

INTER-AMERICAN COURT OF HUMAN RIGHTS

**ADVISORY OPINION OC-11/90
OF AUGUST 10, 1990**

**EXCEPTIONS TO THE EXHAUSTION OF DOMESTIC
REMEDIES (ART. 46(1), 46(2)(a) and 46(2)(b)
AMERICAN CONVENTION ON HUMAN RIGHTS)**

**REQUESTED BY THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

Present:

Héctor Fix-Zamudio, President
Orlando Tovar-Tamayo, Vice-President
Thomas Buergenthal, Judge
Rafael Nieto-Navia, Judge
Policarpo Callejas-Bonilla, Judge
Sonia Picado-Sotela, Judge

Also present:

Manuel E. Ventura-Robles, Secretary

THE COURT,

composed as above,

renders the following Advisory Opinion:

1. By note of January 31, 1989, the Inter-American Commission on Human Rights (hereinafter "the Commission"), submitted to the Inter-American Court of Human Rights (hereinafter "the Court") an advisory opinion request regarding Article 46(1)(a) and 46(2) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention").

2. The request for an advisory opinion poses the following questions:

1. Does the requirement of the exhaustion of internal legal remedies apply to an indigent, who because of economic circumstances is unable to avail himself of the legal remedies within a country?

2. In the event that this requirement is waived for indigents, what criteria should the Commission consider in making its determination of admissibility in such cases?

1. Does the requirement of the exhaustion of internal legal remedies apply to an individual complainant, who because he is unable to retain representation due to a general fear in the legal community cannot avail himself of the legal remedies provided by law in a country?

2. In the event that this requirement is waived for such persons, what criteria should the Commission consider in making its determination of admissibility in these cases?

3. In setting out the considerations that prompted the advisory opinion request, the Commission stated the following:

1. Indigency

The Commission has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in the domestic legislation because he cannot afford legal assistance or, in some cases, the obligatory filing fees.

The Commission is aware that some States provide free legal assistance to persons who qualify because of their economic status. However, this practice does not obtain in all of the countries and even in those countries where it exists, it often covers only highly urbanized areas.

When the legal remedies of a State are not in fact available to an alleged victim of a violation of human rights and should the Commission be obligated to dismiss his complaint for failure to meet the requirement of Article 46(1)(a), does this not bring into play the possibility of a discrimination based on "social condition" (Article 1(1) of the Convention)?

2. Lack of Counsel

Complainants have alleged to the Commission that they have been unable to retain counsel to represent them, thereby limiting their ability to effectively pursue the internal legal remedies putatively available at law. This situation has occurred where an atmosphere of fear prevails and lawyers do not accept cases which they believe could place their own lives and those of their families in jeopardy.

When, as a practical matter, such a situation occurs and an alleged victim of a human rights violation brings the matter to the attention of the Inter-American Commission on Human Rights, should the Commission admit such a complaint or dismiss it as inadmissible?

4. The Commission designated its Chairman and its first and second Vice-Chairmen to act jointly or separately as its delegates in all matters relating to the instant advisory opinion request.

5. In a note of February 9, 1989, the Secretariat, acting pursuant to Article 52 of the Rules of Procedure of the Court, requested written observations and other relevant documents on the issues involved in the instant advisory opinion request both from the member states of the Organization of American States (hereinafter "the OAS") and, through the Secretary General of that Organization, from all the organs listed in Chapter VIII of the OAS Charter.

6. The President of the Court directed that the written observations and other relevant documents be filed with the Secretariat before July 1, 1989.

7. Responses to the Secretariat's communication were received from the governments of Argentina, Costa Rica, Dominican Republic, Jamaica, and Uruguay* .

8. The International Human Rights Law Group, a non-governmental organization, submitted an *amicus curiae* brief.

9. A public hearing was held on July 12, 1989, to enable the Court to hear the oral arguments of the member states and the OAS organs with regard to the issues raised in the request.

10. At this public hearing, the Court heard the following representatives:

For the Inter-American Commission on Human Rights:

Oliver H. Jackman, President and Delegate

David J. Padilla, Assistant Executive Secretary

For the Government of Costa Rica:

Carlos Vargas Pizarro, Agent and Director for Legal Affairs of the Ministry of Foreign Affairs.

Judge Héctor Gros-Espiell, then the President of the Court, presided over this hearing. However, he subsequently resigned from his position as Judge.

I ADMISSIBILITY

11. The Commission has a clear and legitimate interest in seeking advisory opinions from the Court on questions regarding the promotion and protection of human rights in the inter-American system (*The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, paras. 14-16; *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 42, and *Habeas Corpus in Emergency Situations (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. 8).

12. No valid reasons exist for the Court to exercise its discretionary power to decline to render an advisory opinion even when formal requirements of admissibility are met (*"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, paras. 30 and 31; *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, *supra* 11, para. 10; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16, and *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American*

* These and all other important documents related to this Advisory Opinion will be published in the Court's Series B publications.

Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 27).

13. The Court, therefore, admits the request for advisory opinion and will now proceed to address it.

II MERITS

14. The questions submitted by the Commission call for an interpretation by the Court of Article 46(1)(a) and 46(2) of the Convention, which reads as follows:

Article 46

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
 - a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
 - ...
2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:
 - a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
 - 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; or
 - c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

15. Article 46(2)(c) does not have any relevance to the questions before the Court. The remaining provisions -sub-paragraphs (a) and (b)- do and require closer analysis.

16. Article 46(1)(a) provides that, for a petition to be ruled admissible by the Commission, it is necessary *that the remedies under domestic law have been pursued and exhausted*, while sub-paragraph 2 considers the circumstances in which this requirement does not apply.

17. Article 46(2)(a) applies to situations in which the domestic law of a State Party does not provide appropriate remedies to protect rights that have been violated. Article 46(2) is applicable to situations in which the domestic law does provide for remedies, but such remedies are either denied the affected individual or he is otherwise prevented from exhausting them. These provisions thus apply to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact.

18. Article 46(2) makes no specific reference to indigents, the subject of the first question, nor to those situations in which a person has been unable to obtain legal

representation because of a generalized fear in the legal community to take such cases, which the second question addresses.

19. The answers to the questions presented by the Commission thus depend on a determination of whether a person's failure to exhaust domestic remedies in the circumstances posited falls under one or the other exception spelled out in Article 46(2). That is, whether or under what circumstances a person's indigency or inability to obtain legal representation because of a generalized fear among the legal community will exempt him from the requirement to exhaust domestic remedies.

20. In addressing the issue of indigency, the Court must emphasize that merely because a person is indigent does not, standing alone, mean that he does not have to exhaust domestic remedies, for the provision contained in Article 46(1) is of a general nature. The language of Article 46(2) suggests that whether or not an indigent has to exhaust domestic remedies will depend on whether the law or the circumstances permit him to do so.

21. In analyzing these issues, the Court must bear in mind the provisions contained in Articles 1(1), 24 and the relevant parts of Article 8 of the Convention, which are closely related to the instant matter and read as follows:

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

...

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

...

22. The final section of Article 1(1) prohibits a state from discriminating on a variety of grounds, among them *economic status* the meaning of the term *discrimination* employed by Article 24 must, then, be interpreted by reference to the list enumerated in Article 1(1). If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigency), prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.

23. [P]rotection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention. The obligation to respect and guarantee such rights, which Article 1(1) imposes on the States Parties, implies, as the Court has already stated, *the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights (Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C No. 4, para. 166; Godínez Cruz Case, Judgment of January 20, 1989. Series C. No. 5, para. 175).*

24. Insofar as the right to legal counsel is concerned, this duty to organize the governmental apparatus and to create the structures necessary to guarantee human rights is related to the provisions of Article 8 of the Convention. That article distinguishes between *accusations[s] of a criminal nature* and *procedures of a civil, labor, fiscal, or any other nature*. Although it provides that *[e]very person has the right to a hearing, with due guarantees by a tribunal* in both types of proceedings, it spells out in addition certain *minimum guarantees* for those accused of a criminal offense. Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those *minimum guarantees*. By labeling these guarantees as *minimum guarantees*, the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.

25. Sub-paragraphs(d) and (e) of Article 8(2) indicate that the accused has a right to *defend himself personally or to be assisted by legal counsel of his own choosing* and that, if he should choose not to do so, he has *the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides*. Thus, a defendant may defend himself personally, but it is important to bear in mind that this would only be possible where permitted under domestic law. If a person refuses or is unable to defend himself personally, he has the right to be assisted by counsel of his own choosing. In cases where the accused neither defends himself nor engages his own counsel within the time period established by law, he has the right to be assisted by counsel provided by the state, paid or not as the domestic law provides. To that extent the Convention guarantees the right to counsel in criminal proceedings. But since it does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his *economic status* if, when in need of legal counsel, the state were not to provide it to him free of charge.

26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing. Any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.

27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article.

28. For cases which concern the determination of a person's *rights and obligations of a civil, labor, fiscal, or any other nature*, Article 8 does not specify any *minimum guarantees* similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for *due guarantees*; consequently, the individual here also has the right to the fair hearing provided for in criminal cases. It is important to note here that the circumstances of a particular case or proceeding - its significance, its legal character, and its context in a particular legal system- are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.

29. Lack of legal counsel is not, of course, the only factor that could prevent an indigent from exhausting domestic remedies. It could even happen that the state might provide legal counsel free of charge but neglect to cover the costs that might be required to ensure the fair hearing that Article 8 prescribes. In such cases, the exceptions to Article 46(1) would apply. Here again, the circumstances of each case and each particular legal system must be kept in mind.

30. In its advisory opinion request, the Commission states that it *has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in the domestic legislation because he cannot afford legal assistance or, in some cases, the obligatory filing fees*. Upon applying the foregoing analysis to the examples set forth by the Commission, it must be concluded that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee. That is to say, if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the state provides some alternative mechanism.

31. Thus, the first question presented to the Court by the Commission is not whether the Convention guarantees the right to legal counsel as such or as a result of the prohibition of discrimination for reason of economic status (Art. 1(1)). Rather, the question is whether an indigent may appeal directly to the Commission to protect a right guaranteed in the Convention without first exhausting the applicable domestic remedies. The answer to this question given what has been said above, is that if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies. That is the meaning for the language of Article 46(2) read in conjunction with Articles 1(1), 24 and 8.

32. The Court will now turn to the second question. It concerns the exhaustion of domestic remedies in situations where an individual is unable to obtain the necessary legal representation *due to a general fear in the legal community* of a given country. The Commission explains that, according to what some complainants have alleged, *[t]his situation has occurred where an atmosphere of fear prevails and lawyers do*

not accept cases which they believe could place their own lives and those of their families in jeopardy.

33. In general, the same basic principles govern this question as those which the Court has deemed applicable to the first question. That is to say, if a person, for a reason such as the one stated above, is prevented from availing himself of the domestic legal remedies necessary to assert a right which the Convention guarantees, he cannot be required to exhaust those remedies. The state's obligation to guarantee such remedies, is, of course, unaffected by this conclusion.

34. Article 1 of the Convention provides not only that the States Parties have an obligation to *respect the rights and freedoms recognized [t]herein*, it also requires them to *ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms*. The Court has already had occasion to emphasize that this provision imposes an affirmative duty on the States. It is also important to know that the obligation to *ensure* requires the state to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees. Any state which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention. As the Court has stated,

. . . when it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others . . . resort to those remedies becomes a senseless formality. The exceptions of Article 46(2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case. (*Velásquez Rodríguez Case, supra 23, para. 68; Godínez Cruz Case, supra 23, para. 71, and Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989. Series C. No. 6, para. 93*).

35. It follows therefrom that where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation, the exception set out in Article 46(2)(b) is fully applicable and the individual is exempted from the requirement to exhaust domestic remedies.

36. The Court is of the opinion that, in the cases posited by the Commission, it is the considerations outlined that render the remedies adequate and effective in accordance with generally recognized principles of international law to which Article 46(1) refers; namely, remedies *suited to address an infringement of a legal right and capable of producing the result for which [they were] designed* (*Velásquez Rodríguez Case, supra 23, paras. 64 and 66; Godínez Cruz Case, supra 23, paras. 67 and 69, and Fairén Garbi and Solís Corrales Case, supra 34, paras. 88 and 91*).

37. The second part of both questions submitted relates to the standards the Commission should apply in determining the admissibility of the claims analyzed herein.

38. In addressing this issue it is clear that the test to be applied must be whether legal representation was necessary in order to exhaust the appropriate remedies and whether such representation was, in fact, available.

39. It is for the Commission to make this determination. It must be emphasized, nevertheless, that all determinations made by the Commission before the case was referred to the Court are fully reviewable by the latter (*Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 29; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2, para. 34, and Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 32*).

40. The exhaustion of domestic remedies is a requirement for admissibility and the Commission must bear this in mind at the appropriate time and provide both the state and the complainant with the opportunity to present their respective positions on this issue.

41. Under Article 46(1)(a) of the Convention and in accordance with general principles of international law, it is for the state asserting non-exhaustion of domestic remedies to prove that such remedies in fact exist and that they have not been exhausted (*Velásquez Rodríguez Case, Preliminary Objections, supra 39, para. 88; Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra 39, para. 87, and Godínez Cruz Case, Preliminary Objections, supra 39, para. 90*). Once a State Party has shown the existence of domestic remedies for the enforcement of a particular right guaranteed by the Convention, the burden of proof shifts to the complainant, who must then demonstrate that the exceptions provided for in Article 46(2) are applicable, whether as a result of indigency or because of a generalized fear to take the case among the legal community or any other applicable circumstance. Of course, it must also be shown that the rights in question are guaranteed in the Convention and that legal representation is necessary to assert or enjoy those rights.

42. For these reasons,

THE COURT,

IS OF THE OPINION

unanimously

1. That if his indigency or a general fear in the legal community to represent him prevents a complainant before the Commission from invoking the domestic remedies necessary to protect a right guaranteed by the Convention, he is not required to exhaust such remedies.

unanimously

2. That if a State Party has proved that domestic remedies are available, the complainant must then demonstrate that the exceptions contemplated in Article 46(2) apply and that he was prevented from obtaining the legal counsel necessary for the protection of rights guaranteed by the Convention.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this tenth day of August, 1990.

Héctor Fix-Zamudio
President

Orlando Tovar-Tamayo

Thomas Buergenthal

Rafael Nieto-Navia

Policarpo Callejas-Bonilla

Sonia Picado-Sotela

Manuel E. Ventura-Robles
Secretary