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Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Cayara v. Peru
Doc. Type:	Judgment (Preliminary Objections)
Decided by:	President: Héctor Fix-Zamudio; Vice President: Sonia Picado-Sotela; Judges: Rafael Nieto-Navia; Alejandro Montiel-Arguello; Hernan Salgado-Pesantes; Asdrubal Aguiar-Aranguren; Manuel Aguirre-Roca
Dated:	3 February 1993
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In the Cayara Case,

the Inter-American Court of Human Rights delivers the following judgment pursuant to Article 31 of the Rules of Procedure (hereinafter “the Rules”) of the Inter-American Court of Human Rights (hereinafter “the Court”) on the preliminary objections interposed by the Government of Peru (hereinafter “the Government” or “Peru”) in written communications and at the public hearing.

I.

1. The instant case was brought to the Court by the Inter-American Commission on Human Rights (hereinafter “the Commission”) on February 14, 1992. It relates to Petitions Nos 10.264, 10.206, 10.276 and 10.446.

2. The Commission filed this case in order that the Court determine whether the country in question violated the following articles of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”): 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 21 (Right to Property) and 25 (Right to Judicial Protection), read together with Article 1(1) (Obligation to Respect Rights),

as a result of the extrajudicial executions, torture, arbitrary detention, forced disappearance of persons and damages against public property and the property of Peruvian citizens, who were victims of the actions of members of the Peruvian army, beginning on May 14, 1988 in the District of Cayara, Province of Victor Fajardo, Department of Ayacucho.

The Commission also requested that the Court find that Peru did not comply with the terms of Article 1(1) of the Convention by failing to respect or ensure the exercise of the rights listed

above; that the Court rule on the reparations and compensation to which the victims or their next of kin are entitled pursuant to Article 63(1) of the Convention; and, that it demand that the Government conduct a full investigation of the facts denounced in the application, in order to identify the culprits and bring them to trial. The application identifies 40 persons as victims of arbitrary executions and disappearances and eight persons as having been tortured; it also refers to damages caused to public and private property.

3. In presenting the case, the Commission invoked Articles 50 and 51 of the Convention and appointed as its delegates Drs. Marco Tulio Bruni-Celli, Chairman, and Edith Márquez-Rodríguez, Executive Secretary. In addition, the following persons were named as advisors: Francisco Soberón-Garrido, Miguel Talavera, Pablo Rojas-Rojas, Javier Zúñiga, Jill Hedges, Wilder Tyler, Peter Archard, Juan Méndez, Carlos Chipoco and José Miguel Vivanco.

4. On February 28, 1992 and after a preliminary review by the President of the Court (hereinafter “the President”), the Secretariat of the Court (hereinafter “the Secretariat”) gave notice of the application to the Government, informing it that it had a period of three months in which to file a written answer to the application (Article 29(1) of the Rules) and 30 days after notification of the application in which to interpose preliminary objections (Article 31(1) of the Rules). Peru received the application on March 3, 1992, and on March 16 informed the Court that it had appointed Dr. Alonso Esquivel-Cornejo as its Agent. On June 2, 1992, Peru filed its answer to the application. The application was also transmitted to the persons listed in Article 28(1) of the Rules.

5. On April 15, 1992, Peru appointed Dr. Manuel Aguirre-Roca ad hoc Judge.

6. On March 26, 1992, the Agent interposed the following preliminary objections:

- a. lack of jurisdiction of the Inter-American Commission on Human Rights;
- b. *litis finitio*;
- c. expiration of the time limit for filing of the application;
- d. inadmissibility of the application due to deprivation of Peru’s right of defense;
- e. inadmissibility of the application due to invalidity of Resolution N° 1/91 of the Commission;
- f. inadmissibility of the application due to invalidity of the Commission’s second Report N° 29/91;
- g. invalidity by reason of estoppel on the part of the Inter-American Commission on Human Rights;
- h. inadmissibility of the application due to the acceptance of the replies of the claimants after expiration of the time limit;
- i. inadmissibility of the application due to the acceptance of Amnesty International as co-petitioner after expiration of the time limit;
- j. inadmissibility of the application due to improper joining of four cases before the Commission;
- k. inadmissibility of the application due to manifest bias on the part of the Inter-American Commission on Human Rights; and,
- l. lack of jurisdiction of the Inter-American Court of Human Rights.

The Secretariat transmitted the preliminary objections to the Commission on the following day, reminding it that it had a period of 30 days from the date of receipt of such objections in which to file a brief with regard thereto. The Commission's observations were received by the Secretariat on April 29, 1992 and distributed to the persons named in Article 28(1) of the Rules.

7. In his communication of March 26, 1992, the Agent requested the suspension of the proceedings on the merits until a determination was made on the preliminary objections, pursuant to Article 31 of the Rules. Acting on instructions of the President, the Secretariat informed the Government on April 22, 1992, that the proceedings on the merits would only be suspended if the full Court so decided. In the meantime, the periods would continue to run normally.

8. On May 27, 1992, the Secretariat, following the instructions of the Permanent Commission of the Court (hereinafter "the Permanent Commission"), informed the parties that a public hearing would be held at the seat of the Court on June 24, at 10:00 hours, on the preliminary objections interposed by Peru and the observations thereon submitted by the Commission. The President convened the public hearing by Order of June 19, 1992.

9. In its communication regarding the preliminary objections and, later, by note of May 27, 1992, the Government requested the Secretariat to certify "the receipt of the first application regarding the CAYARA CASE on May 30, 1991 and its subsequent withdrawal" as well as "the legal value of the copy of the minutes of the meeting of the Inter-American Court in which it was agreed to grant the plaintiff's request to withdraw the application submitted." The Government likewise requested that the Court require the Commission to send, within a period fixed by the Court, "a copy of the minutes of the October 27, 1991, meeting of the Inter-American Commission on Human Rights which approved Resolution 1/91 and the second Report 29/91 [. . .] under penalty if it is shown that it was approved when the Commission was not in session." On May 28, 1992, the Secretariat informed the Government that the Permanent Commission had determined that the Government's requests that the documents offered with the preliminary objections brief be dealt with and that the Commission be asked to provide its minutes were issues that could not be resolved by the President alone, but required a decision by the full Court.

That same day, Peru insisted that the production of any evidence still pending be ordered, since by June 24, 1992, the date on which the public hearing was to take place, "no evidence should still be pending, to ensure that the Court is able to 'decide thereafter'."

10. On June 23, 1992, the Secretariat, on instructions of the Court, certified the following:

1. That on Monday, June 3, 1991, a letter dated May 30, 1991, was received by fax from the Inter-American Commission on Human Rights. The purpose of the letter was to 'transmit... Report No. 29/91 concerning cases Nos. 10.264, 10.206, 10.276 and 10.446 against the Government of Peru..., in view of the fact that 'during its 79th Session, the Commission approved the report in question on February 20, 1991, and decided to submit it to the Inter-American Court of Human Rights pursuant to Articles 51 of the American Convention on Human Rights and 50 of the Regulations of the ICHR.'

2. That on Friday, June 7, 1991, the Court received the file by courier service.
 3. That on Wednesday, June 12, 1991, the Executive Secretary of the Inter-American Commission on Human Rights telephoned the Secretary of the Court to inform him that Mr. Luis Jiménez, the Commission's attorney, would be travelling to the Court as soon as possible to discuss the possible withdrawal of the case(s). Mr. Jiménez arrived at the Court on June 18, 1991.
 4. That by note of June 20, 1991 (attached), received at the Secretariat on the 24th of that month, the Inter-American Commission stated that 'it ha[d] decided for the time being to withdraw the case from the Court, in order to reconsider it and possibly present it again....' The Secretariat of the Court acknowledged receipt of this note, after consulting with the Permanent Commission.
 5. No minutes of the full Court exist on the subject.
11. The public hearing was held at the seat of the Court on June 24, 1992.

There appeared before the Court

for the Government of Peru:

Alonso Esquivel-Cornejo, Agent
Julio Vega-Erausquin, Ambassador
Eduardo Barandiarán, Minister Counselor of the Diplomatic
Mission of Peru to Costa Rica
Manuel Ubillús-Tolentino;

for the Inter-American Commission on Human Rights:

W. Michael Reisman, Delegate
Edith Márquez-Rodríguez, Delegate
Jill Hedges, Advisor
Wilder Tyler, Advisor
Juan E. Méndez, Advisor
José Miguel Vivanco, Advisor
Marcela Briceño-Donn, Advisor.

12. At the hearing, the Commission supplied the information requested by the Government (supra 9) regarding the session of the Commission of October 27, 1991, which approved Resolution 1/91 and the second Report N° 29/91. Delegate Edith Márquez-Rodríguez stated that

during an on-site visit to Peru by the Commission [the Commission decided] to approve Resolution 1/91 and notify it immediately to the Government, in the person of its Minister of Foreign Affairs, during the course of that visit [and that] no impediment or legal or regulatory provision exists that would prevent the Commission, wheresoever it might be meeting and provided it has the necessary quorum to decide, from adopting resolutions on matters that fall within its jurisdiction and that affect the fundamental rights of persons, as is true of this case and others in which analogous decisions have been made.

13. On September 28, 1992, the Government filed a supplementary brief regarding the preliminary objections interposed, on the grounds that the facts and circumstances referred to in the certification of the Secretariat dated June 23, 1992, required the amplification and adaptation of the original brief. The President decided to submit it to the consideration of the Court during the session beginning January 25, 1993. By Order of January 26, 1993, the President, in consultation with the Court, decided not to allow the brief to expand the scope of the preliminary objections because “the proceeding would be reopened, the steps already taken at the appropriate time would be infringed and, furthermore, the procedural balance and equality of the parties would be seriously affected.”

14. On January 29, 1993, the Agent of the Government appealed the above order to the full Court, which confirmed its decision by Order of January 30 of that same year.

II.

15. According to the petition of November 17, 1988 presented to the Commission, an armed group of the “Sendero Luminoso” movement ambushed a Peruvian Army military convoy in Erusco, an annex of the District of Cayara in the Province of Víctor Fajardo, Department of Ayacucho, on May 13, 1988. Four members of Sendero Luminoso, one Army captain and three soldiers were killed in the fighting. On the following day, Army troops entered the village of Cayara and murdered the first person they came across (Esteban Asto Bautista, according to the petition). They later came to the village church, where they found five more men who were taking down a platform; they shot them point-blank (Emilio Berrocal-Crisóstomo, Patricio Ccayo-Cahuaymi, Teodosio Noa-Pariona, Indalecio Palomino-Tueros and Santiago Tello-Crisóstomo, according to the petition). Later still, when the men of the village returned from the fields, the soldiers killed them with bayonets and farm tools (in Ccehuaypampa). The soldiers then buried the dead in a neighboring site (David Ccayo-Cahuaymi, Solano Ccayo-Noa, José Ccayo-Rivera, Alejandro Chocña-Oré, Artemio González-Palomino, Alfonso Huayanay-Bautista, Ignacio Ipurre-Suárez, Eustaquio Oré-Palomino, Zacarías Palomino-Bautista, Aurelio Palomino-Chocña, Fidel Teodosio Palomino-Suárez, Félix Quispe-Palomino, Dionisio Suárez-Palomino, Prudencio Sulca-Huayta, Emiliano Sulca-Oré, Zózimo Graciano Taquiri-Yanqui, Teodosio Valenzuela-Rivera, Ignacio Tarqui-Ccayo, Hermenegildo Apari-Tello, Indalecio Palomino-Ipurre, Patricio Ccayo-Palomino, Ildefonso Hinostroza-Bautista, Prudencio Palomino-Ccayo and Félix Crisóstomo-García, according to the petition). On May 18, 1988, during the military intervention in Cayara under the command of General José Valdivia, Head of the Security Sub-Zone of the Central Region corresponding to Ayacucho, the Army had detained Alejandro Echaccaya-Villagaray, Samuel García-Palomino and Jovita García-Suárez. The bodies of these persons were subsequently exhumed in Pucutuccasa by the Chief Prosecutor, Carlos Escobar, acting on information given by some peasants on August 10, 1988. According to the petition, between 28 and 31 persons had been murdered on May 14; it was difficult to be more specific as to number and identity because the bodies had disappeared. Nevertheless, 22 victims were identified by name. The Commission transmitted this petition to Peru on November 29, 1988, as N° 10.264. Without prejudging as to the admissibility of the petition, the Commission asked Peru to supply whatever information it deemed appropriate within the prescribed time limit of 90 days. That note was retransmitted on March 1, 1989.

16. On July 8, 1988, the Commission received another petition which complemented the one described above and gave rise to case N° 10.206. According to the petition, which was transmitted to the Government on July 11, some witnesses to the events in Cayara had been arrested in their homes on June 29, 1988. Among them were Guzmán Bautista-Palomino, Gregorio Ipurre-Ramos, Humberto Ipurre-Bautista, Benigna Palomino de Ipurre and Catalina Ramos-Palomino, whose whereabouts are unknown. The relevant parties to the petition approached the Government again on February 22, 1989, and September 7, 1989, without eliciting a response.

17. On December 16, 1988, the Commission received the petition that gave rise to case N° 10.276. According to that petition, the Mayor and Secretary of Cayara, who had witnessed the events that occurred on May 14, were murdered on December 14, 1988, together with the driver of the truck in which they were travelling. The name of the Mayor was Justiniano Tinco-García, the Secretary was Fernandina Palomino-Quispe, and the truck driver was Antonio Félix García-Tipe. The petition was transmitted to the Government on December 29, 1988, and it was asked to provide pertinent information. The Commission repeated this request for information to the Government on September 8, 1989. The Government did not provide any information on the subject.

18. On September 13, 1989, the Commission received a new petition regarding the Cayara Case, N° 10.446. This one referred to the assassination of nurse Martha Crisóstomo-García, one of the principal eyewitnesses to the events that occurred in Cayara who was still alive. She was shot to death on September 8, 1989, in her home in Huamanga, Ayacucho, at three in the morning. The petition was transmitted to the Government the very day of its receipt, September 13, 1989, without eliciting any response. According to the Commission, the petition was retransmitted to the Government on March 13, 1989 (sic), and April 12, 1990. The Government made no reply, despite the fact that the Commission pointed out, as it had in the previous case, that if no answer were forthcoming the Commission would begin to consider applying Article 42 of its Regulations. That article provides that when a government fails to respond, the facts reported in the petition are presumed to be true.

19. In view of the fact that no reply had been received from the Government in case N° 10.264, on June 9, 1989, the Commission sent the Government a note indicating that it would consider the application of Article 42 of its Regulations. That note was retransmitted on September 7. On September 29, the Representation of Peru before the Organization of American States (OAS) declared that “the proceedings within our domestic jurisdiction have still not been concluded. The delay in replying to the ICHR’s request can be attributed to the need for strict compliance with the rules guaranteeing the administration of justice which are contained in the Constitution of the Republic of Peru.”

20. On November 1, 1989, the petitioner affirmed that the domestic jurisdiction had already been exhausted.

21. With regard to case N° 10.264, the Government sent the Commission a communication on May 8, 1990, with which it transmitted copy of a letter dated February 1, 1990, “addressed by

the President of the Supreme Council of Military Justice to the Minister of Defense, informing him that on May 12, 1989, the Army's Second Judicial Zone decided to dismiss the claim in the aforementioned case, and the Supreme Council of Military Justice confirmed the dismissal by Order of January 31, 1990."

22. On March 26, 1990, the original petitioner, Americas Watch, asked the Commission to regard Amnesty International as a co-petitioner for purposes of processing the case. The Commission agreed to do so.

23. In its Report N° 29/91 of February 20, 1991, the Commission expressed the opinion that both the relatives of the victims and the petitioners themselves

have exhausted all the remedies that the Peruvian legal system makes available to them, yet the responsible parties have neither been identified nor punished, thereby preventing the victims, next of kin from filing civil suits for damages, and from this one can conclude that the remedies under domestic law in Peru were ineffective in the instant case.

The Commission also considered that the subject matter relating to these cases was not pending in another international proceeding. Consequently, it concluded that the admissibility requirements spelled out in Article 46 of the Convention had been fully complied with. In that Resolution, the Commission declared that Peru had violated the articles of the Convention listed in paragraph 2 above. In addition, the Resolution

[. . .]

3) Recommends to the Government of Peru that it launch an exhaustive and impartial investigation into the facts denounced to find the persons responsible for the violations indicated in operative paragraphs 1 and 2 described in the report and to bring them to trial so that they may receive the punishment that such serious conduct demands.

4) Recommends to the Government of Peru that it inform the Inter-American Commission on Human Rights of the findings of the investigation recommended in the preceding operative paragraph, within 60 days of the date of transmission of this report.

5) Recommends to the Government of Peru that it indemnify the victims and/or their next of kin, seeking reparation for the damages caused and report to the Commission within the same time period indicated in the preceding operative paragraph.

24. During its 79th Session of February, 1991, the Commission studied cases 10.264, 10.206, 10.276 and 10.446 jointly and approved Report N° 29/91 in which, among other things, it decided to submit the cases to the jurisdiction of the Court. The report was sent to the Government on March 1, 1991.

In view of the fact that the Government did not receive the report until April 5, the Commission agreed to its request that the 60-day period granted begin to run as of that date.

25. On May 27, 1991, the Government pointed out to the Commission that, under the terms of Article 34, paragraphs 7 and 8, of the Regulations of the Commission, it should have transmitted to Peru the pertinent parts and attachments of the replies of the petitioners dated

November 1, 1989 (Americas Watch), and July 18, 1990 (Americas Watch and Amnesty International). The Commission did not do so, depriving the country of its right of defense. In the Government's opinion, this "invalidates the investigation and weakens the general framework of the Convention that Peru has subscribed to and ratified."

The Government affirmed:

Bearing in mind the serious procedural irregularities pointed out above, the Government of Peru believes that as long as the investigation does not adhere to the rules expressly enunciated by the Convention and the Regulations of the ICHR, the necessary guarantees will not be in place to ensure that its conclusions and recommendations enjoy the minimum degree of efficacy required. The investigation of the CAYARA case, which has been rendered invalid, nullifies any other proceeding to which it could give rise and allows Peru to disqualify itself in the future from validating such acts with its participation, since it considers them to be in violation of the principles and guarantees of International Law and, especially, of those that uphold the Inter-American Legal System.

For these reasons, the Government of Peru, being a State Party to the American Convention on Human Rights, requests that the Commission comply with its Regulations and the Pact of San Jose and therefore decide not to take the case to the Inter-American Court of Human Rights without first weighing the observations made in the present note and making the appropriate procedural corrections.

26. The Commission submitted the four joint cases to the Court by note of May 30, 1991. On June 11, 1991, the Commission's Executive Secretary notified the Minister of Foreign Affairs of Peru that she had submitted "the cases in question to the Inter-American Court of Human Rights (San Jose, Costa Rica) on May 30, 1991, for processing." By note of June 20, 1991, received at the Secretariat on the 24th of that month, the Chairman of the Commission, Mr. Patrick L. Robinson, addressed the President of the Court as follows:

I take the liberty of informing Your Excellency that the Commission, acting at the request of the Government of Peru and in order to ensure that no questions arise as to the correct application of the proceedings, as well as to protect the interests of both parties (the Government and the petitioners), has decided for the time being to withdraw the case from the Court, in order to reconsider it and possibly present it again at some future date, after the observations submitted by the Government of Peru with regard to the instant case have been properly assessed.

27. That same June 24, 1991, the Secretariat replied to the above note from the Chairman of the Commission as follows:

Acting on instructions of the President of the Inter-American Court of Human Rights, Judge Héctor Fix-Zamudio, I have the honor to inform Your Excellency that, after consulting with the Permanent Commission, I have been authorized to acknowledge receipt of your note of June 20, 1991, 'relating to Report 29/91 of the Inter-American Commission on Human Rights in connection with cases 10.206, 10.264, 10.276 and 10.446 against the Government of Peru', in which you affirm that the Commission 'has decided for the time being to withdraw the case from the Court....'

28. By note of June 20, 1991, the Commission informed Peru of the withdrawal of the case from the Court and granted it a period of 60 days in which to submit its final observations. The note states the following on the issue:

[I] take the liberty of informing Your Excellency that the Commission, acting at the request of your Government and in order to ensure that no questions arise as to the correct application of the proceedings, as well as to protect the interests of both parties (the Government and the petitioners), has decided for the time being to withdraw the case from the Court, in order to present it again at some future date, after the observations presented by your Government with regard to the instant case have been properly assessed.

Please find enclosed the observations of the petitioners. I would greatly appreciate your taking the necessary steps to provide the Commission with the Government's final observations, as provided in Article 34(8) of the Regulations of the Inter-American Commission on Human Rights, within 60 days of the date of transmittal of this letter.

29. By note of August 26, 1991, Peru replied to the Commission, in part as follows:

[. . .]

From the contents of your communication it would appear that the Government of Peru had requested the Inter-American Commission on Human Rights to reconsider the case. That is inaccurate, for at no time did Peru interpose such a motion, neither as regards the case itself nor as regards the decision to submit the case to the jurisdiction of the Inter-American Court. The possibility of reconsidering a report already vacated is not contemplated in the American Convention on Human Rights nor in the Regulations of the Commission when the State in question is a Party to the Convention and has accepted the jurisdiction of the Inter-American Court of Human Rights, as is the case of Peru. This is especially true of a case that has already been previously submitted to the Court.

The Government of Peru did point out to the Commission the advisability of not submitting the case to the Court, considering the serious procedural omissions incurred in the drafting of its Report No. 29/91, which are precisely those which, among others, served to buttress the decision of the full Commission to submit the joint cases. In other words, the decision to reconsider the case is unilateral and does not comply with the procedural rules in force.

[. . .]

30. On October 27, 1991, the Commission approved Report N° 1/91, which literally states the following:

HAVING SEEN:

1. Report No. 29/91 adopted by the Inter-American Commission on Human Rights on February 20, 1991, referring to cases 10.264, 10.206, 10.276 and 10.446.

2. That on May 27, 1991, the Government of Peru filed a brief wherein it 'requests that the Commission comply with its Regulations and the Pact of San Jose and therefore decide not to take the case to the Inter-American Court of Human Rights without first weighing the observations made in the present note and making the appropriate procedural corrections.' In that note, the Government of Peru stated that 'In accordance with the express provisions of Article 34, paragraphs 7 and 8 of the Commission's Regulations, once the reply was received from the petitioners, the Commission should have transmitted the pertinent parts thereof and its attachments to the Government of Peru for its final observations. None of the petitioners' replies to the Government's notes were transmitted to the Government. Hence, by violating that procedural requirement, the Commission has denied the Peruvian state its right to self defense.'

CONSIDERING:

1. That the request from the Government of Peru constitutes a petition to suspend the proceedings.
2. That while the Government of Peru raised this matter in the note in question, it did not say what injury has been caused by this procedural omission.
3. That in response to its express request and to honor justice, the Commission resolved to consider the objection and therefore transmitted the petitioners' replies as requested by the Government under the provisions of Article 34(8) of the Commission's Regulations.
4. That in its reply dated September 4, 1991, the Government of Peru made no reference to the petitioners' replies.
5. That the Commission also examined Report 29/91 and has found that adjustments must be made in Section II thereof, which are included in the version of that Report attached hereto.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLVES:

1. To reject the argument of the Government of Peru that the report is invalid.
2. To confirm the conclusions and recommendations contained under point 48 of Report 29/91 and to transmit it to the Government of Peru so that it might respond as it sees fit within a period of 90 days.
3. To send the instant case to the Inter-American Court of Human Rights.

The sixth conclusion and recommendation contained in paragraph 48 of Report N° 29/91 reads as follows: "[decides] to submit these cases, joined, to the Inter-American Court of Human Rights, in accordance with articles 51 and 60 of the Convention," taking into account that Peru has recognized the Court's compulsory jurisdiction.

31. On December 20, 1991, Peru responded to the Commission's note transmitting its Report N° 29/91, indicating that it had already replied by note of May 27, 1991, to the conclusions and recommendations of Report N° 29/91 of February 20 of that year. The Government added that since the Commission was on this occasion transmitting a different report which nevertheless contained the same conclusions, recommendations and numbering as the previous version, the appropriate action was to ratify the terms of the note of May 27, 1991, referred to above.

32. Finally, on January 30, 1992, Peru responded to the Commission's note of November 14, 1991, with which it had transmitted Resolution 1/91. After emphasizing that in its letter of May 27, 1991, it had not requested the reconsideration of the case, let alone its withdrawal, and that the Commission could not in good faith maintain that Peru had requested the withdrawal of that case, but, rather, had taken that action on its own initiative, Peru asserted that:

Consequently, the Government of Peru considers that the Commission has exhausted its possibilities with regard to the instant case for reasons attributable, not to Peru, but to the Commission's repeated insistence on going ahead with an irregular proceeding that is not in compliance with the American Convention on Human Rights.

Hence, instead of insisting on submitting the case to the Court as it has been dealt with, the Commission should duly weigh other options within the framework established by the American Convention.

III.

33. The Court has jurisdiction to hear the instant case. Peru has been a Party to the Convention since July 28, 1978, and recognized the contentious jurisdiction of the Court, as set out in Article 62 of the Convention, on January 1, 1981. Although the Government has interposed a preliminary objection it calls "lack of jurisdiction of the Court," in its reasoning it does not dispute the power of the tribunal to rule on the objections interposed by the Government, for it refers only to the inadmissibility of the application filed by the Commission on February 14, 1992, an issue that will be examined below.

IV.

34. Before taking up the preliminary objections, the Court will refer to some issues raised by the representative of the Government during the public hearing, relating to the certification issued by the Court regarding the reception and withdrawal of the so-called first application (*supra* 10). The representative declared that

the application arrived in due form on June 7, 1991, for it was only on that date that the requirements stipulated in Article 25 of the Rules of Procedure of the Court then in force were complied with [. . .] that the time limit provided under Article 51, paragraph 1 of the Convention having fallen due on May 31, 1991, the application entered the Court after the deadline had passed, that is, on June 7.

35. In order to fully understand the Government's observation and deal with the preliminary objections, it is important to recall that Article 51(1) of the Convention provides the following:

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.

36. The report was transmitted to the Government on March 1, 1991. The period stipulated would therefore have fallen due on May 31 of that same year. The Government received the report on April 5 and then requested of the Commission that the 60 days referred to in paragraph 4 of the operative part of Report N° 29/91 (supra 23) begin to run as of the date of receipt and not the date of mailing. This was accepted by the Commission, with the result that the deadline for the Government was moved to June 5, theoretically a later date than the original one. The Government submitted its observations on May 27. In its note, it requested that “the Commission comply with its Regulations and the Pact of San Jose and therefore decide not to take the case to the Inter-American Court of Human Rights without first weighing the observations made in the present note and making the appropriate procedural corrections.” The Commission, on its part, dated the application May 30. Both documents -the Peruvian note and the application- were received on Monday, June 3, the former by the Commission and the latter by the Court.

As indicated in the certification issued by the Secretary, the Executive Secretary of the Commission subsequently telephoned the Court on June 12 and announced that the application would be withdrawn. This was accomplished by a letter from the Commission dated June 20, signed by its Chairman, indicating that the application was being withdrawn

at the request of the Government of Peru and in order to ensure that no questions arise as to the correct application of the proceedings, as well as to protect the interests of both parties (the Government and the petitioners), has decided for the time being to withdraw the case from the Court, in order to reconsider it and possibly present it again at some future date, after the observations submitted by the Government of Peru with regard to the instant case have been properly assessed.

After consulting with the Permanent Commission, the Secretary simply took note of the withdrawal. On August 26, the Government, which had received from the Commission a note dated June 11, informing it of the filing of the application and another dated June 20, communicating the withdrawal thereof, stated that the application had not been withdrawn at its request but was, instead, a unilateral act by the Commission.

After the file returned to the Commission, the latter complied with some of the requests contained in the Government’s communication of May 27, such as transmitting to it the replies of the petitioners dated November 1, 1989, and July 18, 1990. However, as the Executive Secretary of the Commission explained to the Court at the public hearing, the original report was only amended as to style. The Commission issued a resolution and another report bearing the same number but a different date, and filed a new application with the Court on February 14, 1992.

37. The Court has on other occasions analyzed certain aspects of Article 51 of the Convention (Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 62 et seq.; Neira Alegría et al. Case, Preliminary Objections, Judgment of

December 11, 1991. Series C No. 13, para. 32), but not the characteristics or conditions of the time limit contemplated in paragraph 1 of that article. In order to arrive at a satisfactory resolution of the objections interposed by the Government, it is necessary to refer to it. In doing so, moreover, the Court must ratify its often stated opinion that the object and purpose of the treaty is the effective protection of human rights and that the interpretation of all its provisions must be subordinated to that object and purpose, as provided in Article 31 of the Vienna Convention on the Law of Treaties (Velásquez Rodríguez Case, Preliminary Objections, *op. cit.*, para. 30).

38. In the case of Neira Alegría et al., the Court had already found that, since it can be extended, the period contemplated in Article 51(1) is not final (Neira Alegría et al. Case, Preliminary Objections, *supra* 37, paras. 32, 33 and 34). 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.

39. Article 51(1) provides that the Commission must decide within the three months following the transmittal of its report whether to submit the case to the Court or to subsequently set forth its own opinion and conclusions, in either case when the matter has not been settled. While the period is running, however, a number of circumstances could develop that would interrupt it or even require the drafting of a new report or the resumption of the period from the beginning. In each case it will be necessary to conduct an analysis to determine whether or not the time limit expired and what circumstances, if any, could reasonably have interrupted the period.

40. In the instant case, the report was sent on March 1, 1991, and the time limit would therefore have expired on May 31. The original application was received at the Court by fax on Monday, June 3, that is, three days after the calendar day on which the period would have expired, had the extension sought by Peru not affected it, in which case the expiration would have occurred on June 5. The Court will not comment on this fact at the present time, as it will also not comment on the fact that the Commission extended the periods. An application containing such serious charges as those which are before us now cannot be deemed to have lapsed simply on those grounds.

41. Peru stated at the public hearing that “the application arrived in due form on June 7, 1991 (the date on which the file was received), for it was only on that date that the requirements stipulated in Article 25 of the Rules of Procedure of the Court then in force were complied with.”

42. The former Rules of Procedure of the Court, applicable to the instant application, established in its Article 25(2) that “[i]f the Commission intends to bring a case before the Court [. . .] it shall file with the Secretary, together with its report, in twenty copies, its duly signed application.” In the instant case, the application was received before the report, the former having arrived at the Court on June 3, 1991, and the latter at the Secretariat of the Court on June 7.

The rule quoted above must not be applied in a way that distorts the object and purpose of the Convention. It is generally accepted that the procedural system is a means of attaining justice

and that the latter cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved.

A very different issue is, of course, raised by consideration of the effect on the time limit of the Commission's withdrawal of the application in order to resubmit it at a much later date. That issue will be analyzed in due course.

V.

43. The Court will now examine the objections interposed by the Government in the instant case.

44. The first three objections are based on the withdrawal of the case by the Commission after it had been submitted to the Court. Hence, the three objections should be dealt with together.

45. In the first objection, which the Government has labelled "lack of jurisdiction of the Commission," the Government contends that "[t]he applicant lost its jurisdiction to deal with the case on May 30, 1991, the date on which it submitted it to the Court. Hence, all of its subsequent acts aimed at regaining jurisdiction and at attempting to amend its own errors are invalid because they originate in an unjust decision to withdraw the case."

On this issue, the Commission responded as follows:

[. . .] the protection of procedural balance and, especially, of the right of defense of the states is a fundamental requirement of the proceedings at issue. In the instant case, the Commission did everything necessary—including reopen the proceedings at the request of the Peruvian Government—in order to guarantee the unrestricted exercise of that right. The decision to grant the request of the Government of Peru in no way implied admission of any procedural flaw. Rather, it reflected the need to remove any defect that might have existed in the proceedings and to preserve the Government's right of defense.

[. . .]

The jurisdiction of the Commission had not expired when it was decided to reopen proceedings in the Cayara case, for the transfer of jurisdiction to the Court was never consummated or completed. Such transfer occurs not when the Commission files the application but when the Court receives it and processes it in the manner prescribed by the Convention. As the file shows, at the time of withdrawal of the case the Court had not begun to process the application.

In any event, the Commission believes that the Government of Peru is disqualified from interposing this objection of lack of jurisdiction because it contributed conclusively to the creation of the express conditions of which it now wishes to avail itself.[. . .]

46. In the second objection, described as "litis finitio," the Government contends that

[t]he American Convention on Human Rights and the Regulations of the Commission and Rules of Procedure of the Inter-American Court do not contemplate the possibility of withdrawing, removing or extracting a case submitted to the jurisdiction of the Court [and that] [o]n June 20, 1991, the applicant informed the Government of the withdrawal of the case from the jurisdiction of the Court. In light of the Rules of Procedure of the Court and general principles of international law, such an action amounts to an abandonment [. . .] that so-called withdrawal constitutes an absolute annulment of the action and implies the illegality of the application.

The Commission, on its part, indicated that

the Peruvian Government characterizes the act of June 20, 1991, —whereby the Commission temporarily withdrew the case from the Court in order to reopen the proceedings at its request— as abandonment, despite the fact that nowhere in the file has the Commission expressed any intention of abandoning the application filed with the Court. According to the provisions of the Convention, abandonment cannot be presumed, let alone created through an interpretation, because the effect of an abandonment is to deprive the victims of violations of human rights of any opportunity of access to the Court. For such an important legal effect to occur, an unequivocal statement of intention indicating that that is indeed the effect sought must be required.

47. In the third objection, “expiration of the time limit for filing of the application,” the Government argues that the period of three months contemplated in Article 51(1) of the American Convention must

without exception be calculated as of the transmittal of the Report to the State, for that is the period set forth in the American Convention on Human Rights (Article 51). As such, it cannot be amended unilaterally by the Inter-American Commission nor consensually by a State and the Commission; and even if it were possible to amend it in the latter manner, this did not occur in the CAYARA case.

The Government added at the hearing:

if [the Commission] withdrew the case on June 20, it did so after the expiration of the period; consequently, by its arbitrary action it has forfeited any possibility of resubmitting the application [. . .] [I]t is one thing to suspend it within the time limit, quite another to attempt to suspend it after the expiration thereof [. . .] [A]ssuming that such a period could be amended or suspended in exceptional circumstances at the request of one of the parties, this would only be permissible if the request were presented before expiration of the period in question.

On this issue, the Commission responded as follows:

On the matter of the Third Preliminary Objection interposed, the Commission is of the opinion that the application had not expired, since the measure adopted on June 20, 1991, suspended the proceedings at the request of the Government of Peru and antedated the whole matter to February 20, 1991, the date of the approval of Report 29/91.

[. . .]

It is important to note that the Government was not damaged by the withdrawal and reopening of the proceeding. If anybody was affected it was the petitioners, for the action taken entailed the reexamination of a decision that had ruled in their favor, thus delaying the effective and timely protection to which they are entitled under the Convention. With this objection, the Government of Peru is attempting to classify as illegal an action that brought it no procedural damages whatsoever; to the contrary, it benefitted the Government by granting it fresh opportunities for its defense. The adage *pas de nullité sans grief* (there can be no nullity without damages) can be very aptly quoted in connection with this objection of expiration of the time limit for filing of the application.

48. The withdrawal of the application is not expressly regulated in the Convention, the Statutes of the Commission and the Court, the Regulations of the Commission or the Rules of Procedure of the Court. This does not mean that it is inadmissible. General principles of procedural law allow the applicant party to request a court not to process its application, provided the court has not begun to take up the case. As a rule, that stage begins with the notification of the other party. Furthermore, the foundation of the Court's jurisdiction, as set forth in Article 61(1) of the Convention, lies in the will of the Commission or of the States Parties.

49. In a case before the Court, formal notification of the application does not occur automatically but requires a preliminary review by the President in order to determine whether the basic requirements of that action have been met. This is spelled out in Article 27 of the Rules in force, which reflects the long-standing practice of the Court.

50. The withdrawal of the application in the instant case cannot be deemed to be among those situations governed by Article 42 of the Rules applicable at the time of presentation of that application, because that rule refers to hypothetical cases where the dispute has already been brought before the Court, cases in which the parties, acting unilaterally or bilaterally, cannot freely waive the continuation of the proceedings because "[t]he Court may, having regard to its responsibilities, decide that it should proceed with the consideration of the case" (paragraph 3).

51. In the instant case, the request for withdrawal presented by the Commission occurred before the President of the Court was able to conduct the preliminary review of the application and, consequently, before he was in a position to order the notification of same. The President had not even been apprised of the communication of June 11, 1991, by which the Commission notified the Government that the case had been referred to the Court, as provided in Article 50(2) of the Regulations of the Commission.

52. The request for withdrawal was not, at first glance, unjustified or arbitrary. In its note of June 20, the Commission declared that the withdrawal was being sought at "the request of the Government of Peru and, in order to ensure that no questions arise as to the correct application of the proceedings, as well as to protect the interests of both parties (the Government and the

petitioners).” Principles of good faith would preclude casting doubt on the reasons given by the Commission for withdrawing its application.

53. In view of the foregoing, the Secretariat of the Court, acting on instructions of the Permanent Commission, merely acknowledged receipt of the note of withdrawal. It did not assess the action or the timing thereof because neither the Secretariat nor the Permanent Commission was in a position to do so, since the President had not yet begun to review the case, the processing of which had still not been initiated.

54. These considerations are not inconsistent with the precedents established by the Court. In a previous case (*Velásquez Rodríguez Case*, Preliminary Objections, *supra* 37, para. 75), the Court found that “the Commission’s application to the Court unequivocally shows that the Commission had concluded its proceedings and submitted the matter for judicial settlement. The presentation of the case to the Court implies, *ipso jure*, the conclusion of proceedings before the Commission.” On that occasion, the Court was referring to the impossibility of the Commission continuing proceedings in a case that had already been submitted to the Court. At the time, the Court did not define the meaning of “submit a case” or “file an application” nor did it, of course, refer to any subsequent motions or acts by the Commission, such as, for example, the withdrawal of a case already filed with the Court, which is precisely the issue now before the Court.

55. At this time, there is no need for the Court to rule on whether the Commission understood the withdrawal to be a cancellation of the proceedings or the abandonment of the case, even at the judicial level. The Commission has stated that this was not the case and there is nothing in the file that would indicate otherwise. Rather, the Commission’s letter of withdrawal indicates the opposite intention (cf. *Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 21).

56. It is also not necessary to determine whether the prior actions of the Commission were nullified by errors in the handling of the case or whether the Government’s right of defense was impaired by the failure to transmit certain documents.

57. What must be analyzed is whether the withdrawal was instigated by the Peruvian Government and what benefits the latter could have derived from it. It is important to note that the communication from Peru requesting that “the case not be submitted to the Court” reached the Commission on the very date that the latter transmitted the case to the tribunal by fax. It is clear, therefore, that the Government could not request the withdrawal of a case which, to its knowledge, had still not been submitted.

The Peruvian note nevertheless does contain the suggestion that the irregularities which -in Peru’s opinion- occurred in the handling of the case, “nullify any other proceeding to which [they] could give rise and allow Peru to disqualify itself in the future from validating such acts with its participation.”

58. It could be concluded that both issues -that is, the request that the application not be filed because of irregularities in the way it had been handled and the Peruvian Government’s

intimation that it would not participate in the process- persuaded the Commission to withdraw the case.

59. In its note of August 26, the Government insisted that the withdrawal of the application was a unilateral act by the Commission which Peru had not requested. At the public hearing, the Commission admitted that “[i]t is true that the Government of Peru did not request the withdrawal of the case, nor its resubmission.” Consequently, it is of little importance whether or not Peru benefitted, as the Commission argues, from the new time limits that resulted from the withdrawal. Even if it had, that would not prevent it from invoking the expiration of the time limit as a preliminary objection. The withdrawal of the case did not undermine the Peruvian Government’s right of defense nor did it prevent it from exercising any of the other rights recognized in the Convention.

60. More than seven months elapsed between the withdrawal of the case and the filing of the new application. Regardless of whether the original period had expired on May 31, or June 5, 1991, there is no question that February 14, 1992, substantially exceeds the timely and reasonable limits that, as the Court has stated, govern the proceeding. Even if the Commission understood the Peruvian Government to have requested the withdrawal, such a request, however reasonable, could not have been granted because the time limit provided by the Convention for filing an application had already expired. Furthermore, as already stated, that is not one of the factors that could have led to a suspension of the periods.

61. Without taking up the merits of the Commission’s application, the Court will find that it was filed after the expiration of the appropriate time limit. Nevertheless, a reading of Article 51 leads to the conclusion that a declaration of this nature cannot entail the neutralization of the other protective mechanisms set forth in the American Convention. Hence, the Commission continues to enjoy all the other powers conferred on it in that article, which is, furthermore, consistent with the object and purpose of the treaty.

62. Having stated the foregoing, it is not necessary for the Court to analyze the remaining objections.

63. 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.

Now, therefore,

THE COURT

unanimously,

1. Declares that the application dated February 14, 1992, was filed by the Commission after the expiration of the period provided in Article 51(1) of the Convention.

unanimously,

2. Declares that the Commission continues to enjoy the other powers conferred on it by Article 51 of the Convention.

unanimously,

3. Orders that the case be dismissed.

Done in Spanish and English, the Spanish text being authentic. Read at the public hearing at the seat of the Court in San Jose, Costa Rica, on this third day of February, 1993.

Héctor Fix-Zamudio
President

Sonia Picado-Sotela
Rafael Nieto-Navia
Alejandro Montiel-Argüello
Hernán Salgado-Pesantes
Asdrúbal Aguiar-Aranguren
Manuel Aguirre-Roca

Manuel E. Ventura-Robles
Secretary

So ordered,

Héctor Fix-Zamudio
President

Manuel E. Ventura-Robles
Secretary