

**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.

11. By note of November 14, 1991, the Government asked the Court to formally reiterate its request to the Commission to *"duly present the relevant parts of the minutes [ . . . ] with the admonition that, in the event of noncompliance with the Court's order, the allegations of the Government of Peru shall be presumed to be true."* The President acceded to this request in a note dated December 3, 1991. In it, he explained to the Commission that he had requested the transmittal of the relevant portions of two of the summary minutes to which Article 22 of the Commission's Regulations refers because they spelled out the decisions the Commission had adopted; these decisions, in his opinion, could not be considered to be confidential. He also added that the failure to transmit the documents requested *"could have procedural consequences."*

12. The public hearing was held at the seat of the Court on December 6, 1991.

There appeared before the Court;

for the Government of Peru:

Sergio Tapia-Tapia, Agent

Eduardo Barandiarán, Minister Counselor;

for the Inter-American Commission on Human Rights:

Oscar Luján-Fappiano, Delegate

David J. Padilla, Delegate

Carlos Chipoco, Adviser

José Miguel Vivanco, Adviser

Silvio Campana, Adviser.

13. At this hearing, the Commission supplied the dates that had been requested by the President in his notes of August 3 and December 3,

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.

16. On September 8, 1987, the Commission admitted the petition, acknowledged receipt thereof and requested pertinent information from the Government, including information bearing on the question of whether domestic remedies had been exhausted. When the Peruvian Government failed to reply, the Commission repeated its request for information four times (January 11 and June 7, 1988, February 23 and June 9, 1989), in accordance with the procedure provided for in Article 42 of its Regulations.

On June 26, 1989, the Peruvian Government sent the Commission a general reply that referred to several cases pending before that body. The Government did not, however, specifically address the matter of exhaustion of domestic remedies in the instant case.

17. On September 25, 1989, the Commission conducted a hearing which was attended by representatives of the petitioners and of the Government. The former provided details about the events that took place in El Frontón on June 18 and 19, 1986, and particularly about the way in which the uprising was suppressed. The representatives of the Government, however, refrained from making any observations.

18. On September 29, 1989, the Government sent the Commission a communication. It reads in part as follows:

As for [case] 10.078, [which], as is public knowledge, is currently being dealt with by the Special Military Tribunal of Peru in accordance with the laws in force, it must be pointed out that the State's domestic jurisdiction has not been exhausted. Consequently, it would be advisable for the IACHR to await the final outcome of [this case] before making a definitive decision.

19. The Commission examined the instant case during its 77th Regular Session and approved Resolution N° 43/90 of June 7, 1990, the operative part of which reads as follows:

1. To declare that the complaint of the present case is admissible.
2. To declare that a friendly solution to the present case is inappropriate.

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 Victor 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 (s/c)*, 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 21, 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; Fairén 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°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° 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,

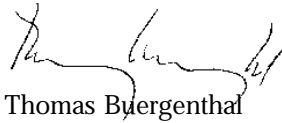
rejects the objections interposed by the Government of Peru.

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

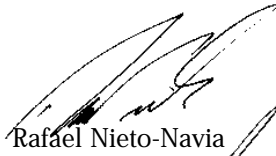
Done in Spanish and English, the Spanish text being authentic. Read at the public hearing held at the seat of the Court in San Jose, Costa Rica, on December 11, 1991.



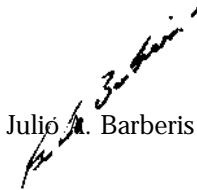
Héctor Fix-Zamudio  
President



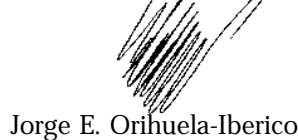
Thomas Buergenthal



Rafael Nieto-Navia



Julio A. Barberis



Jorge E. Orihuela-Iberico

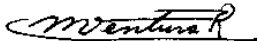


Manuel E. Ventura-Robles  
Secretary

So ordered,



Héctor Fix-Zamudio  
President



Manuel E. Ventura-Robles  
Secretary

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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.



**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 Garbi 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 Garbi 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 Garbi 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 Alegria *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 Alegría *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 Garbí 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:

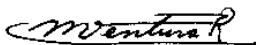
I vote that the Court hold:

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 Alegria *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