Dissenting Opinion of Judge *ad hoc*

Dr. Edgar Enrique Larraondo-Salguero

Case: The White Van
(Ana Elizabeth Paniagua Morales *et al.*)
File: 10.154

I DISSENT from the respectable judgment of the majority of Judges for reasons which I will explain below:

In procedural law the legality of forms is based on the manner and way in which the acts that make up the proceedings must be set forth, which is, in the time, place and order prescribed by law.

This is valid for all types of proceedings, whatever their nature and jurisdiction, so as to avoid falling into procedural anarchy; for law lacking certainty ceases to be law. In the present case the applicable laws: the American Convention of Human Rights, the Rules of Procedure of the Inter-American Commission on Human Rights, and the Rules of Procedure and the Statute of the Inter-American Court of Human Rights contain provisions that invest the proceedings before the Court with solemn formalities. These formalities tend to assure respect for the principles of procedural equality and legal certainty. In this respect the Court *in the Judgment of January 21, 1994, in the Caballero Delgado and Santana Case, paragraph 52, page 24 stated:*

> Nevertheless, the Court must point out that there is no reason why the Commission should not **faithfully** follow the procedural rules. As it has said before and repeats today, although it is true that the object and purpose of the Convention can never be sacrificed to procedure, the latter is, in the interests of legal certainty binding on the Commission. (Emphasis by the Judge *ad hoc*)

In the instant case, the State of Guatemala submitted as preliminary objections, extinguishment of the right to file. Both objections arise from the same causes: the passage of time, and the Commission's failure to comply with the three month period starting from the date of transmission of its report to the State of Guatemala, which it is granted by Article 51(1) of the American Convention on Human Rights, in order to submit the case for a decision of the Court. As a result, the Commission's right to file was extinguished, due to its delay in taking that procedural action.

In view of the fact that the rule establishing limitations is applicable to substantive law, this objection applies equally when the right that the Commission attempts to assert has terminated in accordance with the Convention, due to the Commission's negligence in submitting a matter of merit for a decision of the Court during the period prescribed, a period of three months, according to the article cited above.

On October 20, 1994, the report referred to in Article 51(1) was remitted to the Government. The application was filed with the Court by the Commission out of time and in an anomalous manner, inasmuch as it was sent in the early hours of January 19, 1995, when the period, which ended on January 17, 1995, had already expired.

It seems extreme to think that in international justice two days delay in the filing of an application is irrelevant when it is for the purpose of the protection of human rights. Nevertheless this does not correspond to reality. The Commission itself in the public hearing which took place on September 16, 1995, presented a photocopy of the Judgment of September 22, 1993, rendered by the European Court of Human Rights, in the Instituto Di Vigilanza Case, in which it decided that the request to send the case to the (European) Court was inadmissible because it was made out of time, given that the Commission exceeded **by only one day** the period permitted. The Inter-American Court of Human Rights *in the Cayara Case, Preliminary Objections, Judgment of February 3, 1993, stated in paragraph 38:*

> Nevertheless, legal certainty requires that states know what norms they are to follow. The Commission cannot be permitted to apply the time limits in arbitrary fashion, particularly when these are spelled out in the Convention.

There is, thus, jurisprudence in support of the thesis maintained, without implying excessive formalism.

The Commission argues that the period of three months referred to in Article 51(1) of the Convention should be computed in conformity with the number of days that correspond to the calendar month. This is not the case, since, for the sake of legal certainty, the legally accepted meaning of the expression MONTH is the equivalent of 30 days. Therefore, the period of three months is equal to 90 days. The Inter-American Commission on Human Rights itself recognized it as such in approving *Resolution 43/90 (contained in the Judgment of December 11, 1991), Neira Alegría **e**t **a**l. Case, which reads verbatim:*

> 6. To transmit the present report to the Government of Peru so that the latter may make any observations it deems appropriate **within ninety 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.
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> 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.** (Emphasis by the Judge *ad hoc*)

For its part, the Court has also recognized that the period of three months as mentioned in Article 51(1) of the Convention, is composed of 90 days, as is demonstrated repeatedly *in paragraphs 35-39-43-47(a), and 54, among others, in the Judgment of January 21, 1994. (Caballero Delgado and Santana Case)*. Notwithstanding the above, the Court on this occasion departs from its own case law.

Consequently, both the objection of extinguishment and that of the bar of the rule of limitations should be admitted pursuant to Article 31(6) of the Rules of Procedure of the Court.

The State of Guatemala also submitted the preliminary objection that the application filed against the State by the Commission is null and void for obvious and material violations. One violation is that the period fixed by Article 51(1) of the Convention had

expired; and the other that the Commission did not fulfill the requirements of Article 26 of the Rules of Procedure of the Court, for the referral of a case to the Court under Article 61(1) of the Convention, which mandates that the application be filed with the Secretariat of the Court accompanied by ten (10) copies of the application.

The Commission, on filing the application against the State of Guatemala, in the early hours of January 19, 1995, acted irregularly for the following reasons:

a) The Commission transmitted the application by fax, and subsequently, (seven days later) it sent the ten (10) copies of the application via "courier." Article 26 of the Rules of Procedure of the Court states that to refer a case, the application shall be filed with the Secretariat of the Court **in** ten (10) copies in the working languages of the Court. The filing of the application in one of the working languages does not suspend the prescribed proceedings, but the translation from one language to the others should be submitted within the following 45 days. That legal norm requires the material and physical filing of the application accompanied at that time by ten (10) copies. In the present case the law does not consider the possibility of filing the application by fax and much less the *a posteriori* transmittal of the copies, since these are filed with the application **in or rather by means of** the submission of the copies and without which the filing is not perfected. The previous legal requisite only governs the extension of the period to which the filing of the application in the case is subjected if the filing has been made in only one of the working languages. The translation to the other languages can be made within the following forty-five days.

I also disagree with the legal reasoning of this judgment in drawing an analogy to Article 27 of the Rules of Procedure of the Court. Article 27 establishes that if during a preliminary review of the application the President finds that the basic requirements have not been met, he shall request that the applicant correct them within a period of twenty (20) days. The defects referred to, however, are the failure to observe the requirements contained in sub-sections 1 to 5 of Article 26 of the Rules of Procedure. If the intent of the law were to grant a longer period to send the copies it would have expressly stated as much and granted forty-five (45) days (Article 26) and not twenty (20) as is provided in Article 27 in question. An analogous interpretation is, therefore, not possible in that respect; and

b) The Commission also filed the application after the Court's office hours, as is recorded on the fax, since the transmission began at 1:52 and terminated at 3:17 a.m. (Court time) on January 19 of last year, which is in an untimely manner, particularly as there is no legal provision within the rules governing the activity of the Court which establishes every day and all hours as working times of the Court, or a provision that the dispositions contained in the rules should be interpreted broadly, to bring about the adequate protection of Human Rights (principle of broad interpretation).

Article 31(2) of the Rules of Procedure of the Court requires that preliminary objections, be filed with the Secretariat of the Court by means of a brief in ten (10) copies, etc. I cite this legal norm to demonstrate the congruence in the Rules of Procedure regarding the treatment that should be given both to the filing of an application and to the submission of objections, or to what is equivalent, the rights of the applicant and the rights of the respondent, thereby ensuring respect for the equality of the parties.

The Court in the Cayara Case, paragraph 63, page 29, stated:

> The Court must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism. In the instant case, to continue with a proceeding aimed at ensuring the protection of the interests of the alleged victims in the face of manifest violations of the procedural norms established by the Convention itself would result in a loss of the authority and credibility that are indispensable to organs charged with administering the system for the protection of human rights.

In this respect the fact that non-compliance with basic requirements of time, place and form in the initial filing of applications has been, to date *"a constant practice, not objected to by the Governments"* does not indicate, from any point of view, that the actions have been legal, since error is not a source of law.

For that reason it is not possible to proceed in a manner different from that required by the Convention and the Rules of Procedure of the Court, given that would be the equivalent of *"gravely altering the balance and procedural equality of the parties."* This is precisely the *"procedural injury"* which provokes the respondent state, in this case, Guatemala.

For the reasons expressed, I dissent from the judgment approved by the majority of the Honorable Judges, and I decide, consequently, that the preliminary objections raised by the State of Guatemala should be admitted, and the Court should declare that the application of January 19, 1995, was submitted by the Commission in an anomalous manner and after the period set forth in Article 51(1) of the Convention.

San José, Costa Rica, January 25, 1996.

Edgar Enrique Larraondo-Salguero
Judge *ad hoc*

Manuel E. Ventura-Robles
Secretary