

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
COMISION INTERAMERICANA DE DERECHOS HUMANOS
COMISSAO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMERICAINE DES DROITS DE L' HOMME



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TO THE HONORABLE INTER-AMERICAN COURT OF HUMAN RIGHTS:

Oliver Jackman, delegate of the Inter-American Commission on Human Rights, with Edith Márquez and David Padilla of that body, and Claudio Grossman, attorney for the victims and legal adviser to the Commission, hereby respond to the Government of Suriname's procedural objections contained in the Government's pleading entitled Excepciones Preliminares in Case N° 10.274 known as Asok Gangaram Panday v. the Government of Suriname.

This pleading, dated June 28, 1991, was received in the Secretariat of the Commission in a legible form on July 12, 1991. For the record, the delay in receiving a legible copy of this pleading and the physical separation of the Commission's representatives (in Barbados, Venezuela and the United States of America, respectively) and the absence of the Commission's legal advisor (in Chile) during the period granted the Commission to present this response, prompted the Commission to seek a reasonable extension of time. The request for extension was denied.

INTRODUCTION

The arguments presented by Counsel for the Government can be roughly divided into two categories. The first consists of a series of picayune procedural matters that either have already been settled by the Court or can be readily disposed of by a simple reading of the relevant rules or by the mere application of common sense.

The second matter raised by the Government, however, is much more significant. It goes to the question of the respective roles of the Commission and the Court in this and future contentious cases.

Before addressing the very important second issue, let us dispose of the first.

PART I

Matters of Form

1. The Government complains that the Commission's Memorial was not signed. For the record, it should be noted that the Commission's Memorial was first sent to the Court at the end of March of 1991 by facsimile with a cover transmission sheet indicating that it was being sent by this route (See Court's archives). In this regard, the Commission is of the conviction that there can be no doubt on the part of the Court or the other party as to the authenticity of the Memorial. Furthermore, the Commission is absolutely convinced that the Government has in no way been harmed by the Commission's manner of communicating its pleading to the Court.

2. Representation of the Commission and the victims. The Government questions the right of the Commission to name members of its Secretariat as its delegates and also calls into question its capacity to appoint the attorney for the victims as its legal adviser.

The Court's Rules of Procedure in this matter state in relevant part:

Article 20. Representation of the Parties

The parties shall be represented by agents who may have the assistance of advocates, advisers, or any other person of their choice.

Article 21. Representation of the Commission

The Commission shall be represented by the delegates whom it designates. These delegates may, if they so wish, have the assistance of any person of their choice.

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The delegates of the Commission were duly chosen by the Commission itself in a timely way and this fact was communicated to the Government. For the sake of flexibility, the Commission designated a team of several delegates including one of its members and the Executive Secretary and Assistant Executive Secretary of its Secretariat. A similar approach was taken in the Honduran disappearance cases when a Commission member, Dr. Hilda Russomano and the Executive Secretary, Dr. Edmundo Vargas Carreño, acted as co-delegates.

Again in the Honduran cases the Commission appointed legal advisers who had been named as attorneys for the victims. In those cases the Commission designated Juan Méndez, José Miguel Vivanco, Hugo Muñoz and Claudio Grossman as legal advisers. The same Mr. Grossman has been named legal counsel to the Commission in the instant case. The Court was duly notified of this choice and made no objection.

Moreover, it should be noted that the trend in international human rights practice in this matter is towards an even broader and more flexible role for attorneys for the victims. In the European system, the Court changed its Rules to allow the victims or their legal representatives to appear on their own before that body and to decide independently of the Commission how they wish to present their case.

At some not too distant point in the evolution of our system, it is to be hoped that a similar development will take place.

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Finally, and perhaps most importantly, as long as the Commission is a part time body whose members live and work in their respective far-flung countries and by necessity devote most of their time to their own affairs, it will be essential that the Commission's Secretariat play a large role in the litigation of individual cases. So too with regard to outside legal advisers. In order to attend to the demand for litigation based on human rights violations, the collaboration of legal advisers, either contracted or working pro bono, as in this case, is necessary to enable the Commission to bring cases before the Court. A liberal practice in regard to representation favors victims' rights and in no way prejudices governments. This is particularly true when one considers the extensive human and financial resources available to governments.

3. Non-translation of Annexes. The Government complains that some of the Commission's annexes to its Memorial were in their original language, English. This is true. They were later translated to Spanish by the Commission and sent to the Court.

The Commission insists that this in no way prejudiced the Government. It is interesting to note that key testimony in this case, that of ASIDE, was translated into Spanish but never addressed by the Government's lawyer. Lastly it should be noted that English is widely spoken in Suriname while Spanish is virtually unknown.

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For the record, the Commission, in a spirit of cooperation, has sought to present its pleadings in this case to the Court in Spanish. This document likewise will be presented to the Court in that language in due course. However, this cooperative spirit should not be interpreted as acceptance or acquiescence by the Commission in the practice of working in only one of the official languages of the Organization. This is The Commission insists that all four official languages are equally valid. The Commission's members and staff members come from various members states. Their mother languages vary. As a result, from time to time communications to and pleadings before the Court will be done in different official languages. In its many years of activities, the Commission itself has never insisted that one official language be used to the exclusion of the others.

Matters of Law

1. After a gratuitous lecture on bad faith and the insinuation that the Commission had engaged in such, the reader of the Government's Excepciones Preliminares searches for a substantive complaint. Has the Commission used insulting or defamatory language? No. Did the Commission initially open this case on frivolous or specious grounds? Violation of the right to life can hardly be considered unimportant. Did the Commission make excessive, abnormal or unnecessary use of its powers when it queried the Government on such serious allegations and then reiterated its lawful and sensible requests for information? Absolutely not.

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What should be made of the evasive, incomplete and ambiguous responses provided by the Government? And the Government's failure or refusal to reach a friendly settlement in this matter, despite the fact that the victims' families were interested and the Commission had duly placed itself at the disposal of the parties for such purpose?

The Government's claims of abuse of law are unsupported by the facts. It is totally inappropriate to say that the Commission proceeded in an unserious way in this case, when the Government's own Human Rights Institute has determined that there had been a human right violation. If the Government considered the claims to be manifestly groundless, shouldn't it have stated so in its first communications to the Commission?

Moreover, it must be borne in mind that the Commission is obligated to safeguard against abuses of authority such as those claimed by the Government. Article 47.b and c, of the the American Convention, states:

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

- c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
- d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

The Commission insists that both of these provisions were scrupulously respected.

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The Government goes on to claim that the Commission acted ultra vires in finding human rights violations in this case. A glance at Convention Article 50 is sufficient to show that the Inter American Commission on Human Rights acted properly.

Article 50

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.c of Article 48 shall also be attached to the report.

2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.

3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

The Commission, having determined that the Government was not interested in a settlement, drew up a report and stated its conclusions. What meaning could the word "conclusions" have other than that the Commission is not only authorized but required by the Convention to make a finding, to arrive at a conclusion, as to whether there was a violation. In the instant case the Commission followed the procedures set out in Article 50 and the Government was so informed. During the approximately three months that followed, the Government had exclusive access to the Commission's conclusions and recommendations and did nothing with them. It is ironic now that the Government characterizes the Commission's fulfillment of its treaty obligations as an abuse of law.

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2. Nor is there any merit to the Government's contention that the Commission applied a "double sanction" to the Government. A glance at the Commission's last two Annual Reports, Chapter IV, reveals that the Commission merely continued to report on the status of this case. It should be noted that the Commission has never published its Article 50 report on this case. Nor did it publish an Article 51 report in Chapter III of its Annual Report, the Section in which the Commission customarily publishes its resolutions on individual cases.

Thus, the instant case is completely distinguishable from the Honduran disappearance cases in that the latter were reported via individual case resolutions in Chapter III of the Commission's Annual Report prior to being litigated before the Court.

The relevant question here is whether the publication of a status report on an individual case in the Commission's Annual Report somehow harms the accused Government. The Commission insists that the Government has in no way been prejudiced. In what judicial system of the world would a case such as this be considered confidential? It is absurd to suggest that information on the human rights of individuals should be kept completely confidential for years to the detriment of victims and their families so as to avoid minimal embarrassment to governments.

If in the final analysis the accusations are baseless, the truth will out and the Government will be exonerated.

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For its part, the Commission is obligated to report on the human rights situations in States parties to the Convention. Hence, Article 41.g of the Convention provides:

Article 41

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

...

- g. to submit an annual report to the General Assembly of the Organization of American States.

3. Lastly, counsel for the Government objects to the Commission's revealing the identity of the petitioner to the Court as a breach of confidentiality. The raison d'etre of the rule requiring that petitioner's name be kept in confidence, unless expressly waived, is to protect the petitioner from Government reprisal and not to prevent judges on the Inter-American Court from knowing all the facts of the case. History shows that this rule is a good and necessary one aimed at protecting persons and institutions from governments and not from human rights courts.

The Commission further wishes to underscore the fact that its conclusions were derived from based on an analysis of the merits of the case. Based on its investigation and the evidence obtained. The oral testimony, affidavits, and written proofs, which, taken as a whole, corroborated one another, led the Commission to the conclusion that state agents were responsible for the human rights violations in this case.

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It must be emphasized that these cases were not based on Article 42 of the Commission's Rules of Procedure, which allows a presumption of the truth of the allegations when a Government fails to respond to the Commission's requests for information. In the instant case, while the Government's responses were totally inadequate, the Commission did not have to rely on an Article 42 presumption, because it had marshalled sufficient evidence, obtained primarily through two on-site investigations of the facts.

Exhaustion of Internal Remedies

The Government argues that petitioners failed to exhaust internal remedies. The Commission's position is that there were no internal recourses available to petitioners in this case, an exception to the rule of the prior exhaustion of internal remedies as contemplated in Article 46,2,b of the Convention. That provision states:

Article 46

2. The provisions of paragraphs 1.a and 1.b of this article (requiring exhaustion) shall not be applicable when:

- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.
(Parenthesis added)

In a country in which 12 of its most prominent citizens could be killed in cold blood (see Commission's 1983 Report) by ranking members of the Army and no investigation, arrests or prosecutions ensued and where the Military Police, a part of the National Army, acted as municipal

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police, it is absurd to insist that family members of a humble taxi driver could reasonably be required to risk their lives and whatever their small resources denouncing these crimes, seeking penal and civil remedies in the country's courts. It is out of the question that common citizens be expected to complain to the very military forces, in their capacity as police, who days earlier violated the life and physical integrity of the victim. Nor is it sufficient to say that there was a democratic government in Suriname at the time of the violations in the instant case. Events of December 1990 demonstrate that real power in Suriname continued to reside in the hands of the Army, an institution which could and did recently change the government with a telephone call.

It is axiomatic that for the rule of exhaustion of internal remedies to be applicable, they must be swift and effective (see Article 46.2 of the Convention). In Suriname they were neither. Further proof of this is the amnesty decree promulgated by the Government on behalf of agents guilty of human rights violations.

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PART II

The Respective Roles of the Commission and the Court

The Government argues both in its Excepciones Preliminares as well as its Counter Memorial that the Court should hold trials de novo of the instant cases, that the Court should reexamine all evidence, call and hear all witnesses: in a word, act as trier of fact. The Government further argues that the Commission should have refrained from reaching any conclusion in these matters, since it does not possess the legal authority to do so and should have kept all of its proceedings strictly confidential.

To accept this thesis is to assure that the juridical protection of human rights in the inter-American system will most certainly be ineffective and inefficacious.

The Government would argue that in the Honduran cases, the only precedent available, the Inter-American Court acted as trier of fact with the Commission in the role of a prosecutor or public ministry. This is true only because of the peculiar nature of those cases. The Commission's conclusions in the Honduran cases were based on Article 42 of the Commission's Regulations, which as noted earlier gives rise to a presumption of the truth of the allegations in instances in which

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governments refuse or fail to cooperate with the Commission and provide it with the information related to the case in question. Since the Commission had relied on the Article 42 presumption in arriving at its conclusions in the Honduran cases, the Commission felt obliged to seek to corroborate its finding by presenting witnesses and other proofs at trial, and the Court for its part, felt obliged to verify, on the basis of this evidence, the Commission's findings.

It should be noted that in the Honduran cases there had not only been no on-site visit by the Commission but also the Government of Honduras initially refused to assist the Commission in its investigation of the complaints in those cases.

In the present cases, on the other hand, it is important to appreciate that the Commission's findings are based on painstaking investigations. The Commission has not relied on Article 42 even though the Government's written responses to the allegations herein have been totally inadequate. Fortunately, the Commission was able to interrogate witnesses and even one of the victims in situ. Moreover, the Commission has presented extensive videotaped interviews and other information which fully corroborate the Commission's conclusions.

It is the view of the Commission that ordinarily it is the appropriate finder of fact. The Commission is best equipped to perform this role. It alone conducts on-site investigations. Of equal

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importance, it can take action soon after the events giving rise to a contentious case, whereas in the best of circumstances cases will not reach the Court until at least two or three years after the commission of the human rights violations.

Additional reasons point to this same conclusion. While short of staff, the Commission is and will continue to be better endowed to investigate cases and make factual determinations than the Court. Moreover, it is prohibitively expensive to transport witnesses and family members from remote parts of this enormous hemisphere to participate in trials de novo. If each case brought before this Honorable Court is heard after the fashion of the Honduran cases, very few cases indeed will ever be litigated before that body. If the Commission and Court are able to process only an extremely minute fraction of the cases opened by the former, our nascent system will surely fail.

The European system with its shorter distances, greater resources and (of late) less serious human rights violations, has shown itself to be quite pragmatic in processing cases. Witness the precedent set in Steele v. Germany and cited in the Commission's Memorial.

But what of fairness, due process if you will, for the Government? The Commission does not suggest that governments should be treated unfairly. The Commission notes here that the Government, and this is especially true in the instant case, has had the best opportunity to

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investigate abuses of power by its agents. In the present matter, the Government has had years to interview witnesses. Rather than conducting a serious investigation, the Government engaged in a cover-up.

It is the considered view of the Commission that for the sake of an agile and responsive system, in ordinary cases such as the one at bar, the Commission is and should be the determiner of the facts, "verifying facts" as provided for in Article 48.1.d of the Convention and stating "Conclusions" as provided for in Article 50.

This does not mean the Commission wishes to be a court or a tribunal. It does not claim competence or jurisdiction or authority to fix indemnities, order remedial actions by governments, etc. These prerogatives belong exclusively to this Honorable Court.

Put another way, the Commission is the appropriate body to examine evidence. It should do so using a kind of "best evidence rule." Thus, for example it is unreasonable to suggest that testimony obtained by the Commission from Maroons living in the bush should have been taken under oath before a duly licensed notary public.

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If our system is to work it must be imbued with common sense. Each part of the system must perform its Convention assigned tasks. The number of cases must be increased to better reflect the volume of violations taking place in our region and to help deter practices that result in violations.

In the present cases, the Commission, following serious investigations, concluded on the basis of the evidence that serious violations of human rights were committed by agents of the Government of Suriname and these violations not only went unpunished but were covered-up by governmental authorities.

The Commission prays that the Court use its unique, binding authority to oblige the Government of Suriname to make restitution and take other measures the Court considers appropriate to prevent the recurrence of these violations.

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