

CONCURRING OPINION OF JUDGE DE ROUX-RENGIFO

I must begin with some comments concerning the judgment in the present case; one that concerns violations of the American Convention committed by Peru in trying four civilians –the victims in the instant case- in the military criminal courts.

The preamble to the American Convention begins by describing democratic institutions as the framework for a system of personal liberties and rights which the Convention is intended to reinforce. Article 29(c) de la Convention, moreover, provides that no provision of the Convention shall be interpreted as “precluding [...] rights or guarantees that are [...] derived from representative democracy as a form of government.” These provisions (and also perhaps the one contained in Article 32(2) concerning the limitation of each person’s rights by the demands of the general welfare in a democratic society) articulate the Convention’s commitment to representative democracy, one that goes well beyond anything that Article 23, which recognizes the political rights (the right to vote and to be elected to office, and so on) to which every person is entitled, might encompass.

Thus, the American Convention establishes three sets of provisions for the protection of human rights: the first is set out in the articles that refer to the various rights and freedoms protected (articles 3 to 25); the second consists of articles 1(1) and 2, which establish the duty to respect and guarantee those rights, and to adopt the legislative or other measures necessary to give them effect; and third set, as the preceding paragraph suggests, somehow establishes an association between the protection of those rights and a democratic political system of government.

To give military courts the authority to prosecute civilians is, first of all, to deviate from the democratic principle of separation of powers,* because by so doing the executive branch is being given a function that is the purview of another branch of government, the judiciary. Indeed, in the situation submitted to the Court, the extraordinary method used in deviating from that principle was particularly objectionable: the institution that is the quintessence of the executive and coercive power of the State was given the sensitive job of compiling evidence on certain facts, determining the probative value of that evidence and, based on a given body of laws, determining which facts had been proven, so as to infer their effects in law. Clearly, some of the business of the State is not being driven by principles of modern democratic government, a situation that threatens to weaken the structure and functioning of an even broader cross-section of democratic institutions.

However, judgments that find States responsible for violations of the American Convention that specifically involve the linkage that exists between the protection of human rights and democratic government and institutions will have to wait until more case law on that linkage has been developed. In the interim, the Court has based its condemnation of the practice of military courts prosecuting civilians on the solid grounds that Article 8(1) of the Convention provides. I do not believe any objection could be made to the Court’s argument.

* The abbreviated space for opinions of this type is not the proper place to address the intimate relationship that exists between what the Convention calls “democratic institutions” and the principle of separation of powers.

On the other hand, I do have reason to take issue with the Court's logic in asserting that the State violated Article 8(2)(h) of the American Convention, concerning the "right to appeal the judgment to a higher court."

For this issue, the Court used deductive reasoning. It departed from a premise that the Court established earlier in the judgment, which is that the State failed to respect the "guarantee of a competent, independent and impartial tribunal, previously established by law," upheld in Article 8(1) of the Convention. It then noted that "[I]f the court of second instance fails to satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law, then the phase of the proceedings conducted by that court cannot be deemed to be either lawful or valid." From there it concluded that because the guarantee of a competent judge had been violated in the instant case, so also had the right to appeal the judgment to a higher court. In other words, the Court inferred the violation of Article 8(2)(h) of the Convention from the violation of Article 8(1).

The American Convention on Human Rights has taken pains to separate the right to a hearing by a competent, independent and impartial tribunal previously established by law (Article 8(1)) from the right to enjoy an array of specific procedural guarantees (Article 8(2)), among them the right to appeal a judgment to a higher court (Article 8(2)(h)). To follow this normative plan, the Court needed to examine the alleged flaws in the nature and structure of the domestic courts that tried the victims (in light of Article 8(1)) and the inadvertent errors and noncompliance on the part of those courts in practice and in relation to each specific procedural guarantee. This is precisely what the Court did, except in the case of the guarantee recognized in Article 8(2)(h).

Because they were so egregious, the problems in the nature and structure of the domestic courts that tried the victims overshadowed the entire procedural picture presented to this Court. All the same, the Court should have done a thorough examination of that picture from the particular angle of Article 8(2)(h).

Trials of civilians conducted by military criminal courts are objectionable inasmuch as they violate the guarantee of the competent tribunal previously established by law. While they may also violate the right to appeal to a higher judge or court (as happens, for example, with military proceedings in which there is no higher court), it is also possible that they may not. Denying the right to appeal to a higher court would be another breach of the Convention, in addition to the violation of Article 8(1). But if there were no higher court to which to appeal, any finding of a violation of Article 8(2)(h) would have to be omitted in order to respect the rigorous distinctions in the law that the American Convention makes.

The combination of factors in the instant case allows the Court to conclude that the victim's right to a court of second instance was not respected, but not because the courts that heard this case were part of the military system of justice, but rather because they did not function as tribunals that re-examine all the facts in a case, weigh the probative value of the evidence, compile any additional evidence necessary, produce, once again, a juridical assessment of the facts in question based on domestic laws and give the legal grounds for that assessment. It is only for this last failure -and even though I do not agree with the consideranda that led the Court to its finding- that I concur with the Court's finding that the State did, indeed, violate Article 8(2)(h) of the American Convention.

Carlos Vicente de Roux-Rengifo
Judge

Manuel E. Ventura-Robles
Secretary