case to the Court

1. If a State Party to the Convention has accepted the Court's jurisdiction in accordance with Article 62 of the Convention, the Commission may refer the case to the Court, subsequent to transmittal of the report referred to in Article 46 of these Regulations to the government of the State in question.

III. Case Law

1. 59. [. . .] the case is ripe for submission to the Court pursuant to the terms of Article 51 of the Convention, provided that all other

requirements for the Court to exercise its contentious jurisdiction have been met. (*Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 59; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2, para. 59; and, Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 62.*)

2. 62. Article 51 of the Convention, in turn, reads:

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

The Court need not analyze here the nature of the time limit set by Article 51(1), nor the consequences that would result under different assumptions were such a period to expire without the case being brought before the Court. The Court will simply emphasize that because this period starts to run on the date of the transmittal to the parties of the report referred to in Article 50, this offers the Government one last opportunity to resolve the case before the Commission and before the matter can be submitted to a judicial

decision. (*Velásquez Rodríguez Case, supra 1, para. 62; Fairén Garbí and Solís Corrales Case, supra 1, para. 62; and, Godínez Cruz Case, supra 1, para. 65.*)

3. 63. Article 51(1) also considers the possibility of the Commission preparing a new report containing its opinion, conclusions and recommendations, which may be published as stipulated in Article 51(3). This provision poses many problems of interpretation, such as, for example, defining the significance of this report and how it resembles or differs from the Article 50 report. Nevertheless, these matters are not crucial to the resolution of the procedural issues now before the Court. In this case, however, it should be borne in mind that the preparation of the Article 51 report is conditional upon the matter not having been submitted to the Court within the three-month period set by Article 51(1). Thus, if the application has been filed with the Court, the Commission has no authority to draw up the report referred to in Article 51. (*Velásquez Rodríguez Case, supra 1, para. 63; Fairén Garbí and Solís Corrales Case, supra 1, para. 63; and, Godínez Cruz Case, supra 1, para. 66.*)

IV. Conclusions and Vote

1. The Commission had the opportunity to submit case 10.078 to the Court until September 11, 1990.
2. Since the request for an extension presented by the Government of Peru is not contemplated in the normative provisions in force, it was not only inadmissible but also relied erroneously on Article 34(6) of the Regulations of the Commission, a provision that governs a different stage of the proceedings and is not here applicable. The Commission should have denied the request and pointed out that the period of three months still had 20 days to run before its expiration. And furthermore, it lacked authority to grant an extension of this term fixed in a treaty.
3. In extending a period fixed by the Convention, the Commission not only exceeded the bounds of its jurisdiction, but also, by so doing, placed itself in a position that made it legally impossible to submit the

case to the Court. It did not, however, lose its power to sanction Peru through the publication of its report.

4. The authority to extend or prolong the 90 day period is not granted to the Commission in any article of the Convention, nor does the latter contemplate the States requesting such an extension.

5. Accordingly, it has been demonstrated that in handling this petition the Commission exceeded the powers granted it by the Convention, its Statute and its Regulations.

NOW, THEREFORE:

I vote that the Court hold:

First. The preliminary objection of expiration of the application interposed by the Government of Peru to be well-founded, given that the Commission submitted case 10.078 to the Court after the expiration of the period established in Article 51(1) of the Convention; and

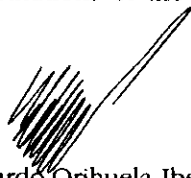
Second. That the Neira Alegría *et al.* case be dismissed.

In signing this vote, I call on the Honorable Inter-American Court of Human Rights to exhort the Inter-American Commission on Human Rights to comply with the American Convention on Human Rights, its Statute and its Regulations, to ensure an adequate protection of human rights without undermining the health of the institutions of the inter-American system.

San Jose, December 11, 1991.



Manuel E. Ventura-Robles
Secretary



Jorge Eduardo Orihuela-Iberico
Ad hoc Judge