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Institution: Inter-American Court of Human Rights
Title/Style of Cause: Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera v. Peru
Doc. Type: Judgment (Preliminary Objections)
Decided by: President: Hernan Salgado-Pesantes;
Vice President: Antonio A. Cancado Trindade;
Judges: Maximo Pacheco-Gomez; Alirio Abreu-Burelli; Sergio Garcia-Ramirez; Carlos Vicente de Roux-Rengifo; Fernando Vidal-Ramirez

Judge Oliver Jackman recused himself as a judge in this particular case owing to the fact that, as a member of the Inter-American Commission on Human Rights, he had participated in various phases of the Commission's proceedings on the case.

Dated: 28 May 1999
Citation: Durand v. Peru, Judgment (IACtHR, 28 May 1999)

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In the Durand and Ugarte case,

the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”), pursuant to Article 36(6) of the Court’s Rules of Procedure (hereinafter “the Rules of Procedure”), renders the following Judgment on the preliminary objections filed by the State of Peru (hereinafter “the State” or “Peru”).

I. INTRODUCTION OF THE CASE

1. The case was submitted to the Court on August 8, 1996, by the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”). It had originated in petition No. 10,009 received at the Secretariat of the Commission on April 27, 1987.

II. FACTS SET FORTH IN THE APPLICATION

2. The Court summarizes the facts in the instant case, as set out in the application, as follows:

a) The Commission brought a case against the State of Peru for the unlawful deprivation of personal freedom and subsequent forced disappearance of Messrs. Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera;

b) According to the application, police with the Dirección contra el Terrorismo (Counter-Terrorism Police, hereinafter “DIRCOTE”) detained Nolberto Durand Ugarte and Gabriel Pablo

Ugarte Rivera on February 14 and 25, 1986, respectively, on suspicion of terrorism. After a police investigation, they were turned over to Lima's Thirty-ninth Examining Court, which instituted the corresponding criminal proceedings. By order of the court, they were later moved to the San Juan Bautista Social Rehabilitation Center -CRAS- on the prison island of El Frontón (hereinafter "El Frontón"), where they were incarcerated. At the time of their arrest, Mrs. Virginia Ugarte Rivera, mother of Nolberto and sister of Gabriel Pablo, petitioned Lima's Forty-sixth Examining Court for writs of habeas corpus, one for her son and the other for her brother. However, the process was interrupted when riots broke out in various Peruvian prisons. Those petitions were filed on February 25 and 26, 1986. On July 17, 1987, Lima's Sixth Police Court, which was hearing the terrorism cases against Mr. Durand Ugarte and Mr. Ugarte Rivera, found them innocent, ordered that they be released and that the case be closed;

c) On June 18, 1986, persons incarcerated for the crime of terrorism at El Frontón and other prisons in the country rioted. On June 19, 1986, an operation assigned to the Peruvian Navy got underway to quash the riot and left scores of inmates either dead or wounded. At the time of the riots, Mr. Durand Ugarte and Mr. Ugarte Rivera were being held at El Frontón. That day, the President of the Republic issued Supreme Decree No. 006-86-JUS, published in El Peruano on June 20, 1986, declaring the prisons to be a "restricted military zone" and placing them formally under the jurisdiction of the Commander of the Armed Forces;

d) Mrs. Virginia Ugarte Rivera learned that a number of inmates had survived the events described in the preceding paragraph and were in the Navy's custody. On June 26, 1986, she filed for a writ of habeas corpus against the Director of Prisons and the Warden at El Frontón, on behalf of Mr. Durand Ugarte and Mr. Ugarte Rivera. That same day, the corresponding order was issued to institute proceedings. On June 27, 1986, the First Examining Court of Callao dismissed the petition of habeas corpus. On July 15, 1986, the First Police Court of Callao upheld the June 27 decision of the First Examining Court of Callao. On August 13, 1986 the First Criminal Law Chamber of the Supreme Court ruled against nullification of the July 15 ruling. The Tribunal of Constitutional Guarantees heard a remedy of cassation brought by Mrs. Virginia Ugarte Rivera challenging the decision delivered by the First Criminal Law Chamber, and on October 28, 1986, ruled that "the decision in question [stood] firm and that claimant still had the right to bring an action once again"; and

e) On June 24, 1986, the Navy's Permanent Court-Martial ordered proceedings to determine whether the Navy troops that put down the riot were criminally liable. The Navy's Second Permanent Court of Inquiry, after hearing and prosecuting the case, dismissed it on July 6, 1987, on the grounds that the accused were not liable. That ruling was upheld by the Navy's Permanent Court-Martial on July 16, 1987. On July 20, 1989, the Review Chamber of the Supreme Court of Military Justice confirmed a decision handed down by the Court-Martial Chamber of the Supreme Court on January 30, 1989, which dismissed the case against those accused of crimes against the life, personal integrity, and health of the deceased El Frontón inmates and of aggravated abuse of authority.

III. PROCEEDINGS WITH THE COMMISSION

3. On April 27, 1987, the Commission received a petition alleging violations of the human rights of Mr. Durand Ugarte and Mr. Ugarte Rivera. On May 19 of that year, it forwarded the pertinent parts of the petition to the State, pursuant to Article 34 of the Commission's Regulations. It also asked the State to provide information as to the exhaustion of local remedies.

4. On January 19, 1988, the Commission again asked State for information relevant to the case. It repeated its request on June 8 of that same year, and pointed out that absent a reply, it would consider application of Article 42 of its Regulations. On February 23, 1989, the Commission again requested information. On May 31, 1989, the claimants requested that the facts denounced be presumed to be true.

5. The State filed a brief dated September 29, 1989, wherein it stated the following:

It is common knowledge that cases 10,009 and 10,078 are being prosecuted in Peru's military courts, pursuant to the laws currently in force. Since the internal jurisdiction of the State has not been exhausted, it would be advisable for the IACHR to wait for the conclusion of such proceedings before arriving at a final decision on the cases in question.

6. On June 7, 1990, the Commission requested information from the State concerning the exhaustion of local remedies, the proceedings under way in the military courts, and whether the whereabouts of Mr. Durand Ugarte and Mr. Ugarte Rivera had been ascertained. The State did not respond to this request.

7. On March 5, 1996, the Commission approved Report No. 15/96 and forwarded it to the State on May 8 of that year. In the operative part of that report, the Commission resolved:

1. TO DECLARE that Peru is responsible for violating, to the detriment of Gabriel Pablo Ugarte Rivera and [Nolberto] Durand Ugarte, the right to personal liberty, the right to life, the right to judicial protection, and the right to the judicial guarantees of due process of law, recognized in articles 7, 4, 25 and 8 of the American Convention and that in the instant case, Peru failed to comply with the obligation to respect the rights and freedoms recognized in the Convention and to ensure their free and full exercise, as set forth in Article 1(1) of the Convention.

2. TO RECOMMEND to Peru that it pay adequate, prompt and effective compensation to the victims' next of kin for the moral and material damages caused as a consequence of the facts denounced and established by the Commission and by the Inter-American Court of Human Rights.

3. TO REQUEST the Government of Peru that, within 60 days of notification of this report, it inform the Inter-American Commission on Human Rights of any measures it has adopted in the instant case, in furtherance of the recommendations contained in the preceding paragraph.

4. TO TRANSMIT the present report in accordance with Article 50 of the American Convention and to advise the Government of Peru that it is not authorized to publish it.

5. TO SUBMIT this case to the Inter-American Court of Human Rights for consideration if, within a period of 60 days, the Peruvian State has not complied with the recommendation made in paragraph 2.

8. On July 5, 1996, the State sent the Commission a copy of a report prepared by a task force composed of representatives of various State offices. The inference of the report, according to the Commission, is that the State did not comply with the Commission's recommendations.

9. On August 8, 1996, the Commission filed the application with the Court (supra, para. 1).

IV. PROCEEDINGS WITH THE COURT

10. When filing the application with the Court, the Commission invoked articles 50 and 51 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and articles 26 et seq. of the Rules of Procedure in force at that time. [FN1] The Commission brought this case for the Court to determine whether the following articles of the Convention had been violated: 1(1) (obligation to respect rights), 2 (duty to adopt domestic legislative or other measures), 4 (right to life), 7.6 (right to personal liberty), 8 (right to a fair trial), 25 (right to judicial protection) and 27.2 (suspension of guarantees). The Commission petitioned the Court to order Peru to conduct the investigations necessary to identify, prosecute and punish those responsible for the violations committed, to report the whereabouts of the mortal remains of Mr. Durand Ugarte and Mr. Ugarte Rivera, and to turn over those remains to their next of kin. Finally, the Commission petitioned the Court to order the State

to provide adequate material and moral compensation to the next of kin of Nolberto Durand Ugarte y Gabriel Pablo Ugarte for the grave injury they suffered as a consequence of the multiple violations of the rights upheld in the Convention [and to] pay the costs that the victims’ next of kin and representatives have incurred both in the proceedings with the Commission and in the proceedings in the case before the Court.

[FN1] Rules of Procedure approved by the Court at its twenty-third regular session, held January 9 to 18, 1991; amended on January 25 and July 16, 1993, and December 2, 1995.

11. The Commission named Mr. John S. Donaldson as its Delegate, Mr. Alvaro Tirado Mejía as Alternate Delegate, and Mr. Domingo E. Acevedo as Advisor. It named the following persons as assistants: Ronald Gamarra, Katya Salazar, José Miguel Vivanco, Viviana Krsticevic, Ariel Dulitzky and Marcela Matamoros. On March 9, 1998, the Commission named Mr. Helio Bicudo and Mr. Domingo E. Acevedo as its Delegates. By a note received on June 18, 1998, Ms. Matamoros informed the Court that she was resigning her role in the instant Case.

12. On August 23, 1996, once the President of the Court (hereinafter “the President”) had done a preliminary review of the application, the Secretariat of the Court (hereinafter “the Secretariat”) sent the State notification of the application and advised it of the time limits for filing its reply and any preliminary objections and for designating its representation in the proceedings. The Secretariat also invited the State to name a judge ad hoc.

13. On September 6, 1996, Peru informed the Court that Mr. Jorge Hawie Soret had been designated as the State’s Agent in the case.

14. At the State’s request, on September 19, 1996, the President extended the deadline for designation of the judge ad hoc to October 8, 1996. On October 4, 1996, the State designated Mr. Fernando Vidal-Ramírez as judge ad hoc.

15. On September 20, 1996, the State entered preliminary objections, which it classified as follows:

One: Failure to exhaust local remedies;

Two: Case already decided by the Commission;

Three: Res judicata;

Four: Extemporaneous filing;

Five: Lack of jurisdiction of the Inter-American Court of Human Rights;

Six: Procedural error, lack of competence and lack of standing (proceedings conducted with the Inter-American Commission on Human Rights invalid by reason of [...] the omissions and irregularities present); and

Seven: The Commission's lack of standing.

The State also requested that the Court order the application filed based on the objections entered.

16. On October 29, 1996, the Commission submitted its written brief in response to the preliminary objections, and requested that the Court dismiss the objections in toto.

17. On November 26, 1996, the State presented its response to the application.

18. Via two briefs dated January 6 and May 30, 1997, respectively, the State petitioned the Court to rule on the preliminary objections it had filed before deciding the merits of the case. On June 2, 1997, the Secretariat informed the State that its request would be brought to the Court's attention at its upcoming session. On September 25, 1997, the Court advised the State that "the decision on the merits of the case [would] never be issued until the judgment on the State's preliminary objections [had been] entered."

19. On March 9, 1998, the President convened the Inter-American Commission and the Peruvian State to a public hearing that was to be held at the seat of the Court on June 8 of that year to hear their arguments on the preliminary objections.

20. The public hearing was at the seat of the Court on June 8, 1998, at which there appeared:

For the State of Peru:

Jorge Hawie Soret, Agent;

For the Inter-American Commission on Human Rights:

Domingo E. Acevedo, Delegate;

Ariel Dulitzky, Assistant, and

Ronald Gamarra, Assistant.

21. As evidence to facilitate adjudication of the case, on November 9, 1998, the President requested that the State provide all documentation pertaining to the petitions of habeas corpus filed on February 26 and June 26, 1986, and any other petition filed seeking a writ of habeas corpus on behalf of Mr. Durand Ugarte and Mr. Ugarte Rivera, as well as the case brought against these two men for the crime of terrorism.

22. On November 27, 1998, by order of the President, the Commission was asked, as per its request in the application, to inform the Court what evidence from the Neira Alegría et al. Case was relevant to the processing of the instant case.

23. On December 14, 1998, the Commission requested that the Court add the following evidence from the Neira Alegría et al. Case to the evidence in the instant case: the Minority Report of the Peruvian Congressional Committee of Inquiry into the events that transpired on June 18 and 19, 1986, at Lurigancho, El Frontón and Santa Barbara prisons; press clippings reporting the events at those prisons; a report on the autopsies conducted on the bodies of the El Frontón inmates by physicians Augusto Yamada, Juan Hever Kruger and José Ruez González; the military case in the El Frontón affair, and a transcript of the statements given by the witnesses who testified at the public hearing the Court held on July 6 and 10, 1993.

24. On January 22, 1999, the State supplied only the October 28, 1986 decision handed down by the Court of Constitutional Guarantees on the petition of cassation filed by Mrs. Virginia Ugarte Rivera challenging the decision delivered by the Supreme Court's First Criminal-Law Chamber, documentation concerning the various steps taken and the difficulties encountered in locating the case files on the petitions filed seeking writs of habeas corpus and the terrorism trial, and documentation supplied by the National Criminal Law Court for Terrorism Cases.

25. On March 3, 1999, the State was again asked to submit documentation concerning the petitions filed seeking writs of habeas corpus, and the case file on the terrorism trial, which the Court had requested to facilitate adjudication of the case. As of the date of this judgment, the State has still not submitted the requested information.

26. On April 7, 1999, the Secretariat requested information from the General Secretariat of the Organization of American States as to whether the Peruvian State had sent it any notification of states of emergency or suspensions of guarantees between June 1, 1986, and July 20, 1987, pursuant to Article 27(3) of the Convention. On May 19, 1999, the General Secretariat's Department of International Law reported that no such notification had been received or recorded.

27. To facilitate adjudication of the case, on April 7 of this year the Secretariat requested a copy of Supreme Decree No. 012-86 IN of June 2, 1986. The State forwarded a copy of that decree on May 5, 1999.

V. JURISDICTION

28. Peru has been a State Party to the American Convention since July 28, 1978, and accepted the jurisdiction of the Court on January 21, 1981. Hence, under the terms of Article

62(3) of the Convention, the Court has jurisdiction to hear the preliminary objections brought by the State.

VI. PRELIMINARY CONSIDERATIONS

29. The preliminary objections filed by the State are presented, grouped and examined under the following procedural principles, given their nature and similarities: a) exhaustion of local remedies (cf. objection one); b) matter decided, *res judicata* and the Court's lack of jurisdiction (cf. objections two, three and five); c) the extemporaneous filing of the application (cf. objection four), and d) procedural error, lack of competence to take action and the Commission's lack of standing (cf. objections six and seven).

VII. EXHAUSTION OF LOCAL REMEDIES

Objection One

30. The State's first objection concerns the "failure to exhaust local remedies."

31. The Court summarizes the State's arguments as follows:

a) Under Article 46 of the American Convention and articles 44 and 45 of the Commission's Regulations, in order for the Commission to admit a petition, the remedies under domestic laws must have been pursued and exhausted in accordance with generally recognized principles of international law, except when the domestic legislation of the state concerned does not establish such remedies, the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, or there has been an unwarranted delay in rendering a final judgment on the aforementioned remedies;

b) The Peruvian legal system has provisions governing the rights involved in the petition and has the jurisdictional bodies and proceedings to guarantee exercise of those rights; a civil action to have a person declared missing and/or presumed dead, and the remedy of *habeas corpus*. The claimants, however, did not go to the regular courts, disregarded the laws stipulated in the Civil Code and failed to have the persons declared officially missing and/or presumed dead which, had they done so, would have unleashed the corresponding chain of events. Had the claimants availed themselves of these means, they would have had an expeditious means of seeing to their interests in inheritance-related matters. These arguments were made again at the public hearing;

c) As for the remedy of *habeas corpus*, the State's argument was that "if exercise of the remedy of *habeas corpus* was not prohibited, then it [the Commission] can hardly conclude that [... application of the] decrees [No. 012-86 IN and No. 006-86 JUS of June 2 and 6, 1986, respectively] implied that said remedy was suspended, and even less that it was ineffective", and

d) Article 8 of the *Habeas Corpus and Amparo Act* [*Ley de Hábeas Corpus y Amparo*] (Law No. 23,506) provides that the "final decision constitutes *res judicata* only when it is favorable to the party filing the remedy." The ruling that led to the filing of this application was delivered in accordance with the laws in force, as required under Article 6.2 of the Act, which provides that: "Remedies are not admissible against a decision resulting from a regular proceeding." The

interests of the next of kin of Mr. Durand Ugarte and Mr. Ugarte Rivera were poorly represented, which made any determination of the merits in this case impossible.

32. The Court will summarize the Commission's arguments as follows:

- a) The remedies under domestic laws were duly pursued and exhausted, in accordance with Article 46(1)(a) of the American Convention;
- b) The State had ample opportunity to raise this objection during the proceedings with the Commission, but did not. The State was notified of the petition on May 19, 1987, yet only after repeated requests were made did the State finally, on September 29, 1989, report that judicial proceedings were under way in the military courts. It was later learned that the proceedings had concluded on July 20, 1989; and
- c) Contrary to what the State contends, the claimants were under no obligation to resort to the civil courts or to have Mr. Durand Ugarte and Mr. Ugarte Rivera declared presumed dead under the pertinent provisions of the Civil Code. The Court has held that the only remedies under domestic law that must be exhausted are those that are adequate and effective; in the case of the forced disappearance of persons, the applicable remedy is that of habeas corpus. If this remedy is pursued and decided without satisfactory result, then the requirements stipulated Article 46(1)(a) of the Convention have been met.

33. On previous occasions, the Court explained the purpose of this exception and pointed out that failure to exhaust local remedies is purely a question of admissibility and that the State that alleges such failure is required to prove that local remedies remain to be exhausted and that they are effective. [FN2]

[FN2] Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 88; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2, para. 87; Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 90; Gangaram Panday Case, Preliminary Objections, Judgment of December 4, 1991. Series C No. 12, para. 38; Neira Alegría et al. Case, Preliminary Objections, Judgment of December 11, 1991. Series C No. 13, para. 30; Castillo Páez Case, Preliminary Objections, Judgment of January 30, 1996. Series C No. 24, para. 40; Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996. Series C No. 25, para. 40, and Cantoral Benavides Case, Preliminary Objections, Judgment of September 3, 1998. Series C No. 40, para. 31.

34. In a case of forced disappearance, the Court has repeatedly held that the remedy of habeas corpus "would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty." [FN3] This Court has also held that the remedy of habeas corpus must be effective; in other words, it must be capable of producing the result for which it was designed. [FN4]

[FN3] Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C No. 4, para. 65; Godínez Cruz Case, Judgment of January 20, 1989. Series C No. 5, para. 68; Fairén Garbi and Solís Corrales Case. Judgment of March 15, 1989. Series C No. 6, para. 90; Caballero Delgado and Santana Case, Preliminary Objections, Judgment of January 21, 1994. Series C No. 17, para. 64, and Habeas corpus under suspension of guarantees (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 35.

[FN4] Castillo Páez Case, Preliminary Objections, supra 33, para. 40; Loayza Tamayo Case, Preliminary Objections, supra 33, para. 40, and Castillo Petruzzi et al. Case, Preliminary Objections, Judgment of September 4, 1998. Series C No. 41, para. 63.

35. The Court considers that these findings apply with equal force to the case of the disappearance of Mr. Durand Ugarte and Mr. Ugarte Rivera and that the procedures mentioned by the State (having the person legally declared missing and/or presumed dead) are intended to serve other purposes having to do with inheritance; they are not, however, intended to shed light on a disappearance that constitutes a violation of human rights and are therefore not suited to achieving the result being sought in the instant case. [FN5]

[FN5] Velásquez Rodríguez Case, supra 34, para. 66; Godínez Cruz Case, supra 34, para. 69, and Fairén Garbi and Solís Corrales Case, supra 34, para. 91.

36. Having studied the facts in the instant case, the Court has established that the remedy of habeas corpus was used on two occasions:

a) On February 25 and 26, 1986, Mrs. Virginia Ugarte Rivera filed petitions with Lima's Forty-sixth Examining Court seeking writs of habeas corpus on behalf of Mr. Nolberto Durand Ugarte and Mr. Gabriel Pablo Ugarte Rivera, who were detained by police from DIRCOTE on February 14 and 15, respectively, on suspicion of terrorism. According to the Commission, proceedings on the two writs were suspended when riots broke out at a number of Peruvian prisons on June 18, 1986; and

b) On June 26, 1986, subsequent to the riots on June 18 of that year, Mrs. Virginia Ugarte Rivera filed for another writ of habeas corpus on behalf of Mr. Durand Ugarte and Mr. Ugarte Rivera, this time with Callao's First Examining Court. On June 27, 1986, that Court denied the writ. On July 15, 1986, Callao's First Police Court upheld the other court's ruling. On August 13, 1986, the Supreme Court's First Criminal Law Chamber found that the July 15, 1986 ruling was not null and void. On October 28, 1986, the Tribunal of Constitutional Guarantees ruled that "the decision in question stands; claimant still has the right to bring another action" (supra, para. 2.d).

37. The Court notes that the first petitions filed concerned the imprisonment of Mr. Durand Ugarte and Mr. Ugarte Rivera following their arrest by DIRCOTE police; the second concerned their disappearance in the wake of the events of June 18, 1986. Given the foregoing, the Court considers that the remedy of habeas corpus filed on June 26, 1986, is the remedy to be considered to determine whether local remedies were exhausted; after being heard at several

instances, that petition was denied by the Tribunal of Constitutional Guarantees (*supra*, para. 2.d). It has thus been established that in the instant case, the appropriate domestic remedy was pursued and exhausted.

38. Moreover, the Court observes that while the Commission requested information from the State concerning the exhaustion of local remedies on May 19, 1987, it was not until September 29, 1989 that the State informed the Commission that the case was being heard in the military courts. With the Commission, therefore, the State did not argue exhaustion of local remedies as a preliminary objection and hence cannot do so now (stopple) to win its argument with this Court.

39. The Court, therefore, dismisses the first preliminary objection.

VIII. MATTER DECIDED, RES JUDICATA, THE COURT'S LACK OF JURISDICTION

Objection Two

40. The second objection argued by the State concerns the "matter decided by the Commission."

41. The State argued that although the Commission acknowledged that the facts in the instant case were precisely the same as those in the Neira Alegría et al. Case, the Commission did not opt to join the two petitions, which was the procedure provided in Article 40.2 of its Regulations. It further noted that the defendant State in both cases was the same.

42. The Commission, for its part, argued that although some of the facts involved in the instant case were the same as those examined in the Neira Alegría et al. Case, the two cases concerned different people. The Commission also pointed out that the hypothesis given in Article 40.2 of its Regulations did not obtain in the instant case, as that article provided that "When two petitions deal with the same facts and persons, they shall be combined and processed in a single file." It further argued that had the State wanted to combine the Durand and Ugarte Case with the Neira Alegría et al. Case, it could have requested joinder during the proceedings with the Commission. Not having done so, the State was now procedurally prohibited from objecting to the fact that the two cases were not joined.

43. The Court notes that the hypothesis given in Article 40.2 of the Commission's Regulations does not obtain in the instant case. The article alludes to a duality: a) of facts and b) of persons. "Facts" refers to the behavior or event that is a violation of some human right. "Persons" has to do with the active and passive subjects of the violation, and mainly the latter, i.e., the victims. Whereas the Neira Alegría et al. Case and the Durand and Ugarte Case concern the same facts -the events at El Frontón-, the obvious difference between them has to do with the persons named as the alleged victims.

44. The Court therefore dismisses the second preliminary objection.

Objection Three

45. The third objection raised by the State concerns *res judicata*.

46. To argue this objection, the State alleged that on January 19, 1995, the Court delivered its judgment in the *Neira Alegría et al. Case* (No. 10,078) and condemned the State for the same facts and matter under consideration in this case; it further argued that by virtue of the principle of *non bis in idem*, no international organization has jurisdiction to hear the instant case.

47. The Commission, for its part, pointed out that this objection was baseless and in no way applicable, since the judgment the Court delivered in the *Neira Alegría et al. Case* was not *res judicata* for the claimants in the *Durand and Ugarte Case*. It added that when a breach of the principle of *non bis in idem* was asserted, various givens had to be met, one being that the subjects were the same, which was not true in this case. It argued that the judgment delivered in the *Neira Alegría et al. Case* did not have effect “*ultra partes*.”

48. The Court observes that just as every individual has human rights, so must any violation of those rights be examined on an equally individual basis. The judgment delivered in one case will not influence the outcome of other cases when the persons whose rights have been violated are different, even when the facts or events that constituted the violation of rights are the same. The instant case involves facts considered in the *Neira Alegría et al. Case*, but violations of different persons’ rights, as the examination of the previous objection showed (*supra*, para. 43). The alleged victims in the instant case are Mr. Durand and Mr. Ugarte, who were not parties to the *Neira Alegría et al. Case*.

49. The Court therefore dismisses the third preliminary objection.

Objection Five

50. The fifth objection raised by the State concerns the Inter-American Court’s “lack of jurisdiction.”

51. The Court summarizes the State’s arguments for this objection as follows:

a) It argued that “the purposes, competence and jurisdiction of the Court” have been vitiated” because the Court is being used “to adjudicate a compensatory damages suit without an intervening proceeding wherein it finds breaches of human rights commitments in a case involving new facts that the Court has not yet heard and adjudicated”;

b) It added that “the Inter-American Court is biased on the facts in the instant case. This supranational body does not have the objectivity and ability to adjudicate this as a discrete case, since it will feel compelled to adhere to its earlier finding;” and

c) During the public hearing it argued that the allegedly aggrieved parties could have availed themselves of local remedies for a resolution of their claims, but did not do so.

52. In rebutting this objection the Commission argued that the filing of a case could neither corrupt nor vitiate the purposes, competence and jurisdiction of the Court. The arguments used against the preliminary objection alleging failure to exhaust local remedies were cited. The Commission further maintained that the Court was not prejudging the same facts. While the

Court had “established precedent in a case similar to but distinct from case 10,009,” the situation that the instant case involved was “entirely different” from the one alleged by the State. The Court’s objectivity and discretion were not influenced by facts similar to those of another case it had already adjudicated.

53. The Court has already held (*supra*, para. 43) that the persons referred to in the application in the instant case are not the same as those involved in the Neira Alegría et al. Case.

54. The Court therefore dismisses the fifth preliminary objection.

IX. LAPSE

Objection Four

55. The fourth preliminary objection brought by the State concerns the “lapse of the application.”

56. The Court summarizes the State’s arguments as follows:

a) The original petition filed with the Commission did not indicate which remedies under domestic law were pursued; it was not for another three years that the claimants, on February 14, 1990, mentioned having petitioned for a writ of habeas corpus, and

b) The petition was filed extemporaneously. The State mentioned two dates in this regard: the first was June 18 or 19, 1986, when the events at El Frontón occurred; the second was June 7, 1990, the date the Commission last asked the State to provide information concerning the exhaustion of local remedies. “As the petition made no mention of any emergency situation that would have prevented or impeded the use of local remedies, if June 18 or 19, 1986 is taken as the date on which the time period began, then the petition was time-barred since the Inter-American Commission did not receive it until April 27, 1987.” At the public hearing, the State reiterated that the petition was entered when the time period established in Article 38 of the Commission’s Regulations had already lapsed.

The State went on to argue that “if June 7, 1990 is taken as the date on which the time period begins, the petition has to be considered all the more extemporaneous since until then the Inter-American Commission had not yet established that local remedies had been exhausted.”

57. The following is the Court’s summation of the Commission’s arguments:

a) Nine years after the processing of the case first began, the State cannot allege that the claimants did not indicate what remedies they had pursued in the local courts. Mrs. Virginia Ugarte Rivera filed a petition with Callao’s First Examining Court seeking a writ of habeas corpus. The State was aware of the case and that it was in the courts. Consequently, the State was duly informed that by the time the petition was filed with the Commission, the claimants had already pursued and exhausted the local remedies, in accordance with Article 46(1)(a) of the American Convention;

b) The State made a number of assertions based on an apparent misunderstanding of how the time periods are computed. It also contradicted itself when referencing the extemporaneous filing of the complaint. On June 26, 1986, Mrs. Virginia Ugarte Rivera petitioned Callao's First Examining Court seeking a writ of habeas corpus on behalf of Mr. Durand Ugarte and Mr. Ugarte Rivera, as their whereabouts were unknown. That writ was dismissed on June 27, 1986. Several higher courts reviewed the case until finally, on October 28, 1986, the Court of Constitutional Guarantees upheld the decision to refuse to grant the writ of habeas corpus. That opened up the possibility for the claimants to turn to the Inter-American Court, which they did on April 27, 1987, within the time period established in Article 46(1)(b) of the Convention. On May 19 of that year, the Commission sent the pertinent parts of that petition to the State.

c) Although the State was asked on a number of occasions to supply information on the Durand and Ugarte and Neira Alegría et al. cases, it did not reply until September 29, 1989. At that time, it stated that the facts in these two cases were being examined by the military justice system, and that local remedies had not, therefore, been exhausted. The Navy's Second Permanent Court of Inquiry instituted proceedings to determine whether there were grounds to suspect that the Naval troops that took part in quashing the riots had acted unlawfully. On July 6, 1987, the case was dismissed with a finding that exonerated the suspects of any wrongdoing. That ruling was confirmed on July 16, 1987. Proceedings in the case were reopened and ended once and for all on July 20, 1989. From the foregoing it is clear that at the time the State presented its information to the Commission, in September 1989, proceedings were no longer under way to identify the disappeared persons or to ascertain who was responsible for the human rights violations that occurred when the riot was put down; and

d) The State cannot raise this objection, not only because the "reasonable" time period allowed for entering such objection has long since expired, but also because it transgressed the principle of good faith by changing the position it took during the proceedings with the Commission when the case was brought to the Court. When the State reported information to the Commission, it indicated that proceedings were pending and made no reference to the facts denounced or to the supposed inadmissibility of the petition. It cannot, therefore, argue now that the time limit given in Article 46(1)(b) of the Convention was not observed.

During the public hearing the Commission observed that the State's preliminary objections were mutually contradictory: whereas it argued that local remedies had not been exhausted, it also claimed that the action was time barred.

58. As for the argument alleging that any action was time barred, the Court notes that this argument contradicts what the State argued in support of its case for failure to exhaust local remedies. As noted on previous occasions, such contradictions do nothing for the principles of procedural economy [FN6] and good faith that must be given in any proceedings. [FN7] In any case, the Court considers that the State should have entered the time-barred exception at the first stage of the process, to object to the petition filed with the Inter-American Commission on April 27, 1987.

[FN6] Cantoral Benavides Case, Preliminary Objections, supra 33, para. 38.

[FN7] Neira Alegría et al. Case, Preliminary Objections, supra 33, para. 35.

59. The Court also considers that the local remedies were exhausted on October 28, 1986, when the Tribunal of Constitutional Guarantees, as court of last resort, ruled on the petition filed seeking a writ of habeas corpus on behalf of Mr. Durand Ugarte and Mr. Ugarte Rivera (*supra*, para. 2.d). This case is not time barred, as alleged, since the complaint was filed with the Commission on April 27, 1987, in other words, within the six-month time limit established in Article 46(1)(b) of the American Convention.

60. The Court therefore dismisses the fourth preliminary objection.

X. PROCEDURAL ERROR, LACK OF COMPETENCE AND LACK OF LEGAL STANDING

Objection Six

61. The sixth preliminary objection presented by the State concerns the “procedural error, lack of competence and lack of standing (proceedings with the Inter-American Commission on Human Rights invalid by reason of [...] the omissions and irregularities present).”

62. The Court’s summation of the State’s arguments for this objection is as follows:

a) The Commission omitted the friendly settlement procedure, which it should have suggested as part of this specific case, and not as part of a separate proceeding, as in the *Neira Alegría et al.* Case.

b) Under Article 47 of the Convention, the Commission is to find any petition that does not satisfy the requirements specified in Article 46(a) to be inadmissible;

c) Report No. 15/96, approved by the Commission, is invalid under Article 19.2 of the Commission’s own Regulations. Commission members may not participate in the “discussion, investigation, deliberation or decision of a matter” if “previously they have participated in any capacity in a decision concerning the same facts upon which the matter is based or have acted as an adviser to, or representative of, any of the parties involved in the decision;” and

d) Under Article 39 of the Commission’s Regulations, it shall not consider any petition when the subject of the petition “essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the state concerned is a member.” In the instant case, the Commission has “ceased to be a deliberative body, an investigative body, and a body for discussion and settlement” since, under that provision of Article 39, it no longer has the competence to perform those functions. The State added that the Commission interrupted the processing of the instant case in 1990, in order to await the Court’s final decision in the *Neira Alegría et al.* Case, thus disregarding the principles of procedural economy and speed.

63. The following is the Court’s summation of the Commission’s rebuttal to the preliminary objection under examination:

a) The State raised a number of objections to the same points. The State mentioned the Commission’s failure to carry out the friendly settlement procedure in the *Neira Alegría et al.*

Case, and not in the present case, as the State contends it was required. Since the facts in the Neira Alegría et al. Case and the Durand and Ugarte case were the same, on February 14, 1995, the Commission proposed to the State that the friendly settlement procedure be instituted, with payment of compensatory damages to the next of kin of Mr. Durand Ugarte and Mr. Ugarte Rivera. The State, however, did not respond to the suggestion. Had the State been interested in a friendly settlement, it could have requested it, under Article 45.1 of the Commission's Regulations; and

b) The objection alleging duplication of proceedings is out of order. The instant case is not pending settlement in another procedure "under an international governmental organization of which the State concerned is a member," nor does it essentially duplicate a petition pending or already settled by the Commission or by another international governmental organization of which Peru is a member.

64. As for the friendly settlement, this Court would make the same point it made on previous occasions, which is that the Commission's authority to encourage a friendly settlement in a case is discretionary, although by no means arbitrary. It has to consider whether such a procedure is advisable or adequate for the protection of human rights. [FN8] In the instant case, the Commission showed that by note of February 14, 1995, it had suggested a friendly settlement in which the next of kin of Mr. Durand Ugarte and Mr. Ugarte Rivera would receive compensatory damages. The State, however, did not respond.

[FN8] Velázquez Rodríguez Case, Preliminary Objections, supra 33, para. 45; Fairén Garbi and Solís Case, Preliminary Objections, supra 33, para. 50; Godínez Cruz Case, Preliminary Objections, supra 33, para. 48 and Caballero Delgado and Santana Case, Preliminary Objections, supra 34, para. 26.

65. As for fulfillment of the requirements stipulated in Article 46(1)(a) of the Convention, this Court refers back to the reasoning given in adjudicating the first preliminary objection (supra, paragraphs 37 and 38), and considers that there was no duplication in the instant case.

66. The Court therefore dismisses the sixth preliminary objection.

Objection Seven

67. The seventh objection filed by the State concerns the "Commission's lack of standing."

68. The State's argued that the Commission could not issue a report on a matter in which it had previous served as a party before the Court. It further argued that the Commission could not decide a case already settled by an international organization, such as the Court.

69. The Commission's contention was that the State's arguments for this objection were a repeat of its arguments for the sixth objection, and referred back to its statements on the sixth objection in its brief of written observations rebutting the preliminary observations.

70. In the Court's examination of the second, third and sixth objections, it referenced the argument made with respect to the objection now under consideration. Its earlier observations, therefore, need not be repeated here

71. The Court therefore dismisses the seventh preliminary objection.

XI. OPERATIVE PARAGRAPHS

72. Now, therefore,

THE COURT

DECIDES:

By six votes to one,

1. To dismiss preliminary objection one entered by the State of Peru.

Judge Vidal-Ramírez dissenting.

Unanimously,

2. To dismiss preliminary objections two, three, four, five, six and seven, all entered by the State of Peru.

By six votes to one,

3. To proceed with consideration of the merits of the case.

Judge Vidal-Ramírez informed the Court of his dissenting opinion.

Written in Spanish and in English, the Spanish being the authentic, in San José, Costa Rica, on May 28, 1999.

Hernán Salgado-Pesantes
President

Antônio A. Cançado Trindade
Máximo Pacheco-Gómez
Alirio Abreu-Burelli
Sergio García-Ramírez
Carlos Vicente de Roux-Rengifo

Fernando Vidal-Ramírez
Judge ad hoc

Manuel E. Ventura-Robles
Secretary

So ordered,

Hernán Salgado-Pesantes
President

Manuel E. Ventura-Robles
Secretary

DISSENTING OPINION OF JUDGE VIDAL-RAMIREZ

I do not concur with the decision adopted in the judgment because it dismisses the preliminary objection claiming failure to exhaust local remedies. My reasons are as follows:

1. The case was filed on August 8, 1996, more than ten years after the disappearance of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera when the riot that broke out at El Frontón Prison on June 18, 1986, was quashed.

The application was filed for the Court to decide whether the provisions of the Convention had been violated and to order the Peruvian State to pay material and moral damages to the next-of-kin.

2. Given the circumstances surrounding the disappearance of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera and the time that has passed since, it is reasonable to presume that they are dead.

Peruvian law, embodied in the provisions of its Civil Code, spells out the procedure to follow to have the courts declare a person legally dead in circumstances such as those that caused the disappearance of Durand Ugarte and Ugarte Rivera.

The provisions of the Civil Code stipulate that if the courts declare a person dead, they shall proceed immediately to declare who the lawful heirs are.

3. Although Mrs. Virginia Ugarte Rivera, mother of Nolberto Durand Ugarte and sister of Pablo Ugarte Rivera, filed petitions seeking writs of habeas corpus and a petition with the Commission, her obvious and legitimate interest in ascertaining the situation of her son and her brother does not preclude the right of other heirs, as legal heirs, to share in the compensatory damages sought, in keeping with the inheritance laws in effect in Peru.

4. When this preliminary objection was entered, the Agent for the Peruvian State specified the procedures stipulated in Peru's Civil Code to have Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera declared legally dead.

5. Finally, with the October 28, 1986 decision of the Court of Constitutional Guarantees, claimant Mrs. Virginia Ugarte Rivera still had one more remedy of habeas corpus available to her to establish the alleged violation of her son's and brother's right to life. With that, she would have exhausted local remedies once and for all.

Fernando Vidal-Ramírez
Judge ad hoc

Manuel E. Ventura-Robles
Secretary