CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ
IN RELATION TO THE JUDGMENT OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
IN THE CASE OF ACEVEDO BUENDÍA *ET AL.*
("DISCHARGED AND RETIRED EMPLOYEES OF THE COMPTROLLER")
OF JULY 1, 2009

I. Loss of opportunity to take steps in the proceeding

1. According to the rules of the Inter-American procedure for the protection of human rights- norms of a compulsory nature- the State has procedural opportunities, clearly established, to put forward its defense. In some cases, the State has failed to raise these defenses before the Commission and has only raised them, by means of preliminary objections, when the suit is brought before the Court.

2. In general, this Tribunal considered such failures under the concept of "tacit" waiver of the right to raise a defense, which entails the inability of filing them during the conduct of the proceeding. The consideration made by the Court has given rise to certain questionings: some of the States point out that no such "waiver" does not exist. The waiver itself entails- as has been said- a State's decision in that regard.

3. In this respect, it seems adequate to recall that procedural acts are subject to certain rules, on whose observance their admissibility and efficacy depend, with all that it entails for the institution, modification, detention or the conclusion of a trial. Among such rules, it could be mentioned those corresponding to the timing (opportunity) to take steps. Actually, the Court does not need to unnecessarily consider that there was a "tacit waiver" of the right to defense- a consideration that only means a nominal determination of the failure, but that it does not alter its nature and consequences-, attributing, in this way, to the State's failure a meaning and purpose leading to doubts or obligations. What it is important is that the State failed to take a certain step at the opportunity provided for that purpose and once this opportunity passed, the State lost the possibility to do it. This is what happens in the well established conduct of any ordinary proceeding.

4. I have previously asserted that the Court may modify the expressions it normally uses in this regard, modification that has effectively occurred in many recent judgments, as the one of the instant case. In such judgments, reference is no longer made to the "tacit waiver" but to the loss or exhaustion of the procedural opportunity to present a defense. Of course, the Court could go beyond in the consideration of this issue and explore the true nature of the topic, which would be recognized as a situation of preclusion or insatisfaction of the procedural burden, with the consequences inherent to these well-known phenomena for the discipline of the proceeding. There is no point in turning the attention towards the technique and the doctrine of the proceeding, embodied in the respective general theory, when we are precisely dealing with a procedural issue, regardless of whether such issue is put forward in an international proceeding.

5. The determination of these effects for the failure of defense- loss of opportunity to file it, once the opportunity to do it has passed- does not mean that the Inter-American Court is able to reconsider decisions adopted in the proceeding before

the Commission in certain cases, in a truly exceptional way and under the terms analyzed by the case-law of the Court itself. I do not intend to reproduce or analyze this issue, about which the Tribunal has ruled in some orders, now.

II. Expressions of the State in an attempt for friendly solutions

6. It has been pointed out that the State may put forward, in the proceeding before the Inter-American Commission, considerations and suggestions leading to reach a friendly solution in the dispute, and that those consideration and suggestions should not be a detriment to the case in case the intended solution does not succeed and the case is brought to the Court. If any expression of the State, leading to favor the settlement between the parties, is understood as something that necessarily produces unfavorable effects on the State in the proceeding before the Court, we would be discouraging the extra-judicial solution or the contentious case.

7. Of course, it is desirable that those cases involving human rights, such as others, find a solution by means of an understanding between the parties, when this is possible and adequate on the basis of the effective protection of the human rights, taking into account the nature of the violations, the remedies provided and the interest and willingness of the litigants. It does not spring from this, however, that the statements made by the State during the conduct of the proceeding before the Commission are ineffective in the proceeding before the Court. It is essential to reconciliate the need to encourage consensual solutions and the relevance of acknowledging the value of, according to their own characteristics, the acts of confession or recognition of responsibility made by the State.

8. Based on the foregoing, it is necessary to differentiate the several hypotheses put forward in this regard, avoiding general considerations that may result impertinent. This is how the Inter-American has done it in the judgment to which this opinion refer, in order to be clear about the value of the steps taken by the State at the procedural stage that we now analyze, to favor the protection of human rights and the reasonable settlement of disputes.

9. The Court makes a distinction between actions that lead, due to its nature and form, to the admission of facts - which would constitute a true confession-, and the recognition of responsibilities, and those other actions that only intend to favor the compromise and moderate or eliminate the dispute. In the last case, the expressions of the State shall not be detrimental to it if the conflict is brought to the Court.

10. Instead, whenever there is an action that materially entails, in a clear and sufficient way, the admission of an illegal act or the recognition of the responsibility that derives therefrom, the action shall produce the corresponding natural effects, to the detriment of the State. As a consequence, the State shall not be able to argue that the confession or recognition it made lacks truthfulness or efficacy, in the understanding that such confession or recognition only formed part of a “strategy” destined to expedite the solution agreed on.

III. Reasonable time

11. The reasonable time for the conduct of a proceeding, the carrying out of an action or the issuance of an order is a frequently issue dealt with in the case-law of the Court. The Tribunal has made progress in regards to the reasonable term, admitting the information provided for by the European case-law- complexity of the matter, procedural behavior of the interested party (without placing the burden on it, of course, for the responsibility of the delays or the hindrance in the use of legal means of defense) and the behavior of the authorities (legal or of other nature). The Court added a new reference to all that, to which I referred on previous occasions: the consideration of the way in which the lapse of time affects the right in question.

12. The Court has not encoded the issue of reasonable time only based on the time elapsed – days, months or years-, considered in isolation. It is relevant to consider the fact on the basis of the characteristics of the matter subjected to the proceeding or decision. From here that, in several cases, including the instant case, the Tribunal expressly associates the reference to such temporal measurement with the material characteristics. Only in this way could we appreciate whether the elapsed time is reasonable or not. Evidently, in some cases, it is easy to note that a certain period of time for the processing of a case is, clearly, excessive; especially, if we try to ponder a proceeding that should be, by definition, simple and prompt, as required, for example, by Article 25 of the American Convention. When this is verified with simplicity, it is noted by the Court. In many cases, it is easy to note the need for States to reexamine the procedural regulation and material application of those means of defense in order for them to truly correspond to the provisions and purpose of Article 25.

IV. Acquisition of rights

13. It is relevant to specify, so as to decide about certain violations, when one person has "acquired" certain right, which must be recognized, respected and guaranteed by the national government. Of course, I do not intend to reconsider the old doctrine of acquired rights and legitimate expectations, but to define, without loosing sight of the matter that I now examine, which are the legal situations from which the entitlement to a right derives that, as from such situations, such right may be claimed by an individual who “acquires” it and must be recognized and protected by the State.

14. To this end, it is necessary to consider- as has been done in the Judgment to which this opinion refers- the legal or procedural system that constitutes the legal ground, by means of general rules that determine broad situations, such as the particular action of the application of such system that recognizes or attributes the right to an individual who satisfies the conditions provided for in the rule. As from this double verification- that is, necessarily, among the facts of a contentious case of this kind- it will be possible to establish that the individual has turned into the person entitled to such right- for example, the right to property- whose violation entails the State's responsibility.

V. Progressive development of economic, social and cultural rights

15. The victims’ representative gave rise to the consideration of the Court regarding the progressive development of economic, social and cultural rights, as from the change of the contributions covered to them and derived from the services

rendered to the State. Even when the Court did not find, in the case in point, the non-compliance with Article 26 of the American Convention- a conclusion that I agree on with- such plea determined new reflections of the Tribunal about the progressive development of such rights and its own competence to examine the matter.

16. I recognize that the competence of the Court has been very limited, up to the present, in reference to the rights of this nature. This treatment does not only derive from an "explicit" restricted actionability according to the Inter-American *corpus juris*, which is widely known, but from the characteristics of the cases brought to the Court's attention and that constitute, obviously, the framework within which the Tribunal acts to examine the Convention and the Protocol of San Salvador.

17. The Court cannot hear cases whose flow before a court is made by means of an application. Even then, the Tribunal has examined issues that relate to social rights or are forthwith identified with such rights, by means of the analysis of violations of rights embodied in the American Convention, particularly the ones related to property, the protection of integrity (designed in health issues) or the special measures for the protection of children.

18. In the case under study, the Tribunal has made progress, as far as it deemed practicable, in the considerations related to the Economic, Social and Cultural Rights. Of course, it reasserted its competence-which must be well-established- to rule over possible non-compliance with Article 26. This issue is within the realm of matters concerning the interpretation and application of the American Convention, whose knowledge and solution is of the Tribunal's concern.

19. By entering into this realm, the Court recalled several steps in the Inter-American regulation of the matter, taking into account the regulatory procedure that led to the framing of Article 26 and its location in the Convention, under the category of "protected rights". It does not deal only with, then, descriptive expression that induce public policies, but with legal methods that determine the meaning and content of such policies, with provisions in which such policies are expressed and with the acts in which they are implemented.

20. The Court quotes, moreover, the opinion of the Inter-American Commission on Human Rights, the European Court of Human Rights and the Committee for the International Covenant of Economic, Social and Cultural Rights, which have explored the assessment of the progressive development of this kind of rights and the indicators that would allow establishing and appraising, reasonably, the progress as well as the regression.

21. The Court understands that the observance of Article 26 -imperative rule, not just a political suggestion- is subject to a claim or demand before the instances called to rule upon this aspect, within the framework of the domestic law or in the foreign realm, according to the constitutional decisions and the international commitments assumed by the State. The assessment has two dimensions: the observation of the progressive development, which makes the best effort to achieve it, and the denial of the regression, which is contrary to the principles and the *corpus juris* of the human rights and that it also must be assessed by the corresponding venues.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary