ORGANIZATION OF AMERICAN STATES
INTER-AMERICAN COURT OF HUMAN RIGHTS

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ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1987

GENERAL SECRETARIAT
ORGANIZATION OF AMERICAN STATES
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I. ORIGIN, STRUCTURE AND COMPETENCE OF THE COURT

A. Creation of the Court

The Inter-American Court of Human Rights was brought into being by the entry into force of the American Convention on Human Rights (Pact of San José, Costa Rica), which occurred on July 18, 1978 upon the deposit of the eleventh instrument of ratification by a member state of the Organization. The Convention had been drafted at the Specialized Inter-American Conference on Human Rights, which took place November 7-22, 1969 in San José, Costa Rica.

The two organs provided for under Article 33 of the Pact are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. They have competence on matters relating to the fulfillment of the commitments made by the States Parties to the Convention.

B. Organization of the Court

In accordance with the terms of its Statute, the Inter-American Court of Human Rights is an autonomous judicial institution which has its seat in San José, Costa Rica and whose purpose is the application and interpretation of the American Convention on Human Rights.

The Court consists of seven judges, nationals of the member states of the Organization of American States, who act in an individual capacity and are elected from among "jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the states of which they are nationals or the state that proposes them as candidates." (Article 52 of the Convention).

The judges serve for a term of six years. They are elected by an absolute majority vote of the States Parties to the Convention. The election is by secret ballot in a General Assembly of the Organization.

Upon entry into force of the Convention and pursuant to its Article 81, the Secretary General of the Organization requested the States Parties to the Convention to nominate candidates for the position of judge of the Court. In accordance with Article 53 of the Convention, each State Party may propose up to three candidates.

The judicial term runs from January 1 of the year in which a judge assumes office until December 31 of the year in which he completes his term. However, judges continue in office until the installation of their successors or to hear cases that are still pending (Article 5 of the Statute).

Election of judges takes place, insofar as possible, at the OAS General Assembly immediately prior to the expiration of the term of the judges. In the case of vacancies on the Court caused by death, permanent disability, resignation or dismissal, an election is held at the next General Assembly. (Article 6).

In order to preserve a quorum of the Court, interim judges may be appointed by the States Parties. (Article 6.3).

In the event that one of the judges called upon to hear a case is the national of one of the States Parties to the case, the other States Parties to the case may appoint an **ad hoc** judge. If none of the States Parties to a case is represented on the Court, each may appoint an **ad hoc** judge. (Article 10).

The judges are at the disposal of the Court and, pursuant to the Rules of Procedure, meet in two regular sessions a year and in special sessions when convoked by the President or at the request of a majority of the judges. Although the judges are not required to reside at the seat of the Court, the President renders his services on a permanent basis. (Article 16 of the Statute and Articles 11 and 12 of the Rules of Procedure).

The President and Vice President are elected by the judges for a period of two years and they may be reelected. (Article 12 of the Statute).

There is a permanent commission composed of the President, Vice President and a judge named by the President. The Court may appoint other commissions for special matters. (Article 6 of the Rules of Procedure).

The Secretariat of the Court functions under the direction of the Secretary, who is elected by the Court.

C. Composition of the Court

As of the date of this report, the Court was composed of the following judges, in order of precedence:

Rafael Nieto-Navia (Colombia), President
Héctor Gros Espiell (Uruguay), Vice President
Rodolfo Piza Escalante (Costa Rica)
Thomas Buergenthal (United States)
Pedro Nikken (Venezuela)
Héctor Fix-Zamudio (Mexico)
Jorge R. Hernández Alcerro (Honduras)

The Secretary of the Court is Mr. Charles Moyer and the Deputy Secretary is Lic. Manuel E. Ventura.

D. Competence of the Court

The American Convention confers two distinct functions on the Inter-American Court of Human Rights. One involves the power to adjudicate disputes relating to charges that a State Party has violated the Convention. In performing this function, the Court exercises its so-called contentious jurisdiction. In addition, the Court also has power to interpret the Convention and certain other human rights treaties in proceedings in which it is not called upon to adjudicate a specific dispute. This is the Court's advisory jurisdiction.

1. The Court's contentious jurisdiction

The contentious jurisdiction of the Court is spelled out in Article 62 of the Convention, which reads as follows:

> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding **ipso facto**, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
>
> 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
>
> 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the states parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by special agreement.

As these provisions indicate, a State Party does not subject itself to the contentious jurisdiction of the Court by ratifying the Convention. Instead, the Court acquires that jurisdiction with regard to the state only when it has filed the special declaration referred to in paragraphs 1 and 2 of Article 62 or concluded the special agreement mentioned in paragraph 3. The special declaration may be made when a state ratifies the Convention or at any time thereafter, it may also be made for a specific case or a series of cases. But since the states parties are free to accept the Court's jurisdiction at any time in a specific case or in general, a case need not be rejected **ipso facto** when acceptance has not previously been granted, as it is possible to invite the state concerned to do so for that case.

A case may also be referred to the Court by special agreement. In speaking of the special agreement, Article 62.3 does not indicate who may conclude

such an agreement. This is an issue that will have to be resolved by the Court.

In providing that "only the States Parties and the Commission shall have the right to submit a case to the Court," Article 61.1 does not give private parties standing to institute proceedings. Thus, an individual who has filed a complaint with the Commission cannot bring that case to the Court. This is not to say that a case arising out of an individual complaint cannot get to the Court, it may be referred to it by the Commission or a State Party, but not by the individual complainant.

The Convention, in Article 63.1, contains the following stipulation relating to the judgments that the Court may render:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

This provision indicates that the Court must decide whether there has been a breach of the Convention and, if so, what rights the injured party should be accorded. Moreover, the Court may also determine the steps that should be taken to remedy the breach and the amount of damages to which the injured party is entitled.

Paragraph 2 of Article 68 of the Convention exclusively concerns compensatory damages. It provides that the "part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."

In addition to regular judgments, the Court also has the power to grant what might be described as temporary injunctions. The power is spelled out in Article 63.2 of the Convention, which reads as follows:

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

This extraordinary remedy is available in two distinct circumstances: the first consists of cases pending before the Court and the second involves complaints being dealt with by the Commission that have not yet been referred to the Court for adjudication.

In the first category of cases, the request for the temporary injunction can be made at any time during the proceedings before the Court, including simul-

taneously with the filing of the case. Of course, before the requested relief may be granted, the Court must determine if it has the necessary jurisdiction.

The judgment rendered by the Court in any dispute submitted to it is "final and not subject to appeal." Moreover, the "States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." (Articles 67 and 68 of the Convention).

Enforcements of judgments of the Court are ultimately for the General Assembly of the Organization. The Court submits a report on its work to each regular session of the Assembly, specifying the cases in which a state has not complied with the judgments and making any pertinent recommendations. (Article 65 of the Convention).

2. The Court's Advisory Jurisdiction

The jurisdiction of the Inter-American Court of Human Rights to render advisory opinions is set forth in Article 64 of the Convention, which reads as follows:

> 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
>
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instrument.

Standing to request an advisory opinion from the Court is not limited to the States Parties to the Convention; instead, any OAS Member State may ask for it as well as all OAS organs, including the Inter-American Commission on Human Rights, specialized bodies such as the Inter-American Commission of Women and the Inter-American Institute of Children, within their fields of competence. Secondly, the advisory opinion need not deal only with the interpretation of the Convention; it may also be founded on a request for an interpretation of any other treaty "concerning the protection of human rights in the American states."

As to the meaning and scope of this phrase, the Court, in response to a request of the Government of Peru, was of the opinion:

> Firstly: By unanimous vote, that the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human

> rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have a right to become parties thereto.
>
> Secondly: By unanimous vote, that, for specific reasons explained in a duly motivated decision, the Court may decline to comply with a request for an advisory opinion if it concludes that, due to the special circumstances of a particular case, to grant the request would exceed the limits of the Court's advisory jurisdiction for the following reasons, **inter alia**: because the issues raised deal mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system; or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being.
>
> (I/A Court H.R., "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).

The Court's advisory jurisdiction power enhances the Organization's capacity to deal with complex legal issues arising under the Convention, enabling the organs of the OAS, when dealing with disputes involving human rights issues, to consult the Court.

Finally, Article 64.2 permits OAS Member States to seek an opinion from the Court on the extent to which their domestic laws are compatible with the Convention or with any other "American" human rights treaty.

Under the provision, this jurisdiction also extends, in certain circumstances, to pending legislation. (See I/A Court H.R., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4). Resort to this provision may contribute to the uniform application of the Convention by national tribunals.

3. Acceptance of the jurisdiction of the Court

On March 10, 1987 the Government of Guatemala deposited with the Secretary General of the Organization the Decree of President Marco Vinicio Cerezo Arévalo, by which Guatemala recognizes the binding jurisdiction of the Court for an indefinite period, in general, on the condition of reciprocity and for cases occurring after the date of the Presidention Decree.

A total of nine States Parties have recognized the jurisdiction of the Court. They are Costa Rica, Peru, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia and Guatemala.

It should be pointed out that, according to the provisions of Article 62, any State Party to the Convention may accept the jurisdiction of the Court in a specific case without recognizing it for all cases. Cases may also be submitted to the Court by special agreement between States Parties to the Convention.

A table showing the status of ratifications of the American Convention may be found at the end of this report (Appendix VI).

E. Budget

The presentation of the budget of the Court is governed by Article 72 of the American Convention which states that "the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it." Pursuant to Article 26 of its Statute, the Court administers its own budget.

The General Assembly of the Organization, at its Fifteenth Regular Session, approved a budget for the Court of $293,700 for 1986 and $284.200 for 1987. These amounts represented reductions, based on its 1983 budget, of 10% in 1986 and another 10% in 1987.

In view of the fact that these reductions have had a serious impact on the carrying out of its functions, the Court has presented to the Seventeenth Regular Session of the General Assembly a budget for the biennium 1988-89 of $325.8 for 1988 and $328.2 for the following year. The Court believes that these amounts are absolutely necessary for it to meet its ever increasing obligations.

F. Relations with other organs of the system and with regional and world-wide agencies of the same kind

The Court has close institutional ties with its sister organ of the American Convention, the Inter-American Commission on Human Rights. These ties have been solidified by a series of meetings between members of the two bodies. The Court also maintains cooperative relations with other OAS bodies working in the area of human rights, such as the Inter-American Commission of Women and the Inter-American Juridical Committee. It also maintains relations with the European Court of Human Rights, which was established by the Council of Europe and exercises functions within the framework of that organization comparable to those of the Inter-American Court, and with the pertinent bodies of the United Nations such as the Commission and Committee on Human Rights and the Office of the High Commissioner for Refugees.

II. ACTIVITIES OF THE COURT

A. Sixteenth Regular Session of the OAS General Assembly

The Court was represented at the Sixteenth Regular Session of the General Assembly of the Organization, which was held November 5-9, 1986 in Guatemala City, by its Permanent Commission composed of the President, Judge Thomas Buergenthal, the Vice President, Judge Rafael Nieto-Navia, and Judge Pedro Nikken.

President Buergenthal, in his report to the Commission on Juridical and Political Matters of the Assembly on the activities of the Court during the year 1986, pointed out that the Court has "more judicial business on its docket this year than it has had altogether in the past seven years since it was created in 1979." This situation, together with the reductions in the budget of the Court due to the financial crisis of the Organization, has hindered the Court, the President underlined, its ability to properly discharge its judicial obligations. President Buergenthal emphasized that "it cannot be doubted that there is an evergrowing realization that a functioning and fully operational judicial institution is indispensable if we are to have an effective inter-American human rights system."

In its Resolution on the Annual Report of the Court (AG/RES.832 (XVI-0/86)), the Assembly resolved:

> 1. To express the appreciation of the Organization of American States for the ever more important work performed by the Inter-American Court of Human Rights, as reflected in its Annual Report.
>
> 2. To urge those member states of the OAS which have not yet done so to ratify or accede to the American Convention on Human Rights.
>
> 3. To express its hope that all States Parties to the American Convention on Human Rights will recognize the compulsory jurisdiction of the Court.
>
> 4. To express its satisfaction that the report of the Court reveals that it has been called upon fully to exercise the functions under its jurisdiction, as well as to express its hope that the necessary steps will continue to be taken to use every means and procedure required for the protection of the human rights set out in the Convention and all other legal instruments of the inter-American system.
>
> 5. To instruct the Secretary General to undertake, in consultation with the Secretariat of the Court, a study of the financial crisis which so seriously affects the activities of the Court, giving it the priority it deserves, and to propose specific measures to resolve it in the 1988/89 budget.

B. Sixteenth Regular Session of the Court

This meeting of the Court was held January 24-30, 1987 at the seat of the Court in San José, Costa Rica. All of the judges attended this session.

The President of the Court, Judge Thomas Buergenthal, informed the Court on his presentation of the state of the Court to the Permanent Council of the Organization on December 3, 1986. (The text of his remarks may be found in Appendix V). This session of the Court was devoted mainly to the request for an advisory opinion (the eighth received by the Court), presented by the Inter-American Commission on Human Rights, on the interpretation of Articles 7(6) (Writ of Habeas Corpus) and 25(1) (Writs of Amparo) of the American Convention on Human Rights when read in conjunction with the last clause of Article 27 of that instrument, which refers to the judicial guarantees essential for the protection of the rights which cannot be suspended under the Convention. (See Appendix I).

The Commission, by note of October 10, 1986, submitted the following question to the Court:

> Is the writ of habeas corpus, the legal basis of which is found in Articles 7(6) and 25(1) of the American Convention on Human Rights, one of the judicial guarantees that, pursuant to the last clause of Article 27(2) of that Convention, may not be suspended by a State Party to the aforementioned Convention?

The Court held a public hearing on January 26, 1987 at which the President of the Commission, Dr. Luis Adolfo Siles Salinas, explained the reasons for which the Commission had requested the advisory opinion and its position on the matter.

The Court was unanimously of the opinion

> That, given the provisions of Article 27(2) of the American Convention on Human Rights, the legal remedies guaranteed in Articles 7(6) and 25(1) of the Convention may not be suspended because they are judicial guarantees essential for the protection of the rights and freedoms whose suspension Article 27(2) prohibits.

(The complete text of this Advisory Opinion may be found in Appendix II of this Report.)

C. Sixth Special Session of the Court

The Sixth Special Session, attended by all of the judges, was held June 8-26, 1987 in San José, Costa Rica. Prior to this meeting, the Permanent Commission of the Court met in order to organize the work of the Court.

In his report to the Court, President Buergenthal made special mention of the meeting that Vice President Nieto-Navia and he had held with the Inter-

American Commission on Human Rights in Washington, D.C. on March 27, 1987, at which views were exchanged on matters of common interest, particularly the contentious cases before the Court.

This session of the Court was devoted to the consideration of a request for an advisory opinion, presented by the Government of Uruguay, and three contentious cases alleging violations of human rights in Honduras, submitted by the Inter-American Commission on Human Rights. For these cases the Government of Honduras designated Rigoberto Espinal Irías as Judge ad hoc, in view of the fact that Judge Hernández Alcerro had recused himself.

In its request, the Government of Uruguay asked for an interpretation of the scope of the prohibition, contained in the American Convention on Human Rights, of the suspension of judicial guarantees essential for the protection of the rights which may not be suspended under Article 27(2) of the Convention. It particularly asked the Court its opinion as to which are those essential judicial guarantees and the relationship of the pertinent part of Article 27(2) to Articles 25 (Right to Judicial Protection) and 8 (Right to a Fair Trial) of the American Convention. (The text of the request may be found in Appendix III).

The Court carefully analyzed the request and decided to continue consideration thereof until the next session, as had been requested by the Government of Uruguay, at which time there may be a public hearing on the matter.

The three contentious cases now before the Court (Velásquez Rodríguez v. Honduras, Fairén Garbi and Solis Corrales v. Honduras, and Godínez Cruz v. Honduras) involve alleged violations of Article 4 (Right to Life), Article 5 (Right to Humane Treatment) and Article 7 (Right to Personal Liberty) of the American Convention on Human Rights. During this session the judges studied the briefs submitted by the Government of Honduras and the Inter-American Commission.

The Court held public hearings on June 15 and 16, 1987 on each of these three cases regarding the preliminary objections interposed by the Government of Honduras.

On June 26, 1987 the Court rendered its judgments on the preliminary questions, in which they unanimously decided in each case to:

1. Deny the preliminary objections interposed by the Goverment of Honduras, except for the issues relating to the exhaustion of the domestic legal remedies, which are herewith ordered joined to the merits of the case.

2. Decide to proceed with the consideration of the instant case.

3. Pospone its decision on the costs until such time as it renders judgment on the merits.

At this session, the Court elected Judge Rafael Nieto-Navia as President and Judge Héctor Gros Espiell as Vice President, for a period of two years to begin July 1, 1987.

Dr. Nieto-Navia, a Colombian, has been a judge of the Court since 1983 and its Vice President since 1985. He is professor of public international law at the Law School of the Universidad Javeriana in Bogotá. He has served as Alternate Judge of the Supreme Court of Colombia and has given lectures at universities and other centers of learning in the Americas and Europe. Judge Nieto-Navia is the author of various publications on legal topics.

Dr. Gros Espiell, a judge of the Court since 1986 has served both as Under-Secretary of State and Ambassador of Uruguay. He has been Secretary General of the Agency for the Prohibition of Nuclear Weapons in Latin America and, until last May, Executive Director of the Inter-American Institute of Human Rights. He is Vice President of the International Institute of Humanitarian Law, member of the Council of the International Institute of Human Rights (Strasbourg) and Judge of the Administrative Tribunal of the ILO. Dr. Gros Espiell has lectured at institutions of higher learning in Latin America and Europe and at the Academy for International Law of the Hague. He has written prolifically on legal matters.

APPENDIX I

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
Washington, D.C.

The Inter-American Commission on Human Rights, as the organ under the Charter of the Organization of American States having the function to promote the observance and protection of human rights and in the exercise of the powers granted it by Article 64(1) of the American Convention on Human Rights, hereby requests the Inter-American Court of Human Rights to render an advisory opinion relating to the interpretation of three articles of the Convention.

In accordance with the provisions of Article 49(2)(b) of the Rules of Procedure of the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights presents its request for an advisory opinion as follows:

A. Provisions to be interpreted

The request of the Commission seeks the interpretation of Articles 25(1) and 7(6) of the American Convention on Human Rights when read in conjunction with the final clause of Article 27(2) thereof.

The first two provisions provide that:

Article 7. Right to Personal Liberty

> 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

Article 25. Right to Judicial Protection

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Article 27, after indicating in its first paragraph that:

> In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

further provides in its second paragraph that:

> The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from **Ex Post Facto** Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

With reference to these provisions, the Inter-American Commission on Human Rights formulates its request for an advisory opinion in the following terms:

Is the writ of habeas corpus, the legal basis of which is found in Articles 7(6) and 25(1) of the American Convention on Human Rights, one of the judicial guarantees that, pursuant to with the last clause of Article 27(2) of that Convention, may not be suspended by a State Party to the aforementioned American Convention?

B. Considerations giving rise to the request

The Commission, in examining the situation of human rights in various American States, has observed with great concern that serious violations of personal freedom and integrity, and even the right to life, have occurred because of the lack of an effective remedy of habeas corpus.

This writ, which originated in the Magna Carta of 1215 and which is historically one of the first juridical advances in the protection of individual rights, has been expressly incorporated into the great majority of the constitutions of the American countries.

The American Declaration of the Rights and Duties of Man in its Article XXV, paragraph 3, recognizes this remedy in the following terms:

> Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay

> or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

The American Convention on Human Rights, for its part, recognizes in the aforementioned Article 7(6) the right of anyone deprived of his liberty to have recourse to a competent court in order that the court may decide without delay on the lawfulness of the arrest or detention and order his release if the arrest or detention is unlawful. Moreover, Article 25(1) of the Convention establishes that, in general, everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal that can protect him against acts that violate the fundamental rights recognized by the constitution or laws of the State concerned or the American Convention on Human Rights.

In practice, however, some States Parties to the American Convention on Human Rights have assumed that one of the rights that may be suspended in emergency situations is the right to judicial protection afforded by the writ of habeas corpus. Some States have even promulgated special laws or have instituted a practice enabling them to hold a detainee incommunicado for a prolonged period of time, in some cases for as long as fifteen days. During that time, the detainee may be refused all contact with the outside world, thus preventing resort to the writ of habeas corpus.

The Commission believes that it is precisely in these special circumstances that the writ of habeas corpus acquires its greatest importance.

As the Commission has previously pointed out, it is by means of the writ of habeas corpus that the judge may require that the apprehending authority bring the detainee before him --which is precisely what is meant by habeas corpus. This allows the judge to determine whether the detainee is alive and whether or not he or she shows symptoms of having been tortured or subjected to other cruel, inhuman or degrading treatment. It also allows the judge to learn of the place of detention and its conditions.

The Commission is convinced that thousands of forced disappearances could have been avoided in the recent past if the writ of **habeas corpus** had been effective and if the judges had investigated the detention by personally going to the places that had been denounced as those of detention. This writ is the best instrument available to correct promptly abuses of authority regarding arbitrary deprivation of freedom. It is also an effective means of preventing torture and other physical and psychological abuses.

The Commission recognizes, of course, that, pursuant to Article 27 of the American Convention, the right to personal liberty may be temporarily suspended in time of war, public danger or other emergency that threatens the independence or security of the State, and that the authority vested in the executive branch permits the temporary detention of a person solely on the basis of information that he or she endangers the independence or security of the State.

The Commission nevertheless considers that, even in emergency situations, the writ of habeas corpus may not be suspended or rendered ineffective. As has been pointed out already, the immediate aim of this remedy is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances.

Even with respect to the right to personal liberty, which may be temporarily suspended in special circumstances, the writ of habeas corpus enables the judge to determine whether the warrant of arrest meets the test of reasonableness, which is the standard prescribed by the case law of certain countries that have found themselves in states of emergency. To hold the contrary view -- that is, that the executive branch is under no obligation to give reasons for a detention or may prolong such a detention indefinitely during states of emergency, without bringing the detainee before a judge empowered to grant the remedies set forth in Articles 7(6) and 25(1) of the Convention -- would, in the opinion of the Commission, be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems.

Based on these considerations, the Commission concludes that the writ of habeas corpus, set forth in the majority of the constitutions of the American States and guaranteed by Articles 7(6) and 25(1) of the American Convention on Human Rights and also by Article XXV of the American Declaration of the Rights and Duties of Man, the purpose of which is to protect the non-derogable right of humane treatment and to correct the abuses of authority for arbitrary deprivations of personal liberty, may not be suspended even under a state of emergency permitted under Article 27 of the American Convention.

For these reasons, the Commission believes that an advisory opinion of the Inter-American Court of Human Rights with respect to the scope of the above-mentioned provisions of the American Convention on Human Rights would be a new and valuable contribution to the interpretation of the Convention and especially to the cause of the international protection of human rights.

C. Name and address of the delegates of the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights names its Chairman, Dr. Luis Adolfo Siles Salinas, or whomever he may subsequently designate, as its delegate for all purposes relating to this request. The address is 1889 F Street N.W., Washington, D.C., USA.

(Translation)

APPENDIX II

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-8/87
OF JANUARY 30, 1987

HABEAS CORPUS IN EMERGENCY SITUATIONS
(ARTS. 27(2), 25(1) Y 7(6)
AMERICAN CONVENTION ON HUMAN RIGHTS)

REQUESTED BY THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Present:

Thomas Buergenthal, President
Rafael Nieto-Navia, Vice President
Rodolfo E. Piza E., Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge
Héctor Gros Espiell, Judge
Jorge R. Hernández Alcerro, Judge

Also present:

Charles Moyer, Secretary, and
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The Inter-American Commission on Human Rights (hereinafter "the Commission"), by note of October 10, 1986, submitted to the Inter-American Court of Human Rights (hereinafter "the Court") an advisory opinion request seeking the interpretation of Articles 25(1) and 7(6) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") when read in conjunction with the final clause of Article 27(2) of that instrument.

2. In a note of October 21, 1986, acting pursuant to Article 52 of the Rules of Procedure of the Court, the Secretariat requested written observations on the issues involved in the instant proceedings from the Member States of the Organization of American States (hereinafter "the OAS") as well as, through the Secretary General, from the organs listed in Chapter X of the Charter of the OAS.

3. The President of the Court directed that the written observations and other relevant documents be filed with the Secretariat before January 26, 1987 in order for them to be considered by the Court during its Sixteenth Regular Session, which was held January 24-30, 1987.

4. A response to the Secretariat's communication was received from the Governments of Ecuador, Panama and Venezuela.

5. Furthermore, the following non-governmental organizations, as **amici curiae**, submitted their points of view on the request: Americas Watch Committee and the International Human Rights Law Group.

6. A public hearing was held on Monday, January 26, 1987, for the purpose of enabling the Member States and the OAS organs to present to the Court their arguments on the issues raised in the request.

7. At this public hearing the Court heard the following:

For the Inter-American Commission on Human Rights:

Dr. Luis Adolfo Siles Salinas, Delegate and President

I

ADMISSIBILITY

8. This request for an advisory opinion has been submitted to the Court by the Commission pursuant to the power conferred upon it by the Convention, which enables the organs listed in Chapter X of the OAS Charter to seek, within their spheres of competence, an "interpretation of (the American) Convention or of other treaties concerning the protection of human rights in the American states" (Art. 64(1)). The Commission is one of the organs listed in said Chapter. Moreover, as the Court has already indicated:

> given the broad powers relating to the promotion and observance of human rights which Article 112 of the OAS Charter confers on the Commission ... the Commission enjoys, as a practical matter, an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention (**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, para. 16).

9. The request of the Commission seeks the interpretation of Articles 25(1) and 7(6) of the Convention when read in conjunction with the final clause of Article 27(2) thereof. Accordingly, it meets the requirements of Article 64(1).

10. Since there is no reason for the Court to make use of the power permitting it, in advisory proceedings, to refrain from rendering an opinion (**"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, para. 31), the Court rules the request admissible and proceeds to answer it.

II

STATEMENT OF THE ISSUES

11. The Commission submitted the following question to the Court:

> Is the writ of habeas corpus, the legal basis of which is found in Articles 7(6) and 25(1) of the American Convention on Human Rights, one of the judicial guarantees that, pursuant to the last clause of Article 27(2) of that Convention, may not be suspended by a State Party to the aforementioned American Convention?

12. In its request, the Commission dealt at length with the considerations that gave rise to the request. Among other points, the Commission declared that:

some States Parties to the American Convention on Human Rights have assumed that one of the rights that may be suspended in emergency situations is the right to judicial protection afforded by the writ of habeas corpus. Some States have even promulgated special laws or have instituted a practice enabling them to hold a detainee incommunicado for a prolonged period of time, in some cases for as long as fifteen days. During that time, the detainee may be refused all contact with the outside world, thus preventing resort to the writ of habeas corpus.

The Commission believes that it is precisely in these special circumstances that the writ of habeas corpus acquires its greatest importance.

The Commission recognizes, of course, that, pursuant to Article 27 of the American Convention, the right to personal liberty may be temporarily suspended in time of war, public danger or other emergency that threatens the independence or security of the State, and that the authority vested in the executive branch permits the temporary detention of a person solely on the basis of information that he or she endangers the independence or security of the State.

The Commission nevertheless considers that, even in emergency situations, the writ of habeas corpus may not be suspended or rendered ineffective. As has been pointed out already, the immediate aim of this remedy is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances.

Even with respect to the right to personal liberty, which may be temporarily suspended in special circumstances, the writ of habeas corpus enables the judge to determine whether the warrant of arrest meets the test of reasonableness, which is the standard prescribed by the case law of certain countries that have found themselves in states of emergency. To hold the contrary view -- that is, that the executive branch is under no obligation to give reasons for a detention and may prolong such a detention indefinitely during states of emergency, without bringing the detainee before a judge empowered to grant the remedies set forth in Articles 7(6) and 25(1) of the Convention -- would, in the opinion of the Commission, be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems.

13. Articles 27(1) and 27(2), 25(1) and 7(6) of the Convention provide that:

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from **Ex Post Facto** Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Article 7. Right to Personal Liberty

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

III

MERITS

14. The interpretation of Articles 25(1) and 7(6) of the Convention seeking to determine whether the suspension of habeas corpus is permissible during states of emergency, given the provisions of Article 27(2), must take account of the rules of interpretation set out in the Vienna Convention on the Law of Treaties, which may be deemed to state the relevant international law principles applicable to this subject (Cf. **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. 48 and other advisory opinions of the Court), and which read as follows:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Art. 31(1)).

15. Note should also be taken of the provisions of Article 29 of the Convention. That article provides:

> **Article 29. Restrictions Regarding Interpretation**
>
> No provision of this Convention shall be interpreted as:
>
> a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
>
> b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
>
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
>
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

16. Article 27(2) must, therefore, be interpreted "in good faith" and keeping in mind the "object and purpose" (Cf. **The Effect of Reservations, supra** 8, para. 29) of the American Convention and the need to prevent a conclusion that could give rise to the suppression of "the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for (t)herein" (Art. 29(a)).

17. The Court will begin by examining some of the general problems involved in the interpretation of Article 27 of the Convention and then determine whether the proceeding to which Articles 25(1) and 7(6) apply are included among the essential judicial guarantees referred to in Article 27(2).

18. Article 27 contains certain phrases that should be emphasized for purposes of this advisory opinion request. Thus, the title of this Article is "Suspension of Guarantees," its first paragraph speaks of "derogating from ... obligations under the present Convention," the second paragraph deals with the "suspension of ... articles (rights)"* guaranteeing certain rights, and the third paragraph refers to the "right of suspension." When the word "guarantees" is used in the second paragraph, it is precisely in order to prohibit suspension of essential judicial guarantees. An analysis of the terms of the Convention in their context leads to the conclusion that we are not here dealing with a "suspension of guarantees" in an absolute sense, nor with the "suspension of ... (rights)", for the rights protected by these provisions are inherent to man. It follows therefrom that what may only be suspended or limited is their full and effective exercise. It is useful to note these differences in the terminology being used in order to clarify the conceptual basis of the instant advisory opinion. Nevertheless, the Court will use the phrase "suspension of guarantees" that is found in the Convention.

19. The starting point for any legally sound analysis of Article 27 and the function it performs is the fact that it is a provision for exceptional situations only. It applies solely "in time of war, public danger or other emergency that threatens the independence or security of a State Party."

And even then, it permits the suspension of certain rights and freedoms "only to the extent and for the period of time strictly required by the exigencies of the situation." Such measures must also not violate the State Party's other international legal obligations, nor may they involve "discrimination on the ground of race, color, sex, language, re- ligion or social origin."

20. It cannot be denied that under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 and the principles contained in other here relevant international instruments. This has, in fact, been the experience of our hemisphere. Therefore, given the principles upon which the inter-American system is founded, the Court must emphasize that the suspension of guarantees

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*-The Spanish text of Article 27(2) speaks of "suspensión de los derechos determinados en los siguientes artículos... ". The English text refers to "suspension of the following articles...." The reference to "rights" -- "derechos" - is omitted only in the English text. The Portuguese and French texts conform to the Spanish text.

cannot be disassociated from the "effective exercise of representative democracy" referred to in Article 3 of the OAS Charter. The soundness of this conclusion gains special validity given the context of the Convention, whose Preamble reaffirms the intention (of the American States) "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system. That system establishes limits that may not be transgressed, thus ensuring that certain fundamental human rights remain permanently protected.

21. It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions --those laid down in Article 27(1)-- are met. Moreover, even when these conditions are satisfied, Article 27(2) provides that certain categories of rights may not be suspended under any circumstances. Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.

22. Since Article 27(1) envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to "the exigencies of the situation," it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures.

23. Article 27(2), as has been stated, limits the powers of the State Party to suspend rights and freedoms. It establishes a certain category of specific rights and freedoms from which no derogation is permitted under any circumstances and it includes in that category "the judicial guarantees essential for the protection of such rights." Some of these rights refer to the physical integrity of the person, such as the right to juridical personality (Art. 3), the right to life (Art. 4), the right to humane treatment (Art. 5), freedom from slavery (Art. 6) and freedom from **ex post facto** laws (Art. 9). The list of non-derogable rights and freedoms also includes freedom of conscience and religion (Art. 12), the rights of the family (Art. 17), the right to a name (Art. 18), the right of the child (Art. 19), the right to nationality (Art. 20) and the right to participate in government (Art. 23).

24. The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of

legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existant, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this conection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law (**The Word "Laws" in Article 30 of the American Convention on Human Rights,** Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 32).

25. It is not the intention of the Court to embark upon a theoretical exposition concerning the relation between rights and guarantees. It is enough to point out what the meaning of the term **guarantee** is as that concept is used in Article 27(2). Guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of all persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (Art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms.

26. The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.

27. As the Court has already noted, in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that "the judicial guarantees essential for (their) protection" remain in force. Article 27(2) does not link these judicial guarantees to any specific provision of the Convention, which indicates that what is important is that these judicial remedies have the character of being essential to ensure the protection of those rights.

28. The determination as to what judicial remedies are "essential" for the protection of the rights which may not be suspended will differ depending upon the rights that are at stake. The "essential" judicial guarantees necessary to guarantee the rights that deal with the physical integrity of the human person must of necessity differ from those that seek to protect the right to a name, for example, which is also non-derogable.

29. It follows from what has been said above that the judicial remedies that must be considered to be essential within the meaning of Article 27(2) are those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment.

30. The guarantees must be not only essential but also judicial. The expression "judicial" can only refer to those judicial remedies that are truly capable of protecting these rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.

31. The Court must now determine whether, despite the fact that Articles 25 and 7 are not mentioned in Article 27(2), the guarantees contained in Articles 25(1) and 7(6), which are referred to in the instant advisory opinion request, must be deemed to be among those "judicial guarantees" that are "essential" for the protection of the non-derogable rights.

32. Article 25(1) of the Convention provides that:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

The above text is a general provision that gives expression to the procedural institution known as "amparo," which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention. Since "amparo" can be applied to all rights, it is clear that it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations.

33. In its classical form, the writ of habeas corpus, as it is incorporated in various legal systems of the Americas, is a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered. The Convention proclaims this remedy in Article 7(6), which states:

> Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

34. If the two remedies are examined together, it is possible to conclude that "amparo" comprises a whole series of remedies and that habeas corpus is

but one of its components. An examination of the essential aspects of both guarantees, as embodied in the Convention and, in their different forms, in the legal systems of the States Parties, indicates that in some instances habeas corpus functions as an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened with detention. In other circumstances, however, habeas corpus is viewed either as the "amparo of freedom" or as an integral part of "amparo."

35. In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.

36. This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some govenrments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended. As the President of the Commission stated in the hearing on this request,

> The Commission is convinced that thousands of forced disappearances could have been avoided in the recent past if the writ of habeas corpus had been effective and if the judges had investigated the detention by personally going to the places that had been denounced as those of detention. This writ is the best instrument available to correct promptly abuses of authority involving arbitrary deprivation of freedom. It is also an effective means of preventing torture and other physical and psychological abuses, such as exile, perhaps the worst punishment, which has been so abused in our hemisphere, where thousands of exiles make up a true exodus.
>
> As the Commission has painfuly recalled in its last Annual Report, these tortures and constraints tend to occur during long periods of incommunication, during which the prisoner lacks the legal means and remedies to assert his rights. It is precisely under these circumstances that the writ of habeas corpus is of greatest importance.

Those who drafted the Convention were aware of these realities, which may well explain why the Pact of San José is the first international human rights instrument to include among the rights that may not be suspended essential judicial guarantees for the protection of the non-derogable rights.

37. A further question that needs to be asked, and which goes beyond the consideration of habeas corpus as a judicial remedy designed to safeguard the non-derogable rights set out in Article 27(2), is whether the writ may remain in effect as a means of ensuring individual liberty even during states of emergency, despite the fact that Article 7 is not listed among the provisions that may not be suspended in exceptional circumstances.

38. If, as the Court has already emphasized, the suspension of guarantees may not exceed the limits of that strictly required to deal with the emergency, any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would also be unlawful notwithstanding the existence of the emergency situation.

39. The Court should also point out that since it is improper to suspend guarantees without complying with the conditions referred to in the preceding paragraph, it follows that the specific measures applicable to the rights or freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power.

40. If this is so, it follows that in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance.

41. In this connection, the Court deems it appropriate to quote the Cámara Federal de Apelaciones en lo Criminal y Correccional of Buenos Aires, Argentina (Case No. 1980 of April 1977), which, in granting a writ of habeas corpus, ruled as follows:

> It is not possible to accept the argument that the President of the Republic is alone empowered to examine the situation of those who are detained at his order. Although it is clearly beyond the scope of judical activity to consider matters of political and not judicial import, it is equally clear that it is the duty of the Judiciary of the Nation to examine exceptional cases such as the present as to the reasonableness of the measures taken by the Executive and this is set out in Articles 23, 29 and 95 of the National Constitution.
>
> The general interest has also to be balanced by individual liberty so that it must in no way be supposed that those who are detained

at the pleasure of the Executive are simply to be left to their fate and are removed beyond the scope of any review by the national judiciary, no matter how long they might be kept under arrest.

...

In view of the need to choose between individual freedom and the hypothetical and undemonstrated dangerous nature (of the detainee), we choose the former, running the risks that it involves, safeguarding a value which no Argentine has renounced.

(**Report on the Situation of Human Rights in Argentina**, OEA/ Ser.L/V/II.49, doc. 19 of 11 April 1980).

42. From what has been said before, it follows that writs of habeas corpus and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society.

43. The Court must also observe that the Constitutions and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of habeas corpus or of "amparo" in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention.

44. Therefore, in response to the question posed by the Inter-American Commission relating to the interpretation of Articles 27(2), 25(1) and 7(6) of the Convention,

THE COURT IS OF THE OPINION

Unanimously,

That, given the provisions of Article 27(2) of the American Convention on Human Rights, the legal remedies guaranteed in Articles 7 (6) and 25(1) of the Convention may not be suspended because they are judicial guarantees essential for the protection of the rights and freedoms whose suspension Article 27(2) prohibits.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this thirtieth day of January, 1987.

Thomas Buergenthal
President

Rafael Nieto-Navia

Rodolfo E. Piza E.

Pedro Nikken

Héctor Fix-Zamudio

Héctor Gros Espiell

Jorge R. Hernández Alcerro

Charles Moyer
Secretary

APPENDIX III

MINISTRY OF FOREIGN AFFAIRS

Montevideo, September 17, 1986

Mister President:

I have the honor to request, Mr. President, in the name of the Government of Uruguay, an advisory opinion of the Inter-American Court of Human Rights.

1. This request, presented by Uruguay as a Member State of the Organization of American States, refers to a matter that falls within the advisory jurisdiction of the Court, pursuant to Article 64(1) of the American Convention on Human Rights, and has as its purpose the interpretation of a provision of that Convention.

2. The question on which the opinion of the Court is sought regards an interpretation of Article 27(2) of the Convention.

That provision reads:

> The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from **Ex Post Facto** Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. The Government of Uruguay requests an interpretation of the scope of the prohibition, contained in the Convention, of the suspension of "the judicial guarantees essential for the protection of such rights."

As it is not possible to suspend "the judicial guarantees essential for the protection of the rights" (listed in Article 27(2)) even "in time of war, public danger, or other emergency that threatens the independence or security of a State Party" (Art. 27(1)), the Government of Uruguay particularly wishes

Doctor Thomas Buergenthal
President of the Inter-American Court
of Human Rights
Apartado Postal 6906 (1000)
San José, Costa Rica

the Court to give its opinion on: a) which are the essential "judicial guarantees" referred to in Article 27(2) and b) the relationship of Article 27(2) to Articles 25 and 8 of the American Convention.

I take this opportunity to renew, Mr. President, the assurances of my highest consideration.

/s/Enrique V. Iglesias
Minister of Foreign Affairs

(Translation)

Montevideo, April 24, 1987 17:50

The President
of the Inter-American Court of Human Rights
Doctor Thomas Buergenthal
San José, Costa Rica

Mr. President:

I have the honor to remit to Your Excellency, pursuant to Article 49(2) of the Rules of Procedure of the Court, the considerations and the motives that gave rise to the request for an advisory opinion that has already been submitted by the Government of Uruguay.

In cases of institutional normality in democratic systems governed by the rule of law where human rights are respected and regulated, the judicial protection granted by domestic law is generally ratified through its exercise. This does not happen in those systems or situations where the violation of basic rights is not only substantive but also reaches the judicial guarantees that exist and have been developed together with those rights.

The political history of Latin America shows, as the Inter-American Commission on Human Rights and your Court in its Advisory Opinion OC-8 of January 30, 1987 have recognized, that it is during states of emergency that the non-functioning of these judicial guarantees presents a more serious threat to the intangibility of the rights that may not be suspended, even in such situations.

It is for this reason that an enumeration of the essential judicial guarantees referred to in paragraph 2 of Article 27 of the American Convention acquires a fundamental importance, this importance is especially determinative in the case of torture, disappearances and clandestine homocides ordered, implicitly or explicitly, by the authorities.

Moreover, in such cases, the exhaustion of domestic remedies (a requisite of admissibility which is the basis for any system of denunciation) is made more difficult, which explains, particularly, the provisions contained in Article 46(2)(b) of the American Convention.

The Government of Uruguay thus requests that the Inter-American Court render an advisory opinion on a concrete and specific situation regarding the eventual application of Article 27(2) of the Convention, taking into account the history and the reality of the Americas, based on situations that have occurred and those that it is reasonable to expect may occur in the future, and not an abstract interpretation of a norm of the American Convention in a merely theoretical or academic sense.

The foregoing considerations should be considered as complying with the request made in your telex of April 1, 1987.

May I take this opportunity, Your Excellency, to renew the assurances of my highest consideration.

Enrique V. Iglesias
Minister of Foreign Relations
Republic of Uruguay

(Translation)

APPENDIX IV-A

INTER-AMERICAN COURT OF HUMAN RIGHTS

VELASQUEZ RODRIGUEZ CASE

PRELIMINARY OBJECTIONS

Judgment of June 26, 1987

In the Velásquez Rodríguez case,

The Inter-American Court of Human Rights, composed of the following judges:

Thomas Buergenthal, President
Rafael Nieto-Navia, Vice President
Rodolfo E. Piza E., Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge
Héctor Gros Espiell, Judge
Rigoberto Espinal Irías, Judge ad hoc

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

delivers the following judgment pursuant to Article 27(4) of its Rules of Procedure (hereinafter "the Rules of Procedure") on the preliminary objections raised by the Government of Honduras (hereinafter "the Government") in its submissions and in oral argument at the public hearing.

I

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted the instant case to the Court on April 24, 1986. It originated in a petition against Honduras (No. 7920) which the Secretariat of the Commission received on October 7, 1981.

2. In 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 requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention in the case of Angel Manfredo Velásquez Rodríguez. The Commission also asked the Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties."

3. On May 13, 1986, the Secretariat of the Court transmitted the application to the Government.

4. On July 23, 1986, Judge Jorge R. Hernández Alcerro informed the President of the Court that, pursuant to Article 19(2) of the Statute of the Court, he had "decided to recuse (him)self from hearing the three cases that... were submitted to the Inter-American Court." By a note of that same date, the President informed the Government of its right to appoint a judge ad hoc under Article 10(3) of the Statute of the Court. The Government named Rigoberto Espinal Irías to that position by note of August 21, 1986.

5. In a note of July 23, 1986, the President of the Court asked the Government to present its submissions by the end of August 1986. On August 21, 1986, the Government requested the extension of this deadline to November 1986.

6. By his Order of August 29, 1986, having heard the views of the parties, the President of the Court set October 31, 1986 as the deadline for the Government's presentation of its submissions. The President also fixed the deadlines of January 15, 1987 for the filing of the Commission's submissions and March 1, 1987 for the Government's response.

7. In its submissions of October 31, 1986, the Government objected to the admissibility of the application filed by the Commission.

8. On December 11, 1986, the President of the Court granted the Commission's request for an extension of the deadline for the presentation of its submissions to March 20, 1987 and extended the deadline for the Government's response to May 25, 1987.

9. In his Order of January 30, 1987, the President made clear that the application which gave rise to the instant proceeding should be deemed to be the Memorial provided for in Article 30(3) of the Court's Rules of Procedure. He also specified that the deadline of March 20, 1987 granted to the Commission was the time limit set forth in Article 27(3) of the Rules for the presentation of its observations and conclusions on the preliminary objections interposed by the Government. Having heard the views of the parties, the President ordered a public hearing on June 15, 1987 for the presentation of oral arguments on the preliminary objections. The time limits for submissions on the merits were left open to allow for the possibility that the Court might decide to join the preliminary objections to the merits or, in the event they should be decided separately, that the decision adopted would result in the continuation of the proceeding.

10. By note of March 13, 1987, the Government informed the Court that because "the Order of January 30, 1987 is not restricted to matters of mere procedure nor to the determination of deadlines, but rather involves the interpretation and classification of the submissions (the Government) considers it advisable, pursuant to Article 25 of the Statute of the Court and Article 44(2) of its Rules of Procedure, for the Court to affirm the terms of the President's Order of January 30, 1987, in order to avoid further confusion between the parties. As these are the first contentious cases submitted to the Court, it is especially important to ensure strict compliance with and the correct application of the procedural rules of the Court."

11. In a motion contained in its observations of March 20, 1987, the Commission asked the President to rescind paragraph 3 of his Order of January 30, 1987 in which he had set the date for the public hearing. The Commission also observed that "in no part of its Memorial had the Government of Honduras presented its objections as preliminary objections." In its note of June 11, 1987, the Government did refer to its objections as "preliminary objections."

12. By note of May 15, 1987, the President informed the Government that "at the public hearings on the cases, the Government shall proceed first and the Commission shall follow. In presenting its case, the Government shall be free to make oral arguments and to request or present relevant evidence on the matters under consideration. The Commission shall have the same right."

13. By Resolution of June 8, 1987, the Court affirmed the President's Order of January 30, 1987, in its entirety.

14. The hearing took place at the seat of the Court on June 15, 1987.

There appeared before the Court

for the Government of Honduras:

Edgardo Sevilla Idiáquez, Agent
Mario Díaz Bustamante, Representative
Rubén Darío Zepeda G., Adviser
Angel Augusto Morales, Adviser
Mario Boquín, Adviser
Enrique Gómez, Adviser
Olmeda Rivera, Adviser
Mario Alberto Fortín M., Adviser
Ramón Rufino Mejía, Adviser

for the Inter-American Commission on Human Rights:

Gilda M. C. M. de Russomano, President, Delegate
Edmundo Vargas Carreño, Executive Secretary, Delegate
Claudio Grossman, Adviser
Juan Méndez, Adviser
Hugo Muñoz, Adviser
José Miguel Vivanco, Adviser

II

15. According to the petition filed with the Commission on October 7, 1981, and the supplementary information received subsequently, Angel Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras, "was violently detained without a warrant for his arrest by members of the Direccion Nacional de Investigacion (DNI) and G-2 of the Armed Forces of Honduras" on the afternoon of September 12, 1981, in Tegucigalpa. According to the petitioners, several eyewitnesses reported that he and others were detained and taken to the cells of Public Security Forces Station No. 2 located in the Barrio El Manchen of Tegucigalpa, where he was "accused of alleged political crimes and subjected to harsh interrogation and cruel torture." The petition added that on September 17, 1981, Velásquez Rodríguez was moved to the First Infantry Battalion, where the interrogation continued, but that the police and security forces, nevertheless, denied that he had been detained.

16. On October 14 and November 24, 1981, the Commission transmitted the relevant parts of the petition to the Government and requested information on the matter.

17. When the Commission received no reply, it again asked the Government for information on May 14, 1982, warning that if it did not receive the information within a reasonable time, it would consider applying Article 42 (formerly 39) of its Regulations and presume the allegations to be true.

18. Although it reiterated its request for information on October 6, 1982, March 23 and August 9, 1983, the Commission received no reply.

19. At its 61st Session, the Commission adopted Resolution 30/83 of October 4, 1983, whose operative parts read as follows:

> 1. By application of Article 39 of the Regulations, to presume as true the allegations contained in the communication of October 7, 1981, concerning the detention and disappearance of Angel Manfredo Velásquez Rodríguez in the Republic of Honduras.
>
> 2. To point out to the Government of Honduras that such acts are most serious violations of the right to life (Art. 4) and the right to personal liberty (Art. 7) of the American Convention on Human Rights.
>
> 3. To recommend to the Government of Honduras: (a) that it order a thorough and impartial investigation to determine who is responsible for the acts denounced; (b) that it punish those responsible in accordance with Honduran law; and (c) that it inform the Commission within 60 days, especially about the measures taken to carry out these recommendations.
>
> 4. If the Government of Honduras does not submit its observations within the time limit set out in paragraph 3 **supra**, the

> Commission shall include this Resolution in its Annual Report to the General Assembly pursuant to Article 59(g) of its Regulations.

20. On November 18, 1983, the Government requested the reconsideration of Resolution 30/83 on the grounds that domestic remedies had not been exhausted, that the Direccion Nacional de Investigación had no knowledge of the whereabouts of Velásquez Rodríguez, that the Government was making every effort to find him, and that there were rumors that Velásquez Rodríguez was "with Salvadoran guerrilla groups."

21. On May 30, 1984, the Commission informed the Government that it had decided at its 62nd Session (May 1984), "in light of the information submitted by the Honorable Government, to reconsider Resolution 30/83 and to continue its study of the case." The Commission also asked the Government to provide information on the exhaustion of domestic legal remedies and other matters relevant to the case.

22. On January 29, 1985, the Commission repeated its request of May 30, 1984 and notified the Government that it would render a final decision on this case at its meeting in March 1985. On March 1 of that year, the Government asked for a postponement of the final decision and reported that it had set up an Investigatory Commission to study the matter. The Commission agreed to the Government's request on March 11, granting it thirty days in which to present the information requested.

23. On April 7, 1986, the Government provided information about the outcome of the proceeding that had been brought before the First Criminal Court on behalf of Velásquez Rodríguez and other persons who had disappeared. According to that information, the tribunal had dismissed the complaints "except as they applied to General Gustavo Alvarez Martínez, because he had left the country and had not given testimony." This decision was later affirmed by the First Court of Appeals.

24. In Resolution 22/86 of April 18, 1986, adopted at its 67th Session, the Commission deemed the new information presented by the Government insufficient to warrant reconsideration of Resolution 30/83 and found, to the contrary, that "all evidence shows that Angel Manfredo Velásquez Rodríguez is still missing and that the Government of Honduras ... has not offered convincing proof that would allow the Commission to determine that the allegations are not true." In that same Resolution, the Commission confirmed Resolution 30/83, denied the request for reconsideration and referred the matter to the Court.

III

25. In its submissions of October 31, 1986, the Government concluded that:

> 1. The Commission did not follow the procedure established for the admissibility of a petition or communication.

2. The Commission did not take into account the information provided by the Government regarding the failure to exhaust the domestic legal remedies.

3. Domestic legal remedies were neither pursued nor exhausted.

4. The Commission did not follow the procedure established for preparation of reports.

5. The Commission ignored the Convention's provision regarding friendly settlement.

6. The procedures established in Articles 48-50 of the Convention for referral of a case to the Court pursuant to Article 61 of the Convention were not complied with.

7. Observations by the Government on the merits are not appropriate at this stage of the proceedings.

26. In its observations of March 20, 1987, on the submissions of the Government, the Commission concluded that:

1. Officials or agents of the Government of Honduras detained Angel Manfredo Velásquez Rodríguez on September 12, 1981, and he has been missing since that date. This constitutes a most serious violation of the rights to life, to humane treatment and to personal liberty, which are guaranteed by Articles 4, 5 and 7 of the American Convention on Human Rights, to which Honduras is a State Party;

2. The substantive or procedural objections raised by the Government of Honduras in its Memorial have no legal basis under the provisions of the relevant articles of the American Convention on Human Rights and the standards of international law; and

3. Since Honduras has recognized the compulsory jurisdiction of the InterAmerican Court of Human Rights, the Commission again petitions the Honorable Court, pursuant to Article 63(1) of the American Convention on Human Rights, to find a violation of the rights to life (Article 4), to humane treatment (Article 5) and to personal liberty (Article 7) guaranteed by the Convention. It also asks the Court to rule that the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties.

IV

27. The Court has jurisdiction to hear the instant case. Honduras has been a Party to the Convention since September 8, 1977, and recognized the con-

tentious jurisdiction of the Court, as set out in Article 62 of the Convention, on September 9, 1981.

V

28. Before considering each of the above objections, the Court must define the scope of its jurisdiction in the instant case. The Commission argued at the hearing that because the Court is not an appellate tribunal in relation to the Commission, it has a limited jurisdiction that prevents it from reviewing all aspects relating to compliance with the prerequisites for the admissibility of a petition or with the procedural norms required in a case filed with the Commission.

29. That argument does not find support in the Convention, which provides that the Court, in the exercise of its contentious jurisdiction, is competent to decide "all matters relating to the interpretation or application of (the) Convention" (Art. 62(1)). States that accept the obligatory jurisdiction of the Court recognize that competence. The broad terms employed by the Convention show that the Court exercises full jurisdiction over all issues relevant to a case. The Court, therefore, is competent to determine whether there has been a violation of the rights and freedoms recognized by the Convention and to adopt appropriate measures. The Court is likewise empowered to interpret the procedural rules that justify its hearing a case and to verify compliance with all procedural norms involved in the "interpretation or application of (the) Convention." In exercising these powers, the Court is not bound by what the Commission may have previously decided, rather, its authority to render judgment is in no way restricted. The Court does not act as a court of review, of appeal or other similar court in its dealings with the Commission. Its power to examine and review all actions and decisions of the Commission derives from its character as sole judicial organ in matters concerning the Convention. This not only affords greater protection to the human rights guaranteed by the Convention, but it also assures the States Parties that have accepted the jurisdiction of the Court that the provisions of the Convention will be strictly observed.

30. The interpretation of the Convention regarding the proceedings before the Commission necessary "for the Court to hear a case" (Art. 61(2)) must ensure the international protection of human rights which is the very purpose of the Convention and requires, when necessary, the power to decide questions concerning its own jurisdiction. Treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art. 31(1) of the Vienna Convention on the Law of Treaties). The object and purpose of the American Convention is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its "appropriate effects." Applicable here is the statement of the Hague Court:

> Whereas, in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects (**Free Zones of Upper Savoy and the District of Gex,** Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13).

VI

31. The Court will now examine the preliminary objections.

32. According to the assertions of the Government, the preliminary objections that the Court must consider are the following:

a. lack of a formal declaration of admissibility by the Commission;

b. failure to attempt a friendly settlement;

c. failure to carry out an on-site investigation;

d. lack of a prior hearing;

e. improper application of Articles 50 and 51 of the Convention, and

f. non-exhaustion of domestic legal remedies.

33. In order to resolve these issues, the Court must first address various problems concerning the interpretation and application of the procedural norms set forth in the Convention. In doing so, the Court first points out that failure to observe certain formalities is not necessarily relevant when dealing on the international plane. What is essential is that the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced, and that the objectives of the different procedures be met. In this regard, it is worth noting that, in one of its first rulings, the Hague Court stated that:

> The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law (**Mavrommatis Palestine Concessions,** Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34; see also, **Aegean Sea Continental Shelf,** Judgment, I.C.J. Reports 1978, para. 42).

34. This Court must then determine whether the essential points implicit in the procedural norms contained in the Convention have been observed. In order to do so, the Court must examine whether the right of defense of the State objecting to admissibility has been prejudiced during the procedural part of the case, or whether the State has been prevented from exercising any other rights accorded it under the Convention in the proceedings before

the Commission. The Court must, likewise, verify whether the essential procedural guidelines of the protection system set forth in the Convention have been followed. Within these general criteria, the Court shall examine the procedural issues submitted to it, in order to determine whether the procedures followed in the instant case contain flaws that would demand refusal **in limine** to examine the merits of the case.

VII

35. At the hearing, the Government argued that the Commission, by not formally recognizing the admissibility of the case, had failed to comply with a requirement demanded by the Convention as a prerequisite to taking up a case.

36. At the same hearing, the Commission asserted that once a petition has been accepted in principle and the procedure is underway, a formal declaration of admissibility is no longer necessary. The Commission also stated that its practice in this area does not violate any provision of the Convention and that no State Party to the Convention has ever objected.

37. Article 46(1) of the Convention lists the prerequisites for the admission of a petition and Article 48(1)(a) sets out the procedure to be followed if the Commission "considers the petition ... admissible."

38. Article 34(1)(c) of the Commission's Regulations establishes that:

> 1. The Commission, acting initially through its Secretariat, shall receive and process petitions lodged with it in accordance with the standards set forth below:
>
> ...
>
> c. if it accepts, in principle, the admissibility of the petition, it shall request information from the government of the State in question and include the pertinent parts of the petition.

39. There is nothing in this procedure that requires an express declaration of admissibility, either at the Secretariat stage or later, when the Commission itself is involved. In requesting information from a government and processing a petition, the admissibility thereof is accepted in principle, provided that the Commission, upon being apprised of the action taken by the Secretariat and deciding to pursue the case (Arts. 34(3), 35 and 36 of the Regulations of the Commission), does not expressly declare it to be inadmissible (Art. 48(1)(c) of the Convention).

40. Although the admission of a petition does not require an express and formal act, such an act is necessary if it is found to be inadmissible. The language of both the Convention and the Regulations of the Commission clearly differentiates between these two options (Art. 48(1)(a) and (c) of the Convention and Arts. 34(1)(c) and 3, 35(b) and 41 of its Regulations). An express declaration by the Commission is required if a petition is to be deemed

inadmissible. No such requirement is demanded for admissibility. The foregoing holds provided that a State does not raise the issue of admissibility, whereupon the Commission must make a formal statement one way or the other. That issue did not arise in the instant case.

41. The Court, therefore, holds that the Commission's failure to make an express declaration on the question of the admissibility of the instant case is not a valid basis for concluding that such failure barred proper consideration by the Commission and, subsequently, by the Court (Arts. 46-51 and 61(2) of the Convention).

VIII

42. In its submissions and at the hearing, the Government argued that the Commission violated Article 48(1)(f) of the Convention by not promoting a friendly settlement. The Government maintains that this procedure is obligatory and that the conditions for friendly settlements established by Article 45 of the Regulations of the Commission are not applicable because they contradict those set out in the Convention, which is of a higher order. The Government concludes that the failure to attempt a friendly settlement makes the application inadmissible, in accordance with Article 61(2) of the Convention.

43. The Commission argued that the friendly settlement procedure is not mandatory and that the special circumstances of this case made it impossible to pursue such a settlement, for the facts have not been clearly established because of the Government's lack of cooperation, and the Government has not accepted any responsibility in the matter. Moreover, the Commission contends that the rights to life (Art. 4), to humane treatment (Art. 5) and to personal liberty (Art. 7) violated in the instant case cannot be effectively restored by conciliation.

44. Taken literally, the wording of Article 48(1)(f) of the Convention stating that "(t)he Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement" would seem to establish a compulsory procedure. Nevertheless, the Court believes that, if the phrase is interpreted within the context of the Convention, it is clear that the Commission should attempt such friendly settlement only when the circumstances of the controversy make that option suitable or necessary, at the Commission's sole discretion.

45. Article 45(2) of the Regulations of the Commission establishes that:

> In order for the Commission to offer itself as an organ of conciliation for a friendly settlement of the matter it shall be necessary for the positions and allegations of the parties to be sufficiently precise, and in the judgment of the Commission, the nature of the matter must be susceptible to the use of the friendly settlement procedure.

The foregoing means that the Commission enjoys discretionary, but by no means arbitrary, powers to decide in each case whether the friendly settlement procedure would be a suitable or appropriate way of resolving the dispute while promoting respect for human rights.

46. Irrespective of whether the positions and aspirations of the parties and the degree of the Government's cooperation with the Commission have been determined, when the forced disappearance of a person at the hands of a State's authorities is reported and that State denies that such acts have taken place, it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment and to personal liberty. Considering the circumstances of this case, the Court finds that the Commission's handling of the friendly settlement matter cannot be challenged.

IX

47. At the hearing, the Government noted that the Commission had not carried out an on-site investigation to verify the allegations. The Government claims that Article 48(2) of the Convention makes this step compulsory and indispensable.

48. The Commission objected to this argument at the same hearing, contending that on-site investigations are not compulsory and must be ordered only in serious and urgent cases. The Commission added that the parties had not requested such an investigation and that it would prove impossible to order on-site investigations for each of the many individual petitions filed with the Commission.

49. The Court holds that the rules governing onsite investigations (Art. 48(2) of the Convention, Art. 18(g) of the Statute of the Commission and Arts. 44 and 55-59 of its Regulations), read in context, lead to the conclusion that this method of verifying the facts is subject to the discretionary powers of the Commission, whether acting independently or at the request of the parties, within the limits of those provisions, and that, therefore, on-site investigations are not mandatory under the procedure governed by Article 48 of the Convention.

50. Thus, the failure to conduct an on-site investigation in the instant case does not affect the admissibility of the petition.

X

51. At the hearing, the Government pursued a similar line of reasoning, arguing that, pursuant to Article 48(1)(e) of the Convention and before adopting Resolution 30/83, the Commission was obligated to hold a preliminary hearing to clarify the allegations. In that Resolution, the Commission accepted the allegations as true, based on the presumption set forth in Article 42 (formerly 39) of its Regulations.

52. The Commission contended that neither Article 48(1)(e) of the Convention nor Article 43 of its Regulations require a preliminary hearing to obtain additional information before the issuance of the report and that, moreover, the Government did not request such a hearing.

53. The Court holds that a preliminary hearing is a procedural requirement only when the Commission considers it necessary to complete the information or when the parties expressly request a hearing. At the hearing, the Commission may ask the representative of the respondent State for any relevant information and, upon request, may also receive oral or written submissions from the interested parties.

54. Neither the petitioners nor the Government asked for a hearing in the instant case, and the Commission did not consider one necessary.

55. Consequently, the Court rejects the preliminary objection raised by the Government.

XI

56. In its motion concerning admissibility, the Government asked the Court to rule that the case should not have been referred to the Court, under Article 61(2) of the Convention, because the Commission had not exhausted the procedures established in Articles 48 to 50 of the Convention. The Government also referred to the absence of any attempt to bring about a friendly settlement under the terms of Article 48(1)(f), an issue which has already been dealt with by the Court (**supra** 42-46), and to other aspects of the handling of this case which, in the Government's opinion, did not meet the requirements of Articles 50 and 51 of the Convention. The Court will analyze the grounds for the latter contentions after making some general observations on the procedure set forth in Articles 48 to 50 of the Convention and the relationship of these provisions to Article 51. This analysis is necessary in order to place the Government's objections within the legal context in which they must be decided.

57. Article 61(2) of the Convention provides:

> In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed.

58. Notwithstanding the statements made in paragraphs 29 and 30, the procedures set forth in Articles 48 to 50 of the Convention must be exhausted before an application can be filed with the Court. The purpose is to seek a solution acceptable to all parties before having recourse to a judicial body. Thus, the parties have an opportunity to resolve the conflict in a manner respecting the human rights recognized by the Convention before the application is filed with the Court and decided in a manner that does not require the consent of the parties.

59. The procedures of Articles 48 to 50 have a broader objective as regards the international protection of human rights: compliance by the States with their obligations and, more specifically, with their legal obligation to cooperate in the investigation and resolution of the violations of which they may be accused. Within this general goal, Article 48(1)(f) provides for the possibility of a friendly settlement through the good offices of the Commission, while Article 50 stipulates that, if the matter has not been resolved, the Commission shall prepare a report which may, if the Commission so elects, include its recommendations and proposals for the satisfactory resolution of the case. If these procedures do not lead to a satisfactory result, the case is ripe for submission to the Court pursuant to the terms of Article 51 of the Convention, provided that all other requirements for the Court to exercise its contentious jurisdiction have been met.

60. The procedure just described contains a mechanism designed, in stages of increasing intensity, to encourage the State to fulfill its obligation to cooperate in the resolution of the case. The State is thus offered the opportunity to settle the matter before it is brought to the Court, and the petitioner has the chance to obtain an appropriate remedy more quickly and simply. We are dealing with mechanisms whose operation and effectiveness will depend on the circumstances of each case and, most especially, on the nature of the rights affected, the characteristics of the acts denounced, and the willingness of the government to cooperate in the investigation and to take the necessary steps to resolve it.

61. Article 50 of the Convention provides:

> 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.e 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 above provision describes the last step of the Commission's proceedings before the case under consideration is ready for submission to the Court. The application of this article presumes that no solution has been reached in the previous stages of the proceedings.

62. Article 51 of the Convention, in turn, reads:

> 1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states con-

cerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

The Court need not analyze here the nature of the time limit set by Article 51(1), nor the consequences that would result under different assumptions were such a period to expire without the case being brought before the Court. The Court will simply emphasize that because this period starts to run on the date of the transmittal to the parties of the report referred to in Article 50, this offers the Government one last opportunity to resolve the case before the Commission and before the matter can be submitted to a judicial decision.

63. Article 51(1) also considers the possibility of the Commission preparing a new report containing its opinion, conclusions and recommendations, which may be published as stipulated in Article 51(3). This provision poses many problems of interpretation, such as, for example, defining the significance of this report and how it resembles or differs from the Article 50 report. Nevertheless, these matters are not crucial to the resolution of the procedural issues now before the Court. In this case, however, it should be borne in mind that the preparation of the Article 51 report is conditional upon the matter not having been submitted to the Court within the three-month period set by Article 51(1). Thus, if the application has been filed with the Court, the Commission has no authority to draw up the report referred to in Article 51.

64. The Government maintains that the above procedures were not fully complied with and that the Commission applied Articles 50 and 51 simultaneously. The Court will now examine this objection, keeping in mind the special features of the procedure followed before the Commission, which gave rise to some unique problems due largely to initiatives taken both by the Commission and the Government.

65. The Commission adopted two Resolutions (30/83 and 22/86) approximately two and a half years apart, neither of which was formally called a "report" for purposes of Article 50. This raises two problems. The first concerns the prerequisites for reports prepared pursuant to Article 50 and the question whether the resolutions adopted by the Commission fulfill those require-

ments. The other problem concerns the existence of two resolutions, the second of which both confirms the earlier one and contains the decision to submit the case to the Court.

66. In addressing the first issue, it should be noted that the Convention sets out, in very general terms, the requirements that must be met by reports prepared pursuant to Article 50. Under this article, such reports must set forth the facts and conclusions of the Commission, to which may be added such proposals and recommendations as the Commission sees fit. In that sense, Resolution 30/83 meets the requirements of Article 50.

67. The Commission did not call Resolution 30/83 a "report," however, and the terms employed by the Commission do not conform to the wording of the Convention. That is, nonetheless, irrelevant if the content of the resolution approved by the Commission is substantially in keeping with the terms of Article 50, as in the instant case, and so long as it does not affect the procedural rights of the parties (particularly those of the State) to have one last opportunity to resolve the matter before it can be filed with the Court. Whether this last condition was complied with in the instant case is related to the other problem: the Commission's adoption of two Resolutions -- Nos. 30/83 and 22/86.

68. The Commission adopted Resolution 30/83 at its 61st Session (October 1983) and transmitted it to the Government by note of October 11, 1983. On November 18 of the same year, that is, fewer than three months after the adoption of Resolution 30/83 and, thus, within the deadline for filing the application with the Court, the Government asked the Commission to reconsider the Resolution on the grounds that various domestic remedies were underway and still pending which could lead to the settlement of the matter in the terms suggested by the Commission. The Commission approved the request for reconsideration and decided at its 62nd Session (May 1984) "to continue the study of the case." Pursuant to that Resolution, the Commission asked the Government to provide additional information. Because the Commission deemed the evidence presented since the adoption of Resolution 32/83 insufficient to warrant a new study of the matter, it adopted Resolution 22/86 on April 18, 1986, which confirmed Resolution 30/83 and contained its decision to submit the case to the Court.

69. The Convention does not foresee a situation where the State might request the reconsideration of a report approved pursuant to Article 50. Article 54 of the Commission's Regulations does contemplate the possibility of a request for reconsideration of a resolution. However, that provision only applies to petitions involving States that are not parties to the Convention, which is not the instant case. Quite apart from strictly formal considerations, the procedure followed by States Parties to the Convention in requesting reconsideration has repercussions on procedural deadlines and can, as in the instant case, have negative effects on the petitioner's right to obtain the international protection offered by the Convention within the legally established time frames. Nevertheless, within certain timely and reasonable limits, a request for reconsideration that is based on the will

to resolve a case through the domestic channels available to the State may be said to meet the general aim of the procedures followed by the Commission, since it would achieve a satisfactory solution of the alleged violation through the State's cooperation.

70. The extension of the time limit for submission of an application to the Court does not impair the procedural position of the State when the State itself requests an extension. In the instant case, the Commission's decision to "continue the study of the case" resulted in a substantial (approximately two and a half years) extension of the period available to the Government for a last opportunity to resolve the matter without being brought before the Court. Thus, neither the State's procedural rights nor its opportunity to provide a remedy were in any way diminished.

71. The Commission never revoked Resolution 30/83, rather, it suspended the procedural effects in expectation of new evidence that might lead to a different settlement. By confirming the previous resolution, the Commission reopened the periods for the succeeding procedural stages.

72. The Government argues that the ratification of Resolution 30/83 should have reinstated the 60-day period granted therein for the Government to adopt the Commission's recommendations. Given the circumstances of this case, the Court considers that argument to be ill-founded because the Government was afforded a much longer period, to the detriment of the petitioner's interest in obtaining a satisfactory result within the established time limits.

73. The investigation conducted by the Government between 1983 and 1986 concluded that it was impossible "to reach an unequivocal determination regarding disappearances resulting from actions attributed to governmental authorities." In this regard, the Government had informed the Commission, by note of April 7, 1986, that the First Criminal Court had dismissed proceedings relating to the disappearance of Manfredo Velásquez, a decision that was affirmed by the First Court of Appeals "except as they applied to General Gustavo Alvarez Martínez, because he had left the country and had not given testimony." Under the circumstances, it made no sense to grant new extensions, which would have resulted in even longer periods than those provided for by the Convention before the matter could be submitted to the Court.

74. Thus, the Commission's decision to submit the case to the Court in the Resolution confirming its previous Resolution is not a procedural flaw that diminished the Government's procedural rights or ability to present its defense. The objection is, therefore, rejected.

75. Nor is the Government correct in asserting that Resolution 22/86 has allowed the Court and the Commission to consider the matter simultaneously. The Government argues that, in confirming Resolution 30/83, the Commission reiterated the recommendations contained therein, the compliance with which was to be evaluated by the Commission itself, and that it also submitted the

case to the jurisdiction of the Court. In this connection, the Court finds that the Commission's application to the Court unequivocally shows that the Commission had concluded its proceedings and submitted the matter for judicial settlement. The presentation of the case to the Court implies, **ipso jure**, the conclusion of proceedings before the Commission. Nevertheless, a friendly settlement between the parties under the terms of Article 42(2) of the Rules of Procedure could still, if approved by the Court, lead to the striking of the case from the Court's docket and the end of the judicial proceedings.

76. Once an application has been filed with the Court, the provisions of Article 51 regarding the Commission's drafting of a new report containing its opinion and recommendations cease to apply. Under the Convention, such a report is in order only after three months have elapsed since transmittal of the communication referred to in Article 50. According to Article 51 of the Convention, it is the drafting of the report that is conditional on the failure to file a case with the Court and not the filing of a case that is conditional on the report not having been prepared or published. If, therefore, the Commission were to draft or publish the report mentioned in Article 51 after having filed the application with the Court, it could be said that the Commission was misapplying the provisions of the Convention. Such action could affect the juridical value of the report but would not affect the admissibility of the application because the wording of the Convention in no way conditions such filing on failure to publish the report required under Article 51.

77. It follows that, although the requirements of Article 50 and 51 have not been fully complied with, this has in no way impaired the rights of the Government and the case should therefore not be ruled inadmissible on those grounds.

78. Likewise, the reasoning developed from paragraph 31 onwards leads to the conclusion that the case should not be dismissed for failure to comply with the procedures set out in Articles 48 to 50 of the Convention.

XII

79. Moreover, the Government has challenged the admissibility of the petition before the Commission on the grounds that domestic remedies had not been previously exhausted.

80. Although proceedings before the Commission began on October 7, 1981, the Government did not raise this issue until November 18, 1983 when, in requesting reconsideration of Resolution 30/83, it asserted that "the domestic jurisdiction of my country has not been exhausted" because "a Writ of "Exhibición Personal" (Habeas Corpus) ... is still pending." By note of May 30, 1984, in response to the Government's request for reconsideration, the Commission, in turn, asked "whether the domestic legal remedies had been exhausted." Finally, Resolution 22/86 pointed out that "there has been, moreover, an unjustified delay in the administration of justice in this case."

81. In its submissions to the Court, the Government declared that "the petitioner has not proved to the Commission that domestic remedies have been previously exhausted or pursued." The Government reiterated this position at the hearing, where it added that, under Honduran law, the writ of exhibición personal does not exhaust domestic remedies.

82. Both in its submissions of March 20, 1987, and at the hearing, the Commission argued that domestic remedies had been exhausted, because those pursued had been unsuccessful. Even if this argument were not accepted, the Commission asserted that the exhaustion of domestic remedies was not required because there were no effective judicial remedies to forced disappearances in Honduras in the period in which the events occurred. The Commission believes that the exceptions to the rule of prior exhaustion of domestic remedies contained in Article 46(2) of the Convention were applicable because during that period there was no due process of law, the petitioner was denied access to such remedies, and there was an unwarranted delay in rendering a judgment.

83. The Commission maintains that the issue of exhaustion of domestic remedies must be decided jointly with the merits of this case, rather than in the preliminary phase. Its position is based on two considerations. First, the Commission alleges that this matter is inseparably tied to the merits, since the lack of due process and of effective domestic remedies in the Honduran judiciary during the period when the events occurred is proof of a government practice supportive of the forced disappearance of persons, the case before the Court being but one concrete example of that practice. The Commission also argues that the prior exhaustion of domestic remedies is a requirement for the admissibility of petitions presented to the Commission, but not a prerequisite for filing applications with the Court and that, therefore, the Government's objection should not be ruled upon as a preliminary objection.

84. The Court must first reiterate that, although the exhaustion of domestic remedies is a requirement for admissibility before the Commission, the determination of whether such remedies have been pursued and exhausted or whether one is dealing with one of the exceptions to such requirement is a matter involving the interpretation or application of the Convention. As such, it falls within the contentious jurisdiction of the Court pursuant to the provisions of Article 62(1) of the Convention (**supra** 29). The proper moment for the Court to rule on an objection concerning the failure to exhaust domestic remedies will depend on the special circumstances of each case. There is no reason why the Court should not rule upon a preliminary objection regarding exhaustion of domestic remedies, particularly when the Court rejects the objection, or, on the contrary, why it should not join it with the merits. Thus, in deciding whether to join the Government's objection to the merits in the instant case, the Court must examine the issue in its specific context.

85. Article 46(1)(a) of the Convention shows that the admissibility of petitions under Article 44 is subject to the requirement "that the remedies

under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

86. Article 46(2) sets out three specific grounds for the inapplicability of the requirement established in Article 46(1)(a), as follows:

> 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.

87. The Court need not decide here whether the grounds listed in Article 46(2) are exhaustive or merely illustrative. It is clear, however, that the reference to "generally recognized principles of international law" suggests, among other things, that these principles are relevant not only in determining what grounds justify non-exhaustion but also as guidelines for the Court when it is called upon to interpret and apply the rule of Article 46(1)(a) in dealing with issues relating to the proof of the exhaustion of domestic remedies, who has the burden of proof, or, even, what is meant by "domestic remedies." Except for the reference to these principles, the Convention does not establish rules for the resolution of these and analogous questions.

88. Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (see **Viviana Gallardo et al.**, Judgment of November 13, 1981, No. G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.

89. The record shows: (a) that the Government failed to make a timely objection when the petition was before the Commission and (b) that when the Government eventually raised the objection, it did so in a contradictory way. For example, in its note of November 18, 1983, the Government stated that domestic remedies had not been exhausted because a writ of exhibición personal was still pending, whereas at the hearing the Government argued that such a writ does not exhaust domestic remedies. On other occasions, the

Government referred generally to domestic remedies, without specifying what remedies were available under its domestic law to deal with complaints of the type under consideration. There is also considerable evidence that the Government replied to the Commission's requests for information, including that concerning domestic remedies, only after lengthy delays, and that the information was not always responsive.

90. Under normal circumstances, the conduct of the Government would justify the conclusion that the time had long passed for it to seek the dismissal of this case on the grounds of non-exhaustion of domestic remedies. The Court, however, must not rule without taking into account certain procedural actions by both parties. For example, the Government did not object to the admissibility of the petition on the grounds of non-exhaustion of domestic remedies when it was formally notified of the petition, nor did it respond to the Commission's request for information. On the other hand, when the Commission first became aware of the objection (subsequent to its adoption of Resolution 30/83), not only did it fail to inform the Government that such an objection was untimely but, by note of May 30, 1984, it asked the Government whether "the domestic legal remedies have been exhausted...." Under those circumstances and with no more evidence than that contained in the record, the Court deems that it would be improper to reject the Government's objection **in limine** without giving both parties the opportunity to substantiate their contentions.

91. The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1). Thus, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case.

92. At the hearing, the Government stressed that the requirement of the prior exhaustion of domestic remedies is justified because the international system for the protection of human rights guaranteed in the Convention is ancillary to its domestic law.

93. The observation of the Government is correct. However, it must also be borne in mind that the international protection of human rights is founded on the need to protect the victim from the arbitrary exercise of governmental authority. The lack of effective domestic remedies renders the victim defenseless and explains the need for international protection. Thus, whenever

a petitioner alleges that such remedies do not exist or are illusory, the granting of such protection may be not only justified, but urgent. In those cases, not only is Article 37(3) of the Regulations of the Commission on the burden of proof applicable, but the timing of the decision on domestic remedies must also fit the purposes of the international protection system. The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective. This is why Article 46(2) of the Convention sets out exceptions to the requirement of recourse to domestic remedies prior to seeking international protection, precisely in situations in which such remedies are, for a variety of reasons, ineffective. Of course, when the State interposes this objection in timely fashion it should be heard and resolved, however, the relationship between the decision regarding applicability of the rule and the need for timely international action in the absence of effective domestic remedies may frequently recommend the hearing of questions relating to that rule together with the merits, in order to prevent unnecessary delays due to preliminary objections.

94. The foregoing considerations are relevant to the analysis of the application now before the Court, which the Commission presented as a case of the forced disappearance of a person on instructions of public authorities. Wherever this practice has existed, it has been made possible precisely by the lack of domestic remedies or their lack of effectiveness in protecting the essential rights of those persecuted by the authorities. In such cases, given the interplay between the problem of domestic remedies and the very violation of human rights, the question of their prior exhaustion must be taken up together with the merits of the case.

95. The Commission has asserted, moreover, that the pursuit of domestic remedies was unsuccessful and that, during the period in which the events occurred, the three exceptions to the rule of prior exhaustion set forth in the Convention were applicable. The Government contends, on the other hand, that the domestic judicial system offers better alternatives. That difference inevitably leads to the issue of the effectiveness of the domestic remedies and judicial system taken as a whole, as mechanisms to guarantee the respect of human rights. If the Court, then, were to sustain the Government's objection and declare that effective judicial remedies are available, it would be prejudging the merits without having heard the evidence and arguments of the Commission or those of the Government. If, on the other hand, the Court were to declare that all effective domestic remedies had been exhausted or did not exist, it would be prejudging the merits in a manner detrimental to the State.

96. The issues relating to the exhaustion and effectiveness of the domestic remedies applicable to the instant case must, therefore, be resolved together with the merits.

97. Article 45(1)(1) of the Rules of Procedure of the Court states that "(t)he judgment shall contain: (1) a decision, if any, in regard to costs." The Court reserves its decision on this matter, in order to take it up together with the merits.

NOW, THEREFORE, THE COURT:

unanimously,

1. Rejects the preliminary objections interposed by the the Government of Honduras, except for the issues relating to the exhaustion of the domestic legal remedies, which are herewith ordered joined to the merits of the case.

unanimously,

2. Decides to proceed with the consideration of the instant case.

unanimously,

3. Postpones its decision on the costs until such time as it renders judgment on the merits.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San Jose, Costa Rica, this 26th day of June, 1987.

Thomas Buergenthal
President

Rafael Nieto-Navia

Rodolfo E. Piza E.

Pedro Nikken

Héctor Fix-Zamudio

Héctor Gros Espiell

Rigoberto Espinal Irías

Charles Moyer
Secretary

So ordered:

Thomas Buergenthal
President

Charles Moyer
Secretary

APPENDIX IV-B

INTER-AMERICAN COURT OF HUMAN RIGHTS

FAIREN GARBI AND SOLIS CORRALES CASE

PRELIMINARY OBJECTIONS

Judgment of June 26, 1987

In the Fairén Garbi and Solís Corrales case,

The Inter-American Court of Human Rights, composed of the following judges:

Thomas Buergenthal, President
Rafael Nieto-Navia, Vice President
Rodolfo E. Piza E., Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge
Héctor Gros Espiell, Judge
Rigoberto Espinal Irías, Judge ad hoc

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

delivers the following judgment pursuant to Article 27(4) of its Rules of Procedure (hereinafter "the Rules of Procedure") on the preliminary objections raised by the Government of Honduras (hereinafter "the Government") in its submissions and in oral argument at the public hearing.

I

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted the instant case to the Court on April 24, 1986. It originated in a petition against Honduras (No. 7951) which the Secretariat of the Commission received on January 14, 1982.

2. In 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 requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention in the case of Francisco Fairén Garbi and Yolanda Solís Corrales. The Commission also asked the Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties."

3. On May 13, 1986, the Secretariat of the Court transmitted the application to the Government.

4. On July 23, 1986, Judge Jorge R. Hernández Alcerro informed the President of the Court that, pursuant to Article 19(2) of the Statute of the Court, he had "decided to recuse (him)self from hearing the three cases that... were submitted to the Inter-American Court." By a note of that same date, the President informed the Government of its right to appoint a judge ad hoc under Article 10(3) of the Statute of the Court. The Government named Rigoberto Espinal Irías to that position by note of August 21, 1986.

5. In a note of July 23, 1986, the President of the Court asked the Government to present its submissions by the end of August 1986. On August 21, 1986, the Government requested the extension of this deadline to November 1986.

6. By his Order of August 29, 1986, having heard the views of the parties, the President of the Court set October 31, 1986 as the deadline for the Government's presentation of its submissions. The President also fixed the deadlines of January 15, 1987 for the filing of the Commission's submissions and March 1, 1987 for the Government's response.

7. In its submissions of October 31, 1986, the Government objected to the admissibility of the application filed by the Commission.

8. On December 11, 1986, the President of the Court granted the Commission's request for an extension of the deadline for the presentation of its submissions to March 20, 1987 and extended the deadline for the Government's response to May 25, 1987.

9. In his Order of January 30, 1987, the President made clear that the application which gave rise to the instant proceeding should be deemed to be the Memorial provided for in Article 30(3) of the Rules of Procedure. He also specified that the deadline of March 20, 1987 granted to the Commission was the time limit set forth in Article 27(3) of the Rules for the presentation of its observations and conclusions on the preliminary objections interposed by the Government. Having heard the views of the parties, the President ordered a public hearing on June 16, 1987 for the presentation of oral arguments on the preliminary objections. The time limits for submissions on the merits were left open to allow for the possibility that the Court might decide to join the preliminary objections to the merits or, in the event they should be decided separately, that the decision adopted would result in the continuation of the proceeding.

10. By note of March 13, 1987, the Government informed the Court that because "the Order of January 30, 1987 is not restricted to matters of mere procedure nor to the determination of deadlines, but rather involves the interpretation and classification of the submissions (the Government) considers it advisable, pursuant to Article 25 of the Statute of the Court and Article 44(2) of its Rules of Procedure, for the Court to affirm the terms of the President's Order of January 30, 1987, in order to avoid further confusion between the parties. As these are the first contentious cases submitted to the Court, it is especially important to ensure strict compliance with and the correct application of the procedural rules of the Court."

11. In a motion contained in its observations of March 20, 1987, the Commission asked the President to rescind paragraph 3 of his Order of January 30, 1987 in which he had set the date for the public hearing. The Commission also observed that "in no part of its Memorial had the Government of Honduras presented its objections as preliminary objections." In its note of June 11, 1987, the Government did refer to its objections as "preliminary objections."

12. By note of May 15, 1987, the President informed the Government that "at the public hearings on the cases, the Government shall proceed first and the Commission shall follow. In presenting its case, the Government shall be free to make oral arguments and to request or present relevant evidence on the matters under consideration. The Commission shall have the same right."

13. By Resolution of June 8, 1987, the Court affirmed the President's Order of January 30, 1987, in its entirety.

14. By note of June 8, 1987, the Minister of Justice of Costa Rica placed at the disposal of the Court all that Government's documentation on the instant case, as the Head of the Consular Department of the Ministry of Foreign Affairs had done previously on October 6, 1986. The offer of that documentation was made known to the Government and to the Commission.

15. The hearing took place at the seat of the Court on June 16, 1987.

There appeared before the Court

for the Government of Honduras:

Edgardo Sevilla Idiáquez, Agent
Mario Díaz Bustamante, Representative
Rubén Darío Zepeda G., Adviser
Angel Augusto Morales, Adviser
Mario Boquín, Adviser
Enrique Gómez, Adviser
Olmeda Rivera, Adviser
Mario Alberto Fortín M., Adviser
Ramón Rufino Mejía, Adviser

for the Inter-American Commission on Human Rights:

Gilda M. C. M. de Russomano, President, Delegate
Edmundo Vargas Carreño, Executive Secretary, Delegate
Claudio Grossman, Adviser
Juan Méndez, Adviser
Hugo Muñoz, Adviser
José Miguel Vivanco, Adviser

II

16. According to the petition filed with the Commission on January 14, 1982, Francisco Fairén Garbi, a 28-year-old student and public employee, and Yolanda Solís Corrales, also 28 and a teacher, both Costa Rican nationals, disappeared in Honduras on December 11, 1981, while in transit through that country on their way to Mexico. It was also claimed that the authorities denied that the Costa Ricans had ever entered Honduras, whereas reports from the Government of Nicaragua certified their departure for Honduras through the Las Manos border post at 4:00 p.m. on December 11, 1981. The petition asked for an appeal to the Government of Honduras to respect their lives and personal security and that the Government of Costa Rica to be informed of their whereabouts and physical condition.

17. Upon receiving the petition, the Commission forwarded the relevant parts to the Government on January 19, 1982 and requested information on the matter.

18. On January 21, 1982, the Commission received additional information on the case. It sent the relevant parts thereof to the Government on February 22, 1982.

19. By note of March 8, 1982, the Government responded that Francisco Fairén Garbi and Yolanda Solís Corrales had entered Honduran territory at the Las Manos Customs Post in the Department of El Paraiso on December 11, 1981 and had left the country on December 12, 1981, through the El Florido Customs Post, presumably headed for Guatemala. The Commission sent this information to the petitioner on March 29, 1982.

20. In communications dated March 15 and April 16, 1982, the petitioner pointed out to the Commission a series of facts that he found contradictory:

a) that on January 8, 1982, the Consulate of Nicaragua in San José, Costa Rica certified that Francisco Fairén Garbi and Yolanda Solís Corrales had left Nicaragua for Honduras, crossing the border at Las Manos at 4:00 p.m. on December 11, 1981. The Consulate subsequently produced photostatic copies of the immigration cards filled out in the travellers' own handwriting;

b) that the Government of Honduras, in a document dated January 24, 1982, and the Honduran Ambassador to Costa Rica, in a paid advertisement in the

Costa Rican newspaper "La Nación", both declared, based upon a "thorough investigation" of Honduran immigration officials, that Francisco Fairén Garbi and Yolanda Solís Corrales had "at no time entered the territory of the Republic of Honduras." On February 19, 1982, the Ambassador to Costa Rica repeated this statement based on an investigation conducted by the Ministry of Foreign Affairs of her country. On February 11, 1982, the Secretary General of Immigration of Honduras had already certified, however, that Yolanda entered Honduran territory on December 12, 1981, through the Las Manos Customs Post, travelling from Nicaragua "in a private vehicle" and that "there is no evidence of Francisco Fairén having entered our country, nor is there any record of the departure of either of the Costa Ricans." On the other hand, on March 10, 1982, the Foreign Minister of Honduras informed his Costa Rican colleague that both Francisco and Yolanda had entered Honduran territory from Nicaragua at Las Manos on December 11, 1981 and had left for Guatemala the following day, December 12, crossing the border at El Florido;

c) that whereas the Consul of Guatemala in San José, Costa Rica certified on January 4, 1982, that Francisco Fairén Garbi and Yolanda Solís Corrales did not enter or leave Guatemala between December 8 and 12, 1981, on February 3, 1982, he certified that both had entered Guatemala from Honduras on December 12, 1981, at the El Florido border post and had departed for El Salvador on December 14, 1981 through the Valle Nuevo border post;

d) that the Department of Motor Vehicles of Costa Rica certified that no driver's license had been issued to Yolanda Solís Corrales;

e) that witnesses had seen Francisco and Yolanda in Tegucigalpa on December 12, 1981.

21. In those communications, the petitioner added that he was worried by the Government's reluctance to allow a second autopsy on the body of a young man found in La Montañita, near Tegucigalpa, on December 28, 1981.

22. On June 9, 1982, the Government responded to the petitioner's observations. It repeated what it had stated on May 8, 1982, when it informed the Commission of the results of its investigations. According to that statement, Francisco Fairén and Yolanda Solís had departed for El Salvador on December 14, 1981 and their departure was attested to by a certificate issued by the Guatemalan authorities.

23. In a letter of November 30, 1982, the petitioner again referred to the facts of the case; the Commission forwarded this letter to the Government on December 20, 1982. The Government responded on January 24, 1983.

24. The Commission also received letters from the petitioner dated February 28 and September 13, 1983 and March 22, 1984, in which he made various observations regarding the allegations.

25. At its 63rd Session, the Commission adopted Resolution 16/84 of October 4, 1984, whose operative parts read as follows:

1. To declare that the acts denounced constituted serious violations of the right to life (Art. 4) and the right to personal liberty (Art. 7) of the American Convention on Human Rights and that the Government of Honduras is responsible for the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales, both Costa Rican nationals.

2. To recommend to the Government of Honduras:

a) that it order the most thorough investigation of the acts denounced in order to determine the circumstances of the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales;

b) that it punish those responsible, in accordance with Honduran law; and

c. that it inform the Commission with in 90 days on the measures taken to carry out these recommendations.

3. To transmit this Resolution to the Government of Honduras.

4. If the Government of Honduras does not submit its observations within the time limit set out in paragraph 2 **supra**, the Commission shall include this Resolution in its Annual Report to the General Assembly, pursuant to Article 59(g) of its Regulations, and shall transmit this Resolution to the claimant in the instant case.

26. On October 29, 1984, the Government requested reconsideration of Resolution 16/84 on the grounds that the persons who had disappeared had left its territory, presumably for Guatemala, that it would consent to the exhumation of the body found in La Montañita, following the procedure established by the laws of Honduras, and that it had given specific orders to the authorities to investigate the allegations contained in the petition. The Government also argued that it had established a highlevel Investigatory Commission to shed light on the facts and to establish the appropriate legal responsibilities and that "with the firm conviction that in this case --as shown in paragraph 10 of the Resolution-- the remedies provided on the national plane have not been exhausted, (it had) decided to forward all the documentation on this deplorable matter to the Investigatory Commission so that it might reopen the investigation and verify the truth of the allegations."

27. On March 15, 1985, the Commission forwarded the relevant parts of the Government's request for reconsideration to the petitioner, who presented his response in a communication of April 19, 1985.

28. On April 7, 1986, the Government informed the Commission that

> notwithstanding the efforts of the Investigatory Commission established by Decree 232 of June 14, 1984, no new evidence has

been discovered. The information at hand contains no convincing evidence on which to rule on the alleged disappearances with absolute certainty. In view of the impossibility of identifying the persons allegedly responsible, the interested parties were publicly exhorted to make use of the judicial remedies available to them through the appropriate courts, in order to bring charges against the public authorities or the private persons they deem responsible.

29. At its 67th Session, the Commission adopted Resolution 23/86 of April 18, 1986. Because the Commission had found no reason to reconsider Resolution 16/84, it decided to publish the Resolution and refer the matter to the Court.

III

30. In its submissions of October 31, 1986, the Government concluded that:

1. It is proven that Francisco Fairén Garbi and Yolanda Solís Corrales departed from Costa Rica and entered the Republic of Nicaragua on December 8, 1981 and that they left Nicaragua on December 11 of that same year.

2. It is also proven that the Costa Rican nationals entered Honduras on December 11, 1981 and left that country on December 12, 1981.

3. It is likewise proven that Francisco Fairén and Yolanda Solís entered the Republic of Guatemala and that the Government of that country asserts that they left Guatemala for El Salvador.

4. It is proven that the petitioner at no time voluntarily exhausted the domestic legal remedies of Honduras.

5. Since the requirements of the Convention and the Regulations have not been met, the petition should have been ruled inadmissible. To admit and process such a petition in violation of the provisions of the Convention nullifies all actions taken in this case.

31. In its brief of March 20, 1987, the Commission concludes that:

1. Francisco Fairén Garbi and Yolanda Solís Corrales, both Costa Rican nationals, were captured on December 11, 1981, and then disappeared while in transit through Honduras, and that the Government of Honduras did not adopt the Commisson's recommendations to investigate the allegations and punish those found to be responsible,

2. Such acts are most serious violations of the rights to life, to humane treatment and to personal liberty which are guaranteed by Articles 4, 5, and 7 of the American Convention on Human Rights, to which Honduras is a State Party;

3. The substantive or procedural objections raised by the Government of Honduras in its Memorial have no legal basis under the provisions of the relevant articles of the American Convention on Human Rights and the standards of international law; and

4. Since Honduras has recognized the compulsory jurisdiction of the InterAmerican Court of Human Rights, the Commission again petitions the Honorable Court, pursuant to Article 63(1) of the American Convention on Human Rights, to find a violation of the rights to life (Article 4), to humane treatment (Article 5) and to personal liberty (Article 7) guaranteed by the Convention. It also asks the Court to rule that the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties.

IV

32. The Court has jurisdiction to hear the instant case. Honduras has been a Party to the Convention since September 8, 1977, and recognized the contentious jurisdiction of the Court, as set out in Article 62 of the Convention, on September 9, 1981.

V

33. Before considering each of the above objections, the Court must define the scope of its jurisdiction in the instant case. The Commission argued at the hearing that because the Court is not an appellate tribunal in relation to the Commission, it has a limited jurisdiction that prevents it from reviewing all aspects relating to compliance with the prerequisites for the admissibility of a petition or with the procedural norms required in a case filed with the Commission.

34. That argument does not find support in the Convention, which provides that the Court, in the exercise of its contentious jurisdiction, is competent to decide "all matters relating to the interpretation or application of (the) Convention" (Art. 62(1)). States that accept the obligatory jurisdiction of the Court recognize that competence. The broad terms employed by the Convention show that the Court exercises full jurisdiction over all issues relevant to a case. The Court, therefore, is competent to determine whether there has been a violation of the rights and freedoms recognized by the Convention and to adopt appropriate measures. The Court is likewise empowered to interpret the procedural rules that justify its hearing a case

and to verify compliance with all procedural norms involved in the "interpretation or application of (the) Convention." In exercising these powers, the Court is not bound by what the Commission may have previously decided, rather, its authority to render judgment is in no way restricted. The Court does not act as a court of review, of appeal or other similar court in its dealings with the Commission. Its power to examine and review all actions and decisions of the Commission derives from its character as sole judicial organ in matters concerning the Convention. This not only affords greater protection to the human rights guaranteed by the Convention, but it also assures the States Parties that have accepted the jurisdiction of the Court that the provisions of the Convention will be strictly observed.

35. The interpretation of the Convention regarding the proceedings before the Commission necessary "for the Court to hear a case" (Art. 61(2)) must ensure the international protection of human rights which is the very purpose of the Convention and requires, when necessary, the power to decide questions concerning its own jurisdiction. Treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art. 31(1) of the Vienna Convention on the Law of Treaties). The object and purpose of the American Convention is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its "appropriate effects." Applicable here is the statement of the Hague Court:

> Whereas, in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects (**Free Zones of Upper Savoy and the District of Gex**, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13).

VI

36. The Court will now examine the preliminary objections.

37. According to the assertions of the Government, the preliminary objections that the Court must consider are the following:

a) lack of a formal declaration of admissibility by the Commission;

b) failure to attempt a friendly settlement;

c) failure to carry out an on-site investigation;

d) improper application of Articles 50 and 51 of the Convention, and

e) non-exhaustion of domestic legal remedies.

38. In order to resolve these issues, the Court must first address various problems concerning the interpretation and application of the procedural norms set forth in the Convention. In doing so, the Court first points out that failure to observe certain formalities is not necessarily relevant when dealing on the international plane. What is essential is that the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced and that the objectives of the different procedures be met. In this regard, it is worth noting that, in one of its first rulings, the Hague Court stated that:

> The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law (**Mavrommatis Palestine Concessions**, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34; see also, **Aegean Sea Continental Shelf**, Judgment, I.C.J. Reports 1978, para. 42).

39. This Court must then determine whether the essential points implicit in the procedural norms contained in the Convention have been observed. In order to do so, the Court must examine whether the right of defense of the State objecting to admissibility has been prejudiced during the procedural part of the case, or whether the State has been prevented from exercising any other rights accorded it under the Convention in the proceedings before the Commission. The Court must, likewise, verify whether the essential procedural guidelines of the protection system set forth in the Convention have been followed. Within these general criteria, the Court shall examine the procedural issues submitted to it, in order to determine whether the procedures followed in the instant case contain flaws that would demand refusal **in limine** to examine the merits of the case.

VII

40. In its submissions and at the hearing, the Government argued that the Commission, by not formally recognizing the admissibility of the case, had failed to comply with a requirement demanded by the Convention as a prerequisite to taking up a case.

41. In its submissions and at the hearing, the Commission asserted that once a petition has been accepted in principle and the procedure is underway, a formal declaration of admissibility is no longer necessary. The Commission also stated that its practice in this area does not violate any provision of the Convention and that no State Party to the Convention has ever objected.

42. Article 46(1) of the Convention lists the prerequisites for the admission of a petition and Article 48(1)(a) sets out the procedure to be followed if the Commission "considers the petition ... admissible."

43. Article 34(1)(c) of the Commission's Regulations establishes that:

> 1. The Commission, acting initially through its Secretariat, shall receive and process petitions lodged with it in accordance with the standards set forth below:
>
> ...
>
> c. If it accepts, in principle, the admissibility of the petition, it shall request information from the government of the State in question and include the pertinent parts of the petition.

44. There is nothing in this procedure that requires an express declaration of admissibility, either at the Secretariat stage or later, when the Commission itself is involved. In requesting information from a government and processing a petition, the admissibility thereof is accepted in principle, provided that the Commission, upon being apprised of the action taken by the Secretariat and deciding to pursue the case (Arts. 34(3), 35 and 36 of the Regulations of the Commission), does not expressly declare it to be inadmissible (Art. 48(1)(c) of the Convention).

45. Although the admission of a petition does not require an express and formal act, such an act is necessary if it is found to be inadmissible. The language of both the Convention and the Regulations of the Commission clearly differentiates between these two options (Art. 48(1)(a) and (c) of the Convention and Arts. 34(1)(c) and 3, 35(b) and 41 of its Regulations). An express declaration by the Commission is required if a petition is to be deemed inadmissible. No such requirement is demanded for admissibility. The foregoing holds provided that a State does not raise the issue of admissibility, whereupon the Commission must make a formal statement one way or the other. That issue did not arise in the instant case.

46. The Court, therefore, holds that the Commission's failure to make an express declaration on the question of the admissibility of the instant case is not a valid basis for concluding that such failure barred proper consideration by the Commission and, subsequently, by the Court (Arts. 46-51 and 61(2) of the Convention).

VIII

47. In its submissions and at the hearing, the Government argued that the Commission violated Article 48(1)(f) of the Convention by not promoting a friendly settlement. The Government maintains that this procedure is obligatory and that the conditions for friendly settlements established by Article 45 of the Regulations of the Commission are not applicable because they contradict those set out in the Convention, which is of a higher order. The Government concludes that the failure to attempt a friendly settlement makes the application inadmissible, in accordance with Article 61(2) of the Convention.

48. The Commission argued that the friendly settlement procedure is not mandatory and that the special circumstances of this case made it impossible

to pursue such a settlement, for the facts have not been clearly established because of the Government's lack of cooperation, and the Government has not accepted any responsibility in the matter. Moreover, the Commission contends that the rights to life (Art. 4), to humane treatment (Art. 5) and to personal liberty (Art. 7) violated in the instant case cannot be effectively restored by conciliation.

49. Taken literally, the wording of Article 48(1)(f) of the Convention stating that "(t)he Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement" would seem to establish a compulsory procedure. Nevertheless, the Court believes that, if the phrase is interpreted within the context of the Convention, it is clear that the Commission should attempt such friendly settlement only when the circumstances of the controversy make that option suitable or necessary, at the Commission's sole discretion.

50. Article 45(2) of the Regulations of the Commission establishes that:

> In order for the Commission to offer itself as an organ of conciliation for a friendly settlement of the matter it shall be necessary for the positions and allegations of the parties to be sufficiently precise, and in the judgment of the Commission, the nature of the matter must be susceptible to the use of the friendly settlement procedure.

The foregoing means that the Commission enjoys discretionary, but by no means arbitrary, powers to decide in each case whether the friendly settlement procedure would be a suitable or appropriate way of resolving the dispute while promoting respect for human rights.

51. Irrespective of whether the positions and aspirations of the parties and the degree of the Government's cooperation with the Commission have been determined, when the forced disappearance of a person at the hands of a State's authorities is reported and that State denies that such acts have taken place, it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment and to personal liberty. Considering the circumstances of this case, the Court finds that the Commission's handling of the friendly settlement matter cannot be challenged.

IX

52. At the hearing, the Government noted that the Commission had not carried out an on-site investigation to verify the allegations. The Government claims that Article 48(2) of the Convention makes this step compulsory and indispensable.

53. The Commission objected to this argument at the same hearing, contending that on-site investigations are not compulsory and must be ordered only in

serious and urgent cases. The Commission added that the parties had not requested such an investigation and that it would prove impossible to order on-site investigations for each of the many individual petitions filed with the Commission.

54. The Court holds that the rules governing onsite investigations (Art. 48(2) of the Convention, Art. 18(g) of the Statute of the Commission and Arts. 44 and 55-59 of its Regulations), read in context, lead to the conclusion that this method of verifying the facts is subject to the discretionary powers of the Commission, whether acting independently or at the request of the parties, within the limits of those provisions, and that, therefore, on-site investigations are not mandatory under the procedure governed by Article 48 of the Convention.

55. Thus, the failure to conduct an on-site investigation in the instant case does not affect the admissibility of the petition.

X

56. In its motion concerning admissibility, the Government asked the Court to rule that the case should not have been referred to the Court, under Article 61(2) of the Convention, because the Commission had not exhausted the procedures established in Articles 48 to 50 of the Convention. The Government also referred to the absence of any attempt to bring about a friendly settlement under the terms of Article 48(1)(f), an issue which has already been dealt with by the Court (**supra** 47-51), and to other aspects of the handling of this case which, in the Government's opinion, did not meet the requirements of Articles 50 and 51 of the Convention. The Court will analyze the grounds for the latter contentions after making some general observations on the procedure set forth in Articles 48 to 50 of the Convention and the relationship of these provisions to Article 51. This analysis is necessary in order to place the Government's objections within the legal context in which they must be decided.

57. Article 61(2) of the Convention provides:

> In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed.

58. Notwithstanding the statements made in paragraphs 29 and 30, the procedures set forth in Articles 48 to 50 of the Convention must be exhausted before an application can be filed with the Court. The purpose is to seek a solution acceptable to all parties before having recourse to a judicial body. Thus, the parties have an opportunity to resolve the conflict in a manner respecting the human rights recognized by the Convention before an application is filed with the Court and decided in a manner that does not require the consent of the parties.

59. The procedures of Articles 48 to 50 have a broader objective as regards the international protection of human rights: compliance by the States with their obligations and, more specifically, with their legal obligation to cooperate in the investigation and resolution of the violations of which they may be accused. Within this general goal, Article 48(1)(f) provides for the possibility of a friendly settlement through the good offices of the Commission, while Article 50 stipulates that, if the matter has not been resolved, the Commission shall prepare a report which may, if the Commission so elects, include its recommendations and proposals for the satisfactory resolution of the case. If these procedures do not lead to a satisfactory result, the case is ripe for submission to the Court pursuant to the terms of Article 51 of the Convention, provided that all other requirements for the Court to exercise its contentious jurisdiction have been met.

60. The procedure just described contains a mechanism designed, in stages of increasing intensity, to encourage the State to fulfill its obligation to cooperate in the resolution of the case. The State is thus offered the opportunity to settle the matter before it is brought to the Court, and the petitioner has the chance to obtain an appropriate remedy more quickly and simply. We are dealing with mechanisms whose operation and effectiveness will depend on the circumstances of each case and, most especially, on the nature of the rights affected, the characteristics of the acts denounced, and the willingness of the government to cooperate in the investigation and to take the necessary steps to resolve it.

61. Article 50 of the Convention provides:

> 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.e 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 above provision describes the last step of the Commission's proceedings before the case under consideration is ready for submission to the Court. The application of this article presumes that no solution has been reached in the previous stages of the proceedings.

62. Article 51 of the Convention, in turn, reads:

> 1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states con-

cerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

The Court need not analyze here the nature of the time limit set by Article 51(1), nor the consequences that would result under different assumptions were such a period to expire without the case being brought before the Court. The Court will simply emphasize that because this period starts to run on the date of the transmittal to the parties of the report referred to in Article 50, this offers the Government one last opportunity to resolve the case before the Commission and before the matter can be submitted to a judicial decision.

63. Article 51(1) also considers the possibility of the Commission preparing a new report containing its opinion, conclusions and recommendations, which may be published as stipulated in Article 51(3). This provision poses many problems of interpretation, such as, for example, defining the significance of this report and how it resembles or differs from the Article 50 report. Nevertheless, these matters are not crucial to the resolution of the procedural issues now before the Court. In this case, however, it should be borne in mind that the preparation of the Article 51 report is conditional upon the matter not having been submitted to the Court within the three-month period set by Article 51(1). Thus, if the application has been filed with the Court, the Commission has no authority to draw up the report referred to in Article 51.

64. The Government maintains that the above procedures were not fully complied with. The Court will now examine this objection, keeping in mind the special features of the procedure followed before the Commission, which gave rise to some unique problems due largely to initiatives taken both by the Commission and the Government.

65. The Commission adopted two Resolutions (16/84 and 23/86) approximately one and a half years apart, neither of which was formally called a "report" for purposes of Article 50. This raises two problems. The first concerns the prerequisites for reports prepared pursuant to Article 50 and the question whether the resolutions adopted by the Commission fulfill those requirements. The other problem concerns the existence of two resolutions, the

second of which both confirms the earlier one and contains the decision to submit the case to the Court.

66. In addressing the first issue, it should be noted that the Convention sets out, in very general terms, the requirements that must be met by reports prepared pursuant to Article 50. Under this article, such reports must set forth the facts and conclusions of the Commission, to which may be added such proposals and recommendations as the Commission sees fit. In that sense, Resolution 16/84 meets the requirements of Article 50.

67. The Commission did not call Resolution 16/84 a "report," however, and the terms employed by the Commission do not conform to the wording of the Convention. That is, nonetheless, irrelevant if the content of the resolution approved by the Commission is substantially in keeping with the terms of Article 50, as in the instant case, and so long as it does not affect the procedural rights of the parties (particularly those of the State) to have one last opportunity to resolve the matter before it can be filed with the Court. Whether this last condition was complied with in the instant case is related to the other problem, the Commission's adoption of two Resolutions -- Nos. 16/84 and 23/86.

68. The Commission adopted Resolution 16/84 at its 63rd Session (October 1984) and transmitted it to the Government by note of October 15, 1984. On October 29 of the same year, that is, fewer than three months after the adoption of Resolution 16/84 and, thus, within the deadline for filing the application with the Court, the Government asked the Commission to reconsider the Resolution because, among other things, it had ordered a general investigation entrusted to an ad hoc commission which would receive "all the documentation on this deplorable matter ... so that it might reopen the investigation and verify the truth of the allegations." The Commission did not take an immediate decision on the request, which was eventually denied on April 18, 1986 by Resolution 23/86, after the Commission received a note dated April 7, 1986 containing information from the Government. According to that note, no new evidence had been discovered that could confirm the facts with certainty and identify the persons allegedly responsible.

69. The Convention does not foresee a situation where the State might request the reconsideration of a report approved pursuant to Article 50. Article 54 of the Commission's Regulations does contemplate the possibility of a request for reconsideration of a resolution. However, that provision only applies to petitions involving States that are not parties to the Convention, which is not the instant case. Quite apart from strictly formal considerations, the procedure followed by States Parties to the Convention in requesting reconsideration has repercussions on procedural deadlines and can, as in the instant case, have negative effects on the petitioner's right to obtain the international protection offered by the Convention within the legally established time frames. Nevertheless, within certain timely and reasonable limits, a request for reconsideration that is based on the will to resolve a case through the domestic channels available to the State may be said to meet the general aim of the procedures followed by the Commission

since it would achieve a satisfactory solution of the alleged violation through the State's cooperation.

70. The extension of the time limit for submission of an application to the Court does not impair the procedural position of the State when the State itself requests an extension. In the instant case, the Commission's delay in reaching a decision on the request for reconsideration resulted in a substantial (approximately a year and half) extension of the period available to the Government for a last opportunity to resolve the matter without being brought before the Court. Thus, neither the State's procedural rights nor its opportunity to provide a remedy were in any way diminished.

71. The Commission never revoked Resolution 16/84. In granting the request for reconsideration, the Commission suspended its procedure in expectation of new evidence that might lead to a different settlement. By adopting Resolution 23/86, which confirmed the previous resolution, the Commission reopened the periods for the succeeding procedural stages.

72. The Government argues that the ratification of Resolution 16/84 should have reinstated the 60-day period granted therein for the Government to adopt the Commission's recommendations. Given the circumstances of this case, the Court considers that argument to be ill-founded because the Government was afforded a much longer period, to the detriment of the petitioner's interest in obtaining a satisfactory result within the established time limits.

73. According to the Government's note to the Commission of April 7, 1986, the investigation conducted between 1983 and 1986 resulted in the following conclusion: "no new evidence has been discovered. The information at hand contains no convincing evidence on which to rule on the alleged disappearances with absolute certainty." The Government also asserted that it was impossible to identify the persons allegedly responsible. Under the circumstances, it made no sense to grant new extensions, which would have resulted in even longer periods than those provided for by the Convention before the matter could be submitted to the Court.

74. Thus, the Commission's decision to submit the case to the Court in the Resolution confirming its previous Resolution is not a procedural flaw that diminished the Government's procedural rights or ability to present its defense. The objection is, therefore, rejected.

75. Once an application has been filed with the Court, the provisions of Article 51 regarding the Commission's drafting of a new report containing its opinion and recommendations cease to apply. Under the Convention, such a report is in order only after three months have elapsed since transmittal of the communication referred to in Article 50. According to Article 51 of the Convention, it is the drafting of the report that is conditional on the failure to file a case with the Court and not the filing of a case that is conditional on the report not having been prepared or published. If, therefore, the Commission were to draft or publish the report mentioned in Arti-

cle 51 after having filed the application with the Court, it could be said that the Commission was misapplying the provisions of the Convention. Such action could affect the juridical value of the report but would not affect the admissibility of the application because the wording of the Convention in no way conditions such filing on failure to publish the report required under Article 51.

76. It follows that, although the requirements of Article 50 and 51 have not been fully complied with, this has in no way impaired the rights of the Government and the case should therefore not be ruled inadmissible on those grounds.

77. Likewise, the reasoning developed from paragraph 36 onwards leads to the conclusion that the case should not be dismissed for failure to comply with the procedures set out in Articles 48 to 50 of the Convention.

XI

78. Moreover, the Government has challenged the admissibility of the petition before the Commission on the grounds that domestic remedies had not been previously exhausted.

79. When the instant case was before the Commission, the Government raised this issue in very general terms. For example, the Deputy Foreign Minister addressed the issue in Document No. 066-DGPE to the Commission, dated January 24, 1983, where he stated that "notwithstanding the failure to exhaust domestic legal remedies" the President of the Republic "gave specific instructions to the various competent governmental bodies to launch a thorough investigation that would convincingly establish the whereabouts or passage in transit" of the persons referred to in the instant case. In addition, the tenth preambular clause of Resolution 16/84, while recognizing that "the petitioner did not file suit before the judicial system of Honduras and has, therefore, not availed himself of the courts of that State," also noted that "in the Commission's opinion it is not necessary to exhaust the domestic legal remedies, since the petitioner's actions before the various governments are sufficient to satisfy this requirement, especially given the period that has elapsed since the alleged acts occurred." In requesting reconsideration of the above Resolution, the Foreign Minister of Honduras in turn pointed out, in a note of October 29, 1984, that "with the firm conviction that --as indicated in paragraph 10 of the Resolution-- the remedies provided on the national plane have not been exhausted, I have decided to forward all the documentation on this deplorable matter to the Investigatory Commission so that it might reopen the investigation and verify the truth of the allegations." Finally, in Resolution 23/86, the Commission affirmed that "the evidence presented by both the Government of Honduras and the petitioner lead to the conclusion that the alleged victim or those who represent him did not have access to the remedies set out in the domestic legislation of Honduras or were prevented from exhausting them."

80. In its submissions to the Court, the Government stated that the petitioner had not come before any of the courts of Honduras and had even expressly declined to do so. In the Government's opinion, the failure to have recourse to domestic remedies was therefore "due to a voluntary act of the petitioner." The Government also stressed that paragraph 10 of Resolution 16/84 expressly recognizes the failure to meet this requirement, which is not fulfilled by representations made before various foreign governments. The Government reiterated this position at the public hearing.

81. Both in its submissions of March 20, 1987 and at the hearing, the Commission argued that the prior exhaustion of domestic remedies was not required because of the total ineffectiveness of the judiciary. The Commission emphasized that in the period when the acts allegedly took place, not a single writ of habeas corpus "resulted in the release of anyone who had been illegally detained by governmental bodies." The Commission also asserted that the exhaustion of domestic legal remedies is not required when the violation of the right protected is the result of repeated state practice. It also argued that at least two of the exceptions to the rule of prior exhaustion of domestic remedies set out in Article 46(2) were applicable, because during that period there was no due process of law, nor was the petitioner allowed access to those remedies.

82. The Commission maintains that the issue of exhaustion of domestic remedies must be decided jointly with the merits of this case, rather than in the preliminary phase. Its position is based on two considerations. First, the Commission alleges that this matter is inseparably tied to the merits, since the lack of due process and of effective domestic remedies in the Honduran judiciary during the period when the events occurred is proof of a government practice supportive of the forced disappearance of persons, the case before the Court being but one concrete example of that practice. The Commission also argues that the prior exhaustion of domestic remedies is a requirement for the admissibility of petitions presented to the Commission, but not a prerequisite for filing applications with the Court and that, therefore, the Government's objection should not be ruled upon as a preliminary objection.

83. The Court must reiterate that, although the exhaustion of domestic remedies is a requirement for admissibility before the Commission, the determination of whether such remedies have been pursued and exhausted or whether one is dealing with one of the exceptions to such requirement is a matter involving the interpretation or application of the Convention. As such, it falls within the contentious jurisdiction of the Court pursuant to the provisions of Article 62(1) of the Convention (**supra** 34). The proper moment for the Court to rule on an objection concerning the failure to exhaust domestic remedies will depend on the special circumstances of each case. There is no reason why the Court should not rule upon a preliminary objection regarding exhaustion of domestic remedies, particularly when the Court rejects the objection, or, on the contrary, why it should not join it to the merits. Thus, in deciding whether to join the Government's objection to the merits in the instant case, the Court must examine the issue in its specific context.

84. Article 46(1)(a) of the Convention shows that the admissibility of petitions under Article 44 is subject to the requirement "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

85. Article 46(2) sets out three specific grounds for the inapplicability of the requirement established in Article 46(1)(a), as follows:

> 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.

86. The Court need not decide here whether the grounds listed in Article 46(2) are exhaustive or merely illustrative. It is clear, however, that the reference to "generally recognized principles of international law" suggests, among other things, that these principles are relevant not only in determining what grounds justify non-exhaustion but also as guidelines for the Court when it is called upon to interpret and apply the rule of Article 46(1)(a) in dealing with issues relating to the proof of the exhaustion of domestic remedies, who has the burden of proof, or, even, what is meant by "domestic remedies." Except for the reference to these principles, the Convention does not establish rules for the resolution of these and analogous questions.

87. Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (see **Viviana Gallardo et al.** Judgment of November 13, 1981, No. G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.

88. The record shows: (a) that the Government failed to make a timely objection when the petition was before the Commission and (b) that when it did object, it did so in very general terms which, taken as a whole, are confusing and do not indicate which remedies were appropriate under domestic law for the solution of controversies like the one now before the Court.

89. Under normal circumstances, the conduct of the Government would justify the conclusion that the time had long passed for it to seek the dismissal of this case on the grounds of non-exhaustion of domestic remedies. The Court, however, must not rule without taking into account certain procedural actions by both parties. For example, the Government did not object to the admissibility of the petition on the grounds of non-exhaustion of domestic remedies when it was formally notified of the petition, nor did it respond to the Commission's request for information. The Commission, in turn, made no reference to the untimeliness, to the very general terms of the Government's allusion to domestic remedies, nor to the juridical effects that could be inferred therefrom. In addition, in Resolutions 16/84 and 23/86 the Commission referred to the matter rather inconsistently, for whereas the first Resolution contended that the representations made before various governments were sufficient to satisfy the requirement, the second affirmed that the victim and the petitioner had not had access to the domestic remedies of Honduras. Under those circumstances and with no more evidence than that contained in the record, the Court deems that it would be improper to reject the Government's objection **in limine** without given both parties the opportunity to substantiate their contentions.

90. The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1). Thus, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case.

91. At the hearing, the Government stressed that the requirement of the prior exhaustion of domestic remedies is justified because the international system for the protection of human rights guaranteed in the Convention is ancillary to its domestic law.

92. The observation of the Government is correct. However, it must also be borne in mind that the international protection of human rights is founded on the need to protect the victim from the arbitrary exercise of governmental authority. The lack of effective domestic remedies renders the victim defenseless and explains the need for international protection. Thus, whenever a petitioner alleges that such remedies do not exist or are illusory, the granting of such protection may be not only justified, but urgent. In those cases, not only is Article 37(3) of the Regulations of the Commission on the burden of proof applicable, but the timing of the decision on

domestic remedies must also fit the purposes of the international protection system. The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective. This is why Article 46(2) of the Convention sets out exceptions to the requirement of recourse to domestic remedies prior to seeking international protection, precisely in situations in which such remedies are, for a variety of reasons, ineffective. Of course, when the State interposes this objection in timely fashion it should be heard and resolved; however, the relationship between the decision regarding applicability of the rule and the need for timely international action in the absence of effective domestic remedies may frequently recommend the hearing of questions relating to that rule together with the merits, in order to prevent unnecessary delays due to preliminary objections.

93. The foregoing considerations are relevant to the analysis of the application now before the Court, which the Commission presented as a case of the forced disappearance of individuals on instructions of public authorities. Wherever this practice has existed, it has been made possible precisely by the lack of domestic remedies or their lack of effectiveness in protecting the essential rights of those persecuted by the authorities. In such cases, given the interplay between the problem of domestic remedies and the very violation of human rights, the question of their prior exhaustion must be taken up together with the merits of the case.

94. The Commission has also argued that the exhaustion of domestic remedies was not, in the instant case, a compulsory prerequisite to seeking international protection, given the lack of effectiveness of the judiciary when the acts allegedly occurred. It has likewise indicated that, at the very least, the exceptions set out in Article 46(2)(a) and (c) of the Convention dealing with the rule of prior exhaustion are applicable to this case. The Government contends, on the other hand, that the domestic judicial system offers better alternatives. That difference inevitably leads to the issue of the effectiveness of the domestic remedies and judicial system taken as a whole, as mechanisms to guarantee the respect of human rights. If the Court, then, were to sustain the Government's objection and declare that effective judicial remedies are available, it would be prejudging the merits without having heard the evidence and arguments of the Commission or those of the Government. If, on the other hand, the Court were to declare that all effective domestic remedies had been exhausted or did not exist, it would be prejudging the merits in a manner detrimental to the State.

95. The issues relating to the exhaustion and effectiveness of the domestic remedies applicable to the instant case must, therefore, be resolved together with the merits.

96. Article 45(1)(1) of the Rules of Procedure states that "(t)he judgment shall contain: (1) a decision, if any, in regard to costs." The Court reserves its decision on this matter, in order to take it up together with the merits.

NOW, THEREFORE, THE COURT:

unanimously,

1. Rejects the preliminary objections interposed by the Government of Honduras, except for the issues relating to the exhaustion of the domestic legal remedies, which are herewith ordered joined to the merits of the case.

unanimously,

2. Decides to proceed with the consideration of the instant case.

unanimously,

3. Postpones its decision on the costs until such time as it renders judgment on the merits.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this 26th day of June, 1987.

Thomas Buergenthal
President

Rafael Nieto-Navia

Rodolfo E. Piza E.

Pedro Nikken

Héctor Fix-Zamudio

Héctor Gros Espiell

Rigoberto Espinal Irías

Charles Moyer
Secretary

So ordered:

Thomas Buergenthal
President

Charles Moyer
Secretary

APPENDIX IV-C

INTER-AMERICAN COURT OF HUMAN RIGHTS

GODINEZ CRUZ CASE

PRELIMINARY OBJECTIONS

Judgment of June 26, 1987

In the Godínez Cruz case,

the Inter-American Court of Human Rights, composed of the following judges:

Thomas Buergenthal, President
Rafael Nieto-Navia, Vice President
Rodolfo E. Piza E., Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge
Héctor Gros Espiell, Judge
Rigoberto Espinal Irías, Judge ad hoc;

also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

delivers the following judgment pursuant to Article 27(4) of its Rules of Procedure (hereinafter "the Rules of Procedure") on the preliminary objections raised by the Government of Honduras (hereinafter "the Government") in its submissions and in oral argument at the public hearing.

I

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted the instant case to the Court on April 24, 1986. It originated in a petition against Honduras (No. 8097) which the Secretariat of the Commission received on October 9, 1981.

2. In 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 requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention in the case of Saul Godínez Cruz. The Commission also asked the Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties."

3. On May 13, 1986, the Secretariat of the Court transmitted the application to the Government.

4. On July 23, 1986, Judge Jorge R. Hernández Alcerro informed the President of the Court that, pursuant to Article 19(2) of the Statute of the Court, he had "decided to recuse (him)self from hearing the three cases that ... were submitted to the Inter-American Court." By a note of that same date, the President informed the Government of its right to appoint a judge ad hoc under Article 10(3) of the Statute of the Court. The Government named Rigoberto Espinal Irías to that position by note of August 21, 1986.

5. In a note of July 23, 1986, the President of the Court asked the Government to present its submissions by the end of August 1986. On August 21, 1986, the Government requested the extension of this deadline to November 1986.

6. By his Order of August 29, 1986, having heard the views of the parties, the President of the Court set October 31, 1986 as the deadline for the Government's presentation of its submissions. The President also fixed the deadlines of January 15, 1987 for the filing of the Commission's submissions and March 1, 1987 for the Government's response.

7. In its submissions of October 31, 1986, the Government objected to the admissibility of the application filed by the Commission.

8. On December 11, 1986, the President of the Court granted the Commission's request for an extension of the deadline for the presentation of its submissions to March 20, 1987 and extended the deadline for the Government's response to May 25, 1987.

9. In his Order of January 30, 1987, the President made clear that the application which gave rise to the instant proceeding should be deemed to be the Memorial provided for in Article 30(3) of the Rules of Procedure. He also specified that the deadline of March 20, 1987 granted to the Commission was the time limit set forth in Article 27(3) of the Rules for the presentation of its observations and conclusions on the preliminary objections interposed by the Government. Having heard the views of the parties, the President ordered a public hearing on June 16, 1987 for the presentation of oral arguments on the preliminary objections. The time limits for submissions on the merits were left open to allow for the possibility that the Court might decide to join the preliminary objections to the merits or, in the event they should be decided separately, that the decision adopted would result in the continuation of the proceeding.

10. By note of March 13, 1987, the Government informed the Court that because "the Order of January 30, 1987 is not restricted to matters of mere procedure nor to the determination of deadlines, but rather involves the interpretation and classification of the submissions (the Government) considers it advisable, pursuant to Article 25 of the Statute of the Court and Article 44(2) of its Rules of Procedure, for the Court to affirm the terms of the President's Order of January 30, 1987, in order to avoid further confusion between the parties. As these are the first contentious cases submitted to the Court, it is especially important to ensure strict compliance with and the correct application of the procedural rules of the Court."

11. In a motion contained in its observations of March 20, 1987, the Commission asked the President to rescind paragraph 3 of his Order of January 30, 1987 in which he had set the date for the public hearing. The Commission also observed that "in no part of its Memorial had the Government of Honduras presented its objections as preliminary objections." In its note of June 11, 1987, the Government did refer to its objections as "preliminary objections."

12. By note of May 15, 1987, the President informed the Government that "at the public hearings on the cases, the Government shall proceed first and the Commission shall follow. In presenting its case, the Government shall be free to make oral arguments and to request or present relevant evidence on the matters under consideration. The Commission shall have the same right."

13. By Resolution of June 8, 1987, the Court affirmed the President's Order of January 30, 1987, in its entirety.

14. The hearing took place at the seat of the Court on June 16, 1987.

There appeared before the Court

for the Government of Honduras:

Edgardo Sevilla Idiáquez, Agent
Mario Díaz Bustamante, Representative
Rubén Darío Zepeda G., Adviser
Angel Augusto Morales, Adviser
Mario Boquín, Adviser
Enrique Gómez, Adviser
Olmeda Rivera, Adviser
Mario Alberto Fortín M., Adviser
Ramón Rufino Mejía, Adviser

for the Inter-American Commission on Human Rights:

Gilda M. C. M. de Russomano, President, Delegate
Edmundo Vargas Carreño, Executive Secretary, Delegate
Claudio Grossman, Adviser
Juan Méndez, Adviser
Hugo Muñoz, Adviser
José Miguel Vivanco, Adviser

II

15. The petition filed with the Commission on October 9, 1982 alleges that Saul Godínez Cruz, a schoolteacher, disappeared on July 22, 1982 after leaving his house by motorcycle at 6:20 a.m. and while en route to his job at the Julia Zelaya Pre-Vocational Institute in Monjarás de Choluteca. The petition states that an eyewitness saw a man in a military uniform and two persons in civilian clothes arrest a person who looked like Godínez Cruz. They placed him and his motorcycle in a double-cabin vehicle without license plates. According to some neighbors, his house had been under surveillance, presumably by government agents, for some days before his disappearance.

16. That same day, October 9, 1982, a complaint on his disappearance was filed in the First Court of the Department of Choluteca.

17. On November 2, 1982 the Commission sent the relevant parts of the petition to the Government and requested information on the matter. By note of November 29, 1982, the Government responded that the request had been "forwarded to the different competent bodies for the proper investigation."

18. On June 1, 1983, the Commission repeated its request with the admonition that, if the Government did not provide the information, the Commission would apply Article 42 (formerly 39) of its Regulations and presume the allegations to be true.

19. By note of July 19, 1983, the Government responded to this communication by pointing out that "the competent national authorities are investigating the case and as soon as specific and objective data are available, they will be forwarded to the Commission."

20. At its 61st Session, the Commission adopted Resolution 32/83 of October 4, 1983, whose operative parts read as follows:

1. By application of Article 39 of the Regulations, to presume as true the allegations contained in the communication of October 9, 1982, concerning the detention and possible disappearance of Saul Godínez Cruz in the Republic of Honduras.

2. To point out to the Government of Honduras that such acts are most serious violations of the right to life (Art. 4) and the right to personal liberty (Art. 7) of the American Convention on Human Rights.

3. To recommend to the Government of Honduras: (a) that it order a thorough and impartial investigation to determine who is responsible for the acts denounced; (b) that it punish those responsible in accordance with Honduran law; and (c) that it inform the Commission within 60 days, especially about the measures taken to carry out these recommendations.

> 4. If the Government of Honduras does not submit its observations within the time limit set out in paragraph 3 **supra**, the Commission shall include this Resolution in its Annual Report to the General Assembly pursuant to Article 59(g) of its Regulations.

21. On December 1, 1983 the Government requested reconsideration of Resolution 32/83 on the grounds that a writ of habeas corpus (exhibicion personal), brought on behalf of Saul Godínez Gómez on August 17, 1982, had been denied because the applicant did not complete the procedure in a timely fashion and that another writ, brought on behalf of Saul Godínez Cruz and others on July 4, 1983, was still pending on the date that the Government requested the reconsideration. The Government included information received from security officials on the impossibility of determining the whereabouts of Saul Godínez Cruz. It also pointed out that Police Sergeant Felix Pedro García Rodríguez, of Monjarás de Choluteca had declared that Godínez was in Cuba, from whence he planned to go to Nicaragua before returning to Honduras.

22. In his response of February 15, 1984, the petitioner admitted that the writ of habeas corpus filed on August 17, 1982 had not been pursued "because they denied holding anybody by the name of Saul Godínez Gomez and the investigating judge fell for that trick." The petitioner also forwarded a written statement by someone who claimed to have seen Saul Godínez Cruz and other prisoners in the custody of Honduran authorities on July 27, 1983, at the Central Penitentiary of Tegucigalpa.

23. By note of May 29, 1984, the Commission informed the Government that it had decided "to reconsider Resolution 32/83 and to continue the study of the case." The Commission also asked the Government to provide information on the exhaustion of domestic legal remedies and on other matters relevant to the case. The Commission reiterated this request on January 29, 1985.

24. On March 1, 1985, the Government asked the Commission to postpone consideration of this case because it had set up an "Investigatory Commission" to study the matter. The Commission granted the Government thirty days in which to present the information requested.

25. According to the Commission's observations of March 20, 1987, the Government submitted the text of the preliminary report of the "Investigatory Commission" on October 17, 1985.

26. On April 7, 1986, the Government informed the Commission that "notwithstanding the efforts of the Investigatory Commission ... no new evidence has been discovered." It also pointed out that "the information at hand contains no convincing evidence on which to rule on the alleged disappearances with absolute certainty" and that it was impossible "to identify the persons allegedly responsible."

27. Based on the foregoing, at its 67th Session (April 1986), the Commission adopted Resolution 24/86, confirming Resolution 32/83 and referring the instant case to the Court.

III

28. In its submissions of October 31, 1986, the Government concluded that:

> (It) has set forth in this document its observations and objections regarding the breach of procedural norms prior to the filing of Case 8097 with the Honorable Inter-American Court of Human Rights.
>
> The incriminating tone of the Resolution, the incorrect mention of certain particulars, the questioning of our country's legal system, the lack of an adequate and impartial evaluation of the evidence and the obvious failure by the Commission to take into account the Central American context and the democratic transition that the State of Honduras was undergoing at that time, are all elements that the Honorable Court cannot ignore.
>
> A reading of Resolution 24/86 leads to the conclusion that the Commission's methodology distorted the truth. The Commission arrived at very serious negative conclusions and judgments that are totally unfounded....

29. In its submissions of March 20, 1987, the Commission concluded that:

> 1. Officials or agents of the Government of Honduras detained Saul Godínez Cruz on July 22, 1982 in Choluteca, Honduras and that he has been missing since that date. This constitutes a most serious violation of the rights to life, to humane treatment and to personal liberty, which are guaranteed by Articles 4, 5 and 7 of the American Convention on Human Rights, to which Honduras is a State Party.
>
> 2. The substantive or procedural objections raised by the Government of Honduras in its Memorial have no legal basis under the provisions of the relevant articles of the American Convention on Human Rights and the standards of international law; and
>
> 3. Since Honduras has recognized the compulsory jurisdiction of the InterAmerican Court of Human Rights, the Commission again petitions the Honorable Court, pursuant to Article 63(1) of the American Convention on Human Rights, to find a violation of the rights to life (Article 4), to humane treatment (Article 5) and to personal liberty (Article 7) guaranteed by the Convention. It also asks the Court to rule that the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties.

IV

30. The Court has jurisdiction to hear the instant case. Honduras has been a Party to the Convention since September 8, 1977, and recognized the con-

tentious jurisdiction of the Court, as set out in Article 62 of the Convention, on September 9, 1981.

V

31. Before considering each of the above objections, the Court must define the scope of its jurisdiction in the instant case. The Commission argued at the hearing that because the Court is not an appellate tribunal in relation to the Commission, it has a limited jurisdiction that prevents it from reviewing all aspects relating to compliance with the prerequisites for the admissibility of a petition or with the procedural norms required in a case filed with the Commission.

32. That argument does not find support in the Convention, which provides that the Court, in the exercise of its contentious jurisdiction, is competent to decide "all matters relating to the interpretation or application of (the) Convention" (Art. 62(1)). States that accept the obligatory jurisdiction of the Court recognize that competence. The broad terms employed by the Convention show that the Court exercises full jurisdiction over all issues relevant to a case. The Court, therefore, is competent to determine whether there has been a violation of the rights and freedoms recognized by the Convention and to adopt appropriate measures. The Court is likewise empowered to interpret the procedural rules that justify its hearing a case and to verify compliance with all procedural norms involved in the "interpretation or application of (the) Convention." In exercising these powers, the Court is not bound by what the Commission may have previously decided, rather, its authority to render judgment is in no way restricted. The Court does not act as a court of review, of appeal or other similar court in its dealings with the Commission. Its power to examine and review all actions and decisions of the Commission derives from its character as sole judicial organ in matters concerning the Convention. This not only affords greater protection to the human rights guaranteed by the Convention, but it also assures the States Parties that have accepted the jurisdiction of the Court that the provisions of the Convention will be strictly observed.

33. The interpretation of the Convention regarding the proceedings before the Commission necessary "for the Court to hear a case" (Art. 61(2)) must ensure the international protection of human rights which is the very purpose of the Convention and requires, when necessary, the power to decide questions concerning its own jurisdiction. Treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art. 31(1) of the Vienna Convention on the Law of Treaties). The object and purpose of the American Convention is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its "appropriate effects." Applicable here is the statement of the Hague Court:

> Whereas, in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects (**Free Zones of Upper Savoy and the District of Gex**, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13).

VI

34. The Court will now examine the preliminary objections.

35. According to the assertions of the Government, the preliminary objections that the Court must consider are the following:

a) lack of a formal declaration of admissibility by the Commission;

b) failure to attempt a friendly settlement;

c) failure to carry out an on-site investigation;

d) lack of a prior hearing;

e) improper application of Articles 50 and 51 of the Convention, and

f) non-exhaustion of domestic legal remedies.

36. In order to resolve these issues, the Court must first address various problems concerning the interpretation and application of the procedural norms set forth in the Convention. In doing so, the Court first points out that failure to observe certain formalities is not necessarily relevant when dealing on the international plane. What is essential is that the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced and that the objectives of the different procedures be met. In this regard, it is worth noting that, in one of its first rulings, the Hague Court stated that:

> The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law (**Mavrommatis Palestine Concessions**, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34; see also, **Aegean Sea Continental Shelf**, Judgment, I.C.J. Reports 1978, para. 42).

37. This Court must then determine whether the essential points implicit in the procedural norms contained in the Convention have been observed. In order to do so, the Court must examine whether the right of defense of the State objecting to admissibility has been prejudiced during the procedural part of the case, or whether the State has been prevented from exercising any other rights accorded it under the Convention in the proceedings before

the Commission. The Court must, likewise, verify whether the essential procedural guidelines of the protection system set forth in the Convention have been followed. Within these general criteria, the Court shall examine the procedural issues submitted to it, in order to determine whether the procedures followed in the instant case contain flaws that would demand refusal **in limine** to examine the merits of the case.

VII

38. At the hearing, the Government argued that the Commission, by not formally recognizing the admissibility of the case, had failed to comply with a requirement demanded by the Convention as a prerequisite to taking up a case.

39. At the same hearing, the Commission asserted that once a petition has been accepted in principle and the procedure is underway, a formal declaration of admissibility is no longer necessary. The Commission also stated that its practice in this area does not violate any provision of the Convention and that no State Party to the Convention has ever objected.

40. Article 46(1) of the Convention lists the prerequisites for the admission of a petition and Article 48(1)(a) sets out the procedure to be followed if the Commission "considers the petition ... admissible."

41. Article 34(1)(c) of the Commission's Regulations establishes that,

> 1. The Commission, acting initially through its Secretariat, shall receive and process petitions lodged with it in accordance with the standards set forth below:
>
> ...
>
> c. if it accepts, in principle, the admissibility of the petition, it shall request information from the government of the State in question and include the pertinent parts of the petition.

42. There is nothing in this procedure that requires an express declaration of admissibility, either at the Secretariat stage or later, when the Commission itself is involved. In requesting information from a government and processing a petition, the admissibility thereof is accepted in principle, provided that the Commission, upon being apprised of the action taken by the Secretariat and deciding to pursue the case (Arts. 34(3), 35 and 36 of the Regulations of the Commission), does not expressly declare it to be inadmissible (Art. 48(1)(c) of the Convention).

43. Although the admission of a petition does not require an express and formal act, such an act is necessary if it is found to be inadmissible. The language of both the Convention and the Regulations of the Commission clearly differentiates between these two options (Art. 48(1)(a) and (c) of the Con-

vention and Arts. 34(1)(c) and 3, 35(b) and 41 of its Regulations). An express declaration by the Commission is required if a petition is to be deemed inadmissible. No such requirement is demanded for admissibility. The foregoing holds provided that a State does not raise the issue of admissibility, whereupon the Commission must make a formal statement one way or the other. That issue did not arise in the instant case.

44. The Court, therefore, holds that the Commission's failure to make an express declaration on the question of the admissibility of the instant case is not a valid basis for concluding that such failure barred proper consideration by the Commission and, subsequently, by the Court (Arts. 46-51 and 61(2) of the Convention).

VIII

45. In its submissions and at the hearing, the Government argued that the Commission violated Article 48(1)(f) of the Convention by not promoting a friendly settlement. The Government maintains that this procedure is obligatory and that the conditions for friendly settlements established by Article 45 of the Regulations of the Commission are not applicable because they contradict those set out in the Convention, which is of a higher order. The Government concludes that the failure to attempt a friendly settlement makes the application inadmissible, in accordance with Article 61(2) of the Convention.

46. The Commission argued that the friendly settlement procedure is not mandatory and that the special circumstances of this case made it impossible to pursue such a settlement, for the facts have not been clearly established because of the Government's lack of cooperation, and the Government has not accepted any responsibility in the matter. Moreover, the Commission contends that the rights to life (Art. 4), to humane treatment (Art. 5) and to personal liberty (Art. 7) violated in the instant case cannot be effectively restored by conciliation.

47. Taken literally, the wording of Article 48(1)(f) of the Convention stating that "(t)he Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement" would seem to establish a compulsory procedure. Nevertheless, the Court believes that, if the phrase is interpreted within the context of the Convention, it is clear that the Commission should attempt such friendly settlement only when the circumstances of the controversy make that option suitable or necessary, at the Commission's sole discretion.

48. Article 45(2) of the Regulations of the Commission establishes that:

> In order for the Commission to offer itself as an organ of conciliation for a friendly settlement of the matter it shall be necessary for the positions and allegations of the parties to be sufficiently precise, and in the judgment of the Commission, the

nature of the matter must be susceptible to the use of the friendly settlement procedure.

The foregoing means that the Commission enjoys discretionary, but by no means arbitrary, powers to decide in each case whether the friendly settlement procedure would be a suitable or appropriate way of resolving the dispute while promoting respect for human rights.

49. Irrespective of whether the positions and aspirations of the parties and the degree of the Government's cooperation with the Commission have been determined, when the forced disappearance of a person at the hands of a State's authorities is reported and that State denies that such acts have taken place, it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment, and to personal liberty. Considering the circumstances of this case, the Court finds that the Commission's handling of the friendly settlement matter cannot be challenged.

IX

50. In its submissions and at the hearing, the Government noted that the Commission had not carried out an on-site investigation to verify the allegations. The Government claims that Article 48(2) of the Convention makes this step compulsory and indispensable.

51. The Commission objected to this argument in its submissions and at the hearing, contending that on-site investigations are not compulsory and must be ordered only in serious and urgent cases. The Commission added that the parties had not requested such an investigation and that it would prove impossible to order on-site investigations for each of the many individual petitions filed with the Commission.

52. The Court holds that the rules governing onsite investigations (Art. 48(2) of the Convention, Art. 18(g) of the Statute of the Commission and Arts. 44 and 55-59 of its Regulations), read in context, lead to the conclusion that this method of verifying the facts is subject to the discretionary powers of the Commission, whether acting independently or at the request of the parties, within the limits of those provisions, and that, therefore, on-site investigations are not mandatory under the procedure governed by Article 48 of the Convention.

53. Thus, the failure to conduct an on-site investigation in the instant case does not affect the admissibility of the petition.

X

54. In its submissions and at the hearing, the Government pursued a similar line of reasoning, arguing that, pursuant to Article 48(1)(e) of the Convention and before adopting Resolution 32/83, the Commission was obligated to

hold a preliminary hearing to clarify the allegations. In that Resolution, the Commission accepted the allegations as true, based on the presumption set forth in Article 42 (formerly 39) of the Regulations of the Commission.

55. The Commission contended that neither Article 48(1)(e) of the Convention nor Article 43 of its Regulations require a preliminary hearing to obtain additional information before the issuance of the report and that, moreover, the Government did not request such a hearing.

56. The Court holds that a preliminary hearing is a procedural requirement only when the Commission considers it necessary to complete the information or when the parties expressly request a hearing. At the hearing, the Commission may ask the representative of the respondent State for any relevant information and, upon request, may also receive oral or written submissions from the interested parties.

57. Neither the petitioners nor the Government asked for a hearing in the instant case, and the Commission did not consider one necessary.

58. Consequently, the Court rejects the preliminary objection raised by the Government.

XI

59. In its motion concerning admissibility, the Government asked the Court to rule that the case should not have been referred to the Court, under Article 61(2) of the Convention, because the Commission had not exhausted the procedures established in Articles 48 to 50 of the Convention. The Government also referred to the absence of any attempt to bring about a friendly settlement under the terms of Article 48(1)(f), an issue which has already been dealt with by the Court (**supra** 45-49), and to other aspects of the handling of this case which, in the Government's opinion, did not meet the requirements of Articles 50 and 51 of the Convention. The Court will analyze the grounds for the latter contentions after making some general observations on the procedure set forth in Articles 48 to 50 of the Convention and the relationship of these provisions to Article 51. This analysis is necessary in order to place the Government's objections within the legal context in which they must be decided.

60. Article 61(2) of the Convention provides:

> In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed.

61. Notwithstanding the statements made in paragraphs 32 and 33, the procedures set forth in Articles 48 to 50 of the Convention must be exhausted before an application can be filed with the Court. The purpose is to seek a solution acceptable to all parties before having recourse to a judicial body.

Thus, the parties have an opportunity to resolve the conflict in a manner respecting the human rights recognized by the Convention before an application is filed with the Court and decided in a manner that does not require the consent of the parties.

62. The procedures of Articles 48 to 50 have a broader objective as regards the international protection of human rights: compliance by the States with their obligations and, more specifically, with their legal obligation to cooperate in the investigation and resolution of the violations of which they may be accused. Within this general goal, Article 48(1)(f) provides for the possibility of a friendly settlement through the good offices of the Commission, while Article 50 stipulates that, if the matter has not been resolved, the Commission shall prepare a report which may, if the Commission so elects, include its recommendations and proposals for the satisfactory resolution of the case. If these procedures do not lead to a satisfactory result, the case is ripe for submission to the Court pursuant to the terms of Article 51 of the Convention, provided that all other requirements for the Court to exercise its contentious jurisdiction have been met.

63. The procedure just described contains a mechanism designed, in stages of increasing intensity, to encourage the State to fulfill its obligation to cooperate in the resolution of the case. The State is thus offered the opportunity to settle the matter before it is brought to the Court, and the petitioner has the chance to obtain an appropriate remedy more quickly and simply. We are dealing with mechanisms whose operation and effectiveness will depend on the circumstances of each case and, most especially, on the nature of the rights affected, the characteristics of the acts denounced, and the willingness of the government to cooperate in the investigation and to take the necessary steps to resolve it.

64. Article 50 of the Convention provides:

> 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.e 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 above provision describes the last step of the Commission's proceedings before the case under consideration is ready for submission to the Court. The application of this article presumes that no solution has been reached in the previous stages of the proceedings.

65. Article 51 of the Convention, in turn, reads:

> 1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.
>
> 2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.
>
> 3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

The Court need not analyze here the nature of the time limit set by Article 51(1), nor the consequences that would result under different assumptions were such a period to expire without the case being brought before the Court. The Court will simply emphasize that because this period starts to run on the date of the transmittal to the parties of the report referred to in Article 50, this offers the Government one last opportunity to resolve the case before the Commission and before the matter can be submitted to a judicial decision.

66. Article 51(1) also considers the possibility of the Commission preparing a new report containing its opinion, conclusions and recommendations, which may be published as stipulated in Article 51(3). This provision poses many problems of interpretation, such as, for example, defining the significance of this report and how it resembles or differs from the Article 50 report. Nevertheless, these matters are not crucial to the resolution of the procedural issues now before the Court. In this case, however, it should be borne in mind that the preparation of the Article 51 report is conditional upon the matter not having been submitted to the Court within the three-month period set by Article 51(1). Thus, if the application has been filed with the Court, the Commission has no authority to draw up the report referred to in Article 51.

67. The Government maintains that the above procedures were not fully complied with. The Court will now examine this objection, keeping in mind the special features of the procedure followed before the Commission, which gave rise to some unique problems due largely to initiatives taken both by the Commission and the Government.

68. The Commission adopted two Resolutions (32/83 and 24/86) approximately two and a half years apart, neither of which was formally called a "report"

for purposes of Article 50. This raises two problems. The first concerns the prerequisites for reports prepared pursuant to Article 50 and the question whether the resolutions adopted by the Commission fulfill those requirements. The other problem concerns the existence of two resolutions, the second of which both confirms the earlier one and contains the decision to submit the case to the Court.

69. In addressing the first issue, it should be noted that the Convention sets out, in very general terms, the requirements that must be met by reports prepared pursuant to Article 50. Under this article, such reports must set forth the facts and conclusions of the Commission, to which may be added such proposals and recommendations as the Commission sees fit. In that sense, Resolution 32/83 meets the requirements of Article 50.

70. The Commission did not call Resolution 32/83 a "report," however, and the terms employed by the Commission do not conform to the wording of the Convention. That is, nonetheless, irrelevant if the content of the resolution approved by the Commission is substantially in keeping with the terms of Article 50, as in the instant case, and so long as it does not affect the procedural rights of the parties (particularly those of the State) to have one last opportunity to resolve the matter before it can be filed with the Court. Whether this last condition was complied with in the instant case is related to the other problem: the Commission's adoption of two Resolutions -- Nos. 32/83 and 24/86.

71. The Commission adopted Resolution 32/83 at its 61st Session (October 1983) and transmitted it to the Government by note of October 11, 1983. On December 1 of the same year, that is, fewer than three months after the adoption of Resolution 32/83 and, thus, within the deadline for filing the application with the Court, the Government asked the Commission to reconsider the Resolution on the grounds that various domestic remedies were underway and still pending which could lead to the settlement of the matter in the terms suggested by the Commission. The Commission approved the request for reconsideration and decided at its 62nd Session (May 1984) "to continue the study of the case." Pursuant to that Resolution, the Commission asked the Government to provide additional information. Because the Commission deemed the evidence presented since the adoption of Resolution 32/83 insufficient to warrant a new study of the matter, it adopted Resolution 24/86 on April 18, 1986, which confirmed Resolution 32/83 and contained its decision to submit the case to the Court.

72. The Convention does not foresee a situation where the State might request the reconsideration of a report approved pursuant to Article 50. Article 54 of the Commission's Regulations does contemplate the possibility of a request for reconsideration of a resolution. However, that provision only applies to petitions involving States that are not parties to the Convention, which is not the instant case. Quite apart from strictly formal considerations, the procedure followed by States Parties to the Convention in requesting reconsideration has repercussions on procedural deadlines and can, as in the instant case, have negative effects on the petitioner's right

to obtain the international protection offered by the Convention within the legally established time frames. Nevertheless, within certain timely and reasonable limits, a request for reconsideration that is based on the will to resolve a case through the domestic channels available to the State may be said to meet the general aim of the procedures followed by the Commission, since it would achieve a satisfactory solution of the alleged violation through the State's cooperation.

73. The extension of the time limit for submission of an application to the Court does not impair the procedural position of the State when the State itself requests an extension. In the instant case, the Commission's decision to "continue the study of the case" resulted in a substantial (approximately two and a half years) extension of the period available to the Government for a last opportunity to resolve the matter without being brought before the Court. Thus, neither the State's procedural rights nor its opportunity to provide a remedy were in any way diminished.

74. The Commission never revoked Resolution 32/83, rather, it suspended the procedural effects in expectation of new evidence that might lead to a different settlement. By confirming the previous resolution, the Commission reopened the periods for the succeeding procedural stages.

75. The Government argues that the ratification of Resolution 32/83 should have reinstated the 60-day period granted therein for the Government to adopt the Commission's recommendations. Given the circumstances of this case, the Court considers that argument to be ill-founded because the Government was afforded a much longer period, to the detriment of the petitioner's interest in obtaining a satisfactory result within the established time limits.

76. As shown by the text of its submissions of October 31, 1986, the Government's investigation conducted between 1983 and 1986 concluded that it was impossible "to reach an unequivocal determination regarding disappearances resulting from actions attributed to governmental authorities, or to identify those responsible." Under the circumstances, it made no sense to grant new extensions, which would have resulted in even longer periods than those provided for by the Convention before the matter could be submitted to the Court.

77. Thus, the Commission's decision to submit the case to the Court in the Resolution confirming its previous Resolution is not a procedural flaw that diminished the Government's procedural rights or ability to present its defense. The objection is, therefore, rejected.

78. Once an application has been filed with the Court, the provisions of Article 51 regarding the Commission's drafting of a new report containing its opinion and recommendations cease to apply. Under the Convention, such a report is in order only after three months have elapsed since transmittal of the communication referred to in Article 50. According to Article 51 of the Convention, it is the drafting of the report that is conditional on the failure to file a case with the Court and not the filing of a case that is

conditional on the report not having been prepared or published. If, therefore, the Commission were to draft or publish the report mentioned in Article 51 after having filed the application with the Court, it could be said that the Commission was misapplying the provisions of the Convention. Such action could affect the juridical value of the report but would not affect the admissibility of the application because the wording of the Convention in no way conditions such filing on failure to publish the report required under Article 51.

79. It follows that, although the requirements of Article 50 and 51 have not been fully complied with, this has in no way impaired the rights of the Government and the case should therefore not be ruled inadmissible on those grounds.

80. Likewise, the reasoning developed from paragraph 34 onwards leads to the conclusion that the case should not be dismissed for failure to comply with the procedures set out in Articles 48 to 50 of the Convention.

XII

81. Moreover, the Government has challenged the admissibility of the petition before the Commission on the grounds that domestic remedies had not been previously exhausted.

82. The Government did not expressly raise this issue until its note of December 1, 1983, when it requested reconsideration of Resolution 32/83. It then asserted that the remedies had been incorrectly pursued by the petitioner. By note of May 29, 1984, in response to the Government's request for reconsideration, the Commission, in turn, asked whether the domestic legal remedies had been exhausted." Finally, Resolution 24/86 pointed out that "the evidence presented in this case, both that submitted by the Government and that offered by the petitioner, shows that the alleged victim or those who claim in his name and on his behalf did not have access to the domestic legal remedies of Honduras or were prevented from exhausting them."

83. In its submissions to the Court, the Government declared that "the petitioner tacitly accepted the non-exhaustion" and that he "had not filed any criminal charges." It also argued that "a decision on a writ of habeas corpus does not necessarily mean that domestic remedies have been exhausted." The Government also asserted that Honduran law provides due process of law for the rights involved and that recourse to the courts by the family and friends of Saul Godínez Cruz proved that they had access to them. The Government reiterated this position at the hearing.

84. Both in its submissions of March 20, 1987 and at the hearing, the Commission argued that domestic remedies had been exhausted, because those pursued had been unsuccessful. It specifically referred to a criminal complaint that was never decided. Even if this argument were not accepted, the

Commission asserted that the exhaustion of domestic remedies was not required because there were no effective judicial remedies to forced disappearances in Honduras in the period in which the events occurred. The Commission believes that the exceptions to the rule of prior exhaustion of domestic remedies contained in Article 46(2) of the Convention were applicable because during that period there was no due process of law, the petitioner was denied access to such remedies, and there was an unwarranted delay in rendering a judgment.

85. The Commission maintains that the issue of exhaustion of domestic remedies must be decided jointly with the merits of this case, rather than in the preliminary phase. Its position is based on two considerations. First, the Commission alleges that this matter is inseparably tied to the merits, since the lack of due process and of effective domestic remedies in the Honduran judiciary during the period when the events occurred is proof of a government practice supportive of the forced disappearance of persons, the case before the Court being but one concrete example of that practice. The Commission also argues that the prior exhaustion of domestic remedies is a requirement for the admissibility of petitions presented to the Commission, but not a prerequisite for filing applications with the Court and that, therefore, the Government's objection should not be ruled upon as a preliminary objection.

86. The Court must first reiterate that, although the exhaustion of domestic remedies is a requirement for admissibility before the Commission, the determination of whether such remedies have been pursued and exhausted or whether one is dealing with one of the exceptions to such requirement is a matter involving the interpretation or application of the Convention. As such, it falls within the contentious jurisdiction of the Court pursuant to the provisions of Article 62(1) of the Convention (**supra** 32). The proper moment for the Court to rule on an objection concerning the failure to exhaust domestic remedies will depend on the special circumstances of each case. There is no reason why the Court should not rule upon a preliminary objection regarding exhaustion of domestic remedies, particularly when the Court rejects the objection, or, on the contrary, why it should not join it to the merits. Thus, in deciding whether to join the Government's objection to the merits in the instant case, the Court must examine the issue in its specific context.

87. Article 46(1)(a) of the Convention shows that the admissibility of petitions under Article 44 is subject to the requirement "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

88. Article 46(2) sets out three specific grounds for the inapplicability of the requirement established in Article 46(1)(a), as follows:

> The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

29, 1984, asked the Government to provide information on whether "the domestic legal remedies have been exhausted." Under those circumstances and with no more evidence than that contained in the record, the Court deems that it would be improper to reject the Government's objection **in limine** without giving both parties the opportunity to substantiate their contentions.

93. The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1). Thus, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case.

94. At the hearing, the Government stressed that the requirement of the prior exhaustion of domestic remedies is justified because the international system for the protection of human rights guaranteed in the Convention is ancillary to its domestic law.

95. The observation of the Government is correct. However, it must also be borne in mind that the international protection of human rights is founded on the need to protect the victim from the arbitrary exercise of governmental authority. The lack of effective domestic remedies renders the victim defenseless and explains the need for international protection. Thus, whenever a petitioner alleges that such remedies do not exist or are illusory, the granting of such protection may be not only justified, but urgent. In those cases, not only is Article 37(3) of the Regulations of the Commission on the burden of proof applicable, but the timing of the decision on domestic remedies must also fit the purposes of the international protection system. The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective. This is why Article 46(2) of the Convention sets out exceptions to the requirement of recourse to domestic remedies prior to seeking international protection, precisely in situations in which such remedies are, for a variety of reasons, ineffective. Of course, when the State interposes this objection in timely fashion it should be heard and resolved, however, the relationship between the decision regarding applicability of the rule and the need for timely international action in the absence of effective domestic remedies may frecuently recommend the hearing of questions relating to that rule together with the merits, in order to prevent unnecessary delays due to preliminary objections.

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.

89. The Court need not decide here whether the grounds listed in Article 46(2) are exhaustive or merely illustrative. It is clear, however, that the reference to "generally recognized principles of international law" suggests, among other things, that these principles are relevant not only in determining what grounds justify non-exhaustion but also as guidelines for the Court when it is called upon to interpret and apply the rule of Article 46(1)(a) in dealing with issues relating to the proof of the exhaustion of domestic remedies, who has the burden of proof, or, even, what is meant by "domestic remedies." Except for the reference to these principles, the Convention does not establish rules for the resolution of these and analogous questions.

90. Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (see **Viviana Gallardo et al.** Judgment of November 13, 1981, No. G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.

91. The record shows that the Government failed to make a timely objection when the petition was before the Commission and did not object at any time during the proceedings. There is also considerable evidence that the Government replied to the Commission's requests for information, including that concerning domestic remedies, only after lengthy delays, and that the information was not always responsive.

92. Under normal circumstances, the conduct of the Government would justify the conclusion that the time had long passed for it to seek the dismissal of this case on the grounds of non-exhaustion of domestic remedies. The Court, however, must not rule without taking into account certain procedural actions by both parties. For example, the Government did not object to the admissibility of the petition on the grounds of non-exhaustion of domestic remedies when it was formally notified of the petition, nor did it respond to the Commission's request for information. Instead of accepting the Government's silence as a tacit waiver of the rule, the Commission, by note of May

96. The foregoing considerations are relevant to the analysis of the application now before the Court, which the Commission presented as a case of the forced disappearance of a person on instructions of public authorities. Wherever this practice has existed, it has been made possible precisely by the lack of domestic remedies or their lack of effectiveness in protecting the essential rights of those persecuted by the authorities. In such cases, given the interplay between the problem of domestic remedies and the very violation of human rights, the question of their prior exhaustion must be taken up with the merits of the case.

97. The Commission has asserted, moreover, that the pursuit of domestic remedies was unsuccessful and that, during the period in which the events occurred, the three exceptions to the rule of prior exhaustion set forth in the Convention were applicable. The Government contends, on the other hand, that the domestic judicial system offers better alternatives. That difference inevitably leads to the issue of the effectiveness of the domestic remedies and judicial system taken as a whole, as mechanisms to guarantee the respect of human rights. If the Court, then, were to sustain the Government's objection and declare that effective judicial remedies are available, it would be prejudging the merits without having heard the evidence and arguments of the Commission or those of the Government. If, on the other hand, the Court were to declare that all effective domestic remedies had been exhausted or did not exist, it would be prejudging the merits in a manner detrimental to the State.

98. The issues relating to the exhaustion and effectiveness of the domestic remedies applicable to the instant case must, therefore, be resolved together with the merits.

99. Article 45(1)(1) of the Rules of Procedure of the Court states that "(t)he judgment shall contain: (1) a decision, if any, in regard to costs." The Court reserves its decision on this matter, in order to take it up together with the merits.

NOW, THEREFORE, THE COURT:

unanimously,

1. Rejects the preliminary objections interposed by the Government of Honduras, except for the issues relating to the exhaustion of the domestic legal remedies, which are herewith ordered joined to the merits of the case.

unanimously,

2. Decides to proceed with the consideration of the instant case.

unanimously,

3. Postpones its decision on the costs until such time as it renders judgment on the merits.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this 26th day of June, 1987.

Thomas Buergenthal
President

Rafael Nieto-Navia

Rodolfo E. Piza E.

Pedro Nikken

Héctor Fix-Zamudio

Héctor Gros Espiell

Rigoberto Espinal Irías

Charles Moyer
Secretary

So ordered:

Thomas Buergenthal
President

Charles Moyer
Secretary

APPENDIX V

ADDRESS BY JUDGE THOMAS BUERGENTHAL
PRESIDENT, INTER-AMERICAN COURT OF HUMAN RIGHTS
BEFORE A SPECIAL SESSION OF THE OAS PERMANENT COUNCIL

Washington, D.C.
December 3, 1986

Mr. President, Distinguished Members of the Permanent Council, Mr. Secretary General:

It is a great honor for me to appear at this special session of the Permanent Council to speak about the Inter-American Court of Human Rights, and I am profoundly grateful to you, Mr. President, and to your colleagues for giving me this opportunity. This is the first time that a judge of the Court has been invited to talk with you in this setting about the role of the Court and about the functions it does and could perform in the inter-American system. The fact that the initiative for this interchange of ideas came from you, Mr. President, and from your colleagues adds special significance to this event, and is a particular honor for the Court and for me, for which I wish to thank you in a most heartfelt manner.

May I also note, Mr. President, that in a formal sense I speak here only for myself because I have not cleared these remarks with my fellow judges. As the current president of the Court -- the term of the president runs two years -- I am merely a temporary **primus inter pares** -- with all the institutional limitations such a position implies. I have, however, served on the Court from its very inception -- I am one of only two judges left on the Court who have this distinction -- and this gives me some confidence that what I have to say also reflects the thinking of my colleagues in a general way.

The Court, as you know, consists of seven judges who are elected by the States Parties to the American Convention on Human Rights in the OAS General Assembly. The Convention has to date been ratified by 19 OAS Member States. The judges are Dr. Rafael Nieto Navia of Colombia, who is the Vice President of the Court, Dr. Rodolfo Piza Escalante of Costa Rica, Dr. Pedro Nikken of Venezuela, Dr. Héctor Fix-Zamudio of Mexico, Dr. Héctor Gros Espiell of Uruguay, and Dr. Jorge Ramón Hernández Alcerro of Honduras. I am sure that most, if not all, of these names are familiar to many of you, because these individuals all have distinguished records as legal scholars and practitioners, with fine international reputations. I for one have never worked with a better and more serious group of lawyers.

The Court is one of two organs established by the Convention to supervise the enforcement of the rights which the Convention guarantees. The other organ is, as you know, the Inter-American Commission on Human Rights. The Commission is the successor organ to a body of the same name that dates back to 1959.

The Court was formally established in 1979. In addition to the Convention, which entered into force in 1978 and is a treaty adopted under the auspices of the OAS, the Court's powers are regulated by its Statute and its Rules of Procedure. The Statute of the Court was adopted in October 1979 in the form of an OAS General Assembly resolution and entered into force on January 1, 1980. The adoption of the Statute formally establishes and confirms the institutional link that exists between the Court and the OAS. That link has its constitutional basis in the language of Article 112(2) of the OAS Charter and the Convention itself. The Court's Rules of Procedure were adopted by the Court itself pursuant to the authority vested in it by the Convention and the Statute.

The Convention and the Statute confer on the Court two types of jurisdiction. The Court has contentious jurisdiction, that is, jurisdiction to decide specific cases or disputes in which it is alleged that a State Party to the Convention has violated a right which the Convention guarantees. The Court's judgments in these cases are final and binding.

Here I should call your attention to three points that bear on the Court's contentious jurisdiction. First, and most important, in order for the Court to exercise its contentious jurisdiction in a case, the State being charged with the violation must not only have ratified the Convention, it must, in addition, have accepted the contentious jurisdiction of the Court, which is regulated by Article 62 of the Convention. Second, the individual victims of a violation of the Convention have no legal right or legal standing to take their case to the Court. Only the Inter-American Commission on Human Rights or another state may do so. The state may do so, moreover, only if it itself has also accepted the Court's jurisdiction. Third, no contentious case may be brought to the Court until the Commission has dealt with it first.

As you can see, the Court's contentious jurisdiction is surrounded by many hurdles which in turn explains why few such cases have to date come to the Court. The biggest obstacle is, of course, that only eight States Parties have thus far accepted the Court's contentious jurisdiction. These states are: Argentina, Colombia, Costa Rica, Ecuador, Honduras, Peru, Uruguay and Venezuela.

The Court is proud of the confidence which these countries have reposed in it by suscribing to its contentious jurisdiction. You will have noted that of the five Andean Pact nations, four have accepted the Court's jurisdiction and that two Central American and two Southern Cone nations have done so. Guatemala recently announced that it will do so shortly. I do not need to tell you what an occasion for rejoicing it would be if the remaining 10 nations that are parties to the Convention --Barbados, Bolivia, Dominican Republic, El Salvador, Grenada, Haiti, Jamaica, Mexico, Nicaragua and Panama -- would do the same. Let me hasten to add, in this connection, that under the Convention these nations are under no legal obligation to accept the Court's jurisdiction, if they do not wish to do so, although this action would certainly strengthen the inter-American human rights system. Of

course, the system would be strengthened even further if the remaining OAS Member States, which have to date not even ratified the Convention, would do so and if they also accepted the Court's jurisdiction. The OAS General Assembly has consistently urged such action in its annual resolutions. This would place the OAS human rights effort on a much sounder juridical footing and greatly strengthen the inter-American human rights system.

Let me turn now to the Court's other jurisdiction. In addition to its contentious jurisdiction, the Court also has so-called advisory jurisdiction. The Convention and the Court's Statute empower it to render advisory opinions interpreting the Convention and various other human rights treaties applicable in American states. The right to request these advisory opinions is granted to all OAS Member States (and not only to the States Parties to the Convention). It is also granted to all OAS organs. This enables the Permanent Council, the General Assembly or, for that matter, any other OAS organ, to seek an advisory opinion from the Court on a legal question relating to the interpretation of the Convention or other human rights treaties, including the human rights provisions of the OAS Charter itself.

Permit me to make two points in connection with the subject I have just discussed. The first point has to do with the fact that by adopting the Court's Statute in the form in which the OAS General Assembly adopted it, the Assembly has authorized all OAS organs to utilize the Court's advisory jurisdiction, if they wish to do so.

The second point I would like to make relates to the usefulness of the Court's advisory jurisdiction. It is inherent in the nature of advisory opinions as a judicial technique that they are not legally binding in a formal sense and that the ruling in an advisory proceeding does not contain a formal determination charging a state with a violation of the Convention or any other human rights treaty. In a formal sense, there are no defendants and no plaintiffs in advisory proceedings. The sole legal effect of the opinion is that it constitutes an authoritative interpretation by a judicial body whose value derives from the institutional legitimacy the Court enjoys as an independent, impartial and non-political judicial body.

It is obvious, and I do not need to belabor this point in a room full of experienced diplomats and lawyers, that the mere fact that an opinion is not legally binding in a formal sense does not mean that it is necessarily less effective than a legally binding opinion. Politically, moreover, an advisory opinion has the great advantage that it does not stigmatize a government as a violator of human rights, it does not accuse the government and it does not determine its guilt. At the same time, however, it makes the abstract legal issue perfectly clear for any government wishing to avoid being held in violation of its international legal obligations. By resolving the legal issue, it can also change the tenor and character of the political debate in the body that asked for the opinion. The advisory opinion route can therefore provide a politically and diplomatically useful technique for OAS organs wishing to avoid over-politicizing an issue and giving governments a graceful way to comply with their obligations.

As you know, much of the Court's jurisprudence up to now has consisted of advisory opinions, and some of these have had a beneficial impact. Here I should note that all OAS Member States have the right to submit their written and oral observations in any advisory proceeding pending before the Court. Unfortunately, very few states have thus far availed themselves of this opportunity, which is an opportunity to affect the interpretation of the international human rights law of our hemisphere. Here each permanent representative could help. You have no doubt seen the various notices for observations by governments that the Court sends out whenever it receives an advisory opinion request. A note from you to your foreign ministries in appropriate cases suggesting that someone consider the advisability of a written or oral comment would have an impact and would, I am sure, enable the Court to have a better understanding of the legal considerations deemed significant by individual governments.

Allow me to return now for a minute to the Court's contentious jurisdiction. In my opinion, the Court's advisory role will only perform its function if the contentious jurisdiction is also utilized. The mere existence of a contentious system provides states with the incentive to comply with the Court's advisory rulings. In short, it does not help much to tell a state what the law is, if it knows that it can go on violating it with impunity, that is, if there is no risk that it will be called to account in a contentious proceeding. It is clear, therefore, that the Court's two jurisdictions are intertwined and that one cannot function without the other also being operational.

As you know, this past April the Inter-American Commission referred its first three contentious cases to the Court. There are various reasons why the Commission did not do so earlier, but the more important point is that the step has been taken and that the Commission, under the very imaginative chairmanship of Dr. Luis Siles-Salinas of Bolivia, has adopted an unambiguous policy decision that it will, in the future, refer appropriate cases to the Court. This position of the Commission is of critical importance to the effective functioning and proper evolution of the inter-American human rights system. I should note, in this connection, that the Court and Commission recently held their first joint meeting to exchange ideas on common problems and to establish a mechanism for the coordination and resolution of procedural issues to facilitate the work of each organ. This is an exciting development that has been greeted with enthusiasm by the Court and the Commission alike.

Let me say too, Mr. Chairman, that your invitation that I address this special session of the Permanent Council also marks an important and most encouraging development. It would probably not have been possible all that many years ago, when a significant number of government representatives on this Council were not great friends of human rights. The fact that this is no longer true today, that we have in this regard witnessed a dramatic change in our region, is good reason for rejoicing and offers hope for the future. It also provides this Organization -- the OAS -- with a great opportunity to overcome what some have characterized as its increasing political marginalization. Today, as never before, it should be possible, it is possible, to put the OAS in the forefront of the struggle for human rights and human dig-

nity in our hemisphere. It is an historic opportunity for the Organization and for its Member States. The machinery exists, the normative basis exists, the institutions exist to grasp this opportunity. What is needed is the political will and imagination to make the promotion and protection of human rights a high priority policy of the Organization.

The fact that you, Mr. President, invited me to meet with you today, suggests that you and your colleagues are way ahead of me in recognizing the wisdom and necessity of strengthening the human rights mission of the OAS. The yearning for human rights and human dignity, and all which that implies in political, economic and social terms, has never been greater and more promising in our hemisphere than it is today. What the OAS does in this area can make a difference; it can make a difference for our region and for the OAS.

Here the experience of the Council of Europe is worth recounting. Not all that long ago, that Organization was undergoing a serious identity crisis because the expansion of the European Common Market and because other geopolitical developments threatened to marginalize the Council of Europe. Its decision to give top priority to human rights issues produced an expansion of its human rights program, the flourishing of its Human Rights Court and Commission, and of its educational and social programs, all of which dramatically strengthened the prestige of the Council of Europe and, with it, its political standing and institutional relevance. The renaissance of the Council of Europe provides a useful lesson for the OAS, which is only now in a position to act with imagination in the field of human rights because of the political changes that our region has undergone in recent years.

As far as the Inter-American Court of Human Rights is concerned, you have a perfect opportunity to contribute to this development almost immediately. Since Cartagena, the issue of the transformation of the Court into an OAS Charter organ has been before you. I don't know whether the issue is of real or of symbolic importance only, although I cannot help but feel that a very special message would be sent to the people of our hemisphere if the OAS Charter were to be amended and the Inter-American Court of Human Rights were elevated to the status of an organ of the Organization.

The failure to take that action, the delay in resolving this issue, also sends a message. I am, of course, somewhat biased, but I have no doubt whatsoever that the formal designation of the Court as an OAS Charter organ would honor the OAS no less than the Court.

The Court is an OAS institution, it was established under the auspices of the OAS, its Statute was adopted by the OAS General Assembly, its budget comes from the OAS, its judges are elected in the OAS General Assembly, it is the only judicial institution in the inter-American system charged with the protection of human rights. The Court is not expressly mentioned in Article 51 of the OAS Charter for the following very simple reason: when the Protocol of Buenos Aires, which amended the 1948 Charter and which added the Inter-American Commission to the list of OAS organs, was drafted, the

American Convention on Human Rights had not as yet been adopted. It was adopted in 1969. The Protocol was signed in 1967. In 1967 it was by no means clear that a human rights court would eventually be created. That the Commission would be established was a given, if only because such a body already existed. Moreover, and this is particularly relevant, the drafters of the Protocol of Buenos Aires, anticipating the possibility that a Court or some other institution might emerge from the future Convention, did the only thing smart lawyers could do under the circumstances: they drafted Article 112, paragraph 2, in the following terms: "An inter-American convention on human rights shall determine the structure, competence and procedure of this Commission, as well as those of other organs responsible for these matters." The Commission, of course, is the body listed in Article 51(e) of the OAS Charter and the "other organs responsible for these matters" can reasonably be deemed to refer to the Court -- for there is no other organ mentioned in the Convention that fits this description. What we have here is what in the law is known as an incorporation by reference, which suggests, at the very least, an intention by those who drafted the Protocol of Buenos Aires to treat the organs that would emerge from the Convention as equals. They could not do it any more expressly than they did, since no one had any assurance in 1967 that the 1969 Convention would establish a Court.

I have engaged in this little bit of legal analysis only to demonstrate that the elevation of the Court to an OAS organ would be an action constituting a rectification merely of an unavoidable omission and that it should not therefore be equated with other full scale Charter amendments that may or may not raise issues of substance or principle. It would also be an act of great symbolic importance to the OAS.

One final word on this subject, Mr. President. It has to do with the fact that the formal designation of the Court as an OAS organ cannot, and would not, change the Court's jurisdiction with regard to states that have not ratified the Convention or accepted the tribunal's jurisdiction. The Court's jurisdiction would continue to be governed by the Convention and its Statute, which makes clear beyond any doubt that no state is subject to the Court's jurisdiction which (a) has not ratified the Convention and (b) expressly accepted its jurisdiction as well. The fears voiced on this subject by some representatives on this Council are therefore not justified.

Permit me now to turn to a different subject of great importance to the Court at this time. As I already had occasion to note in my presentation to the General Assembly in Guatemala, the Court currently confronts a very serious financial crisis. I realize, of course, that the Organization as whole faces serious financial problems, but the 20% across-the-board budget cuts mandated by the OAS (10% this year and 10% next year) hit the Court particularly hard. This is due to the fact that the Court's 1980-81 start-up budget and those that followed were very small, and rightly so, because the Court did not have much work. Now that our work load has significantly increased, our already small budget is being automatically reduced to a level that has a paralyzing effect on the Court and its ability to properly discharge its obligations. The General Assembly, in its resolution on the Court, has recognized the seriousness of this problem and concluded that high priority should be given

to addressing the Court's financial needs. I am sure that you can understand the Court's concern in this matter and hope that you will be able to give it the sympathetic consideration it deserves.

The Court, Mr. President, is an instrument that can contribute immensely not only to the promotion of human rights in our hemisphere, but also to the depolitization of a great many human rights issues that now unnecessarily stir discord in the political bodies of this Organization, sometimes before the legal issues have been finally adjudicated by the judicial body competent to do so. Now that the level of massive violations of human rights has been significantly reduced in our hemisphere, it is important to increase dramatically the flow of individual cases from the Commission to the Court, thereby reducing the number of cases involving violations that now go to the General Assembly from the Commission before the Court has dealt with them. This will require, of course, that more countries ratify the Convention and that more of them accept the jurisdiction of the Court. But the failure of many states to do so at this moment has to do less with their internal human rights conditions than with sheer bureaucratic inertia. The Council representatives from those countries could play an important role in overcoming some of these bureaucratic obstacles merely by sending appropriate reminders from time to time.

Of course, as I have already noted, the depolitization of the human rights debate within the Organization could also be significantly advanced if some of the political organs were to utilize the advisory jurisdiction of the Court in appropriate situations.

Mr. President, distinguished representatives: My fellow judges and I, who have the honor to serve on the Inter-American Court of Human Rights, are neither so naive nor inexperienced as to think that the Court or, for that matter, any judicial institution, can solve all or even most human rights problems confronting our hemisphere. The causes giving rise to these problems are many -- they are political, social, economic, etc. -- and courts, whether national or international, are institutionally and constitutionally ill-equipped to deal with causes of societal ills. They deal with symptoms instead. Like medical doctors, who also treat mainly symptoms, courts can do a great deal of good without being able to affect the underlying causes. For example, there is a great need, in our hemisphere, to legitimize the human rights debate, to give the people of our region some tangible examples of international human rights justice, and to demonstrate that it is possible to resolve many human rights issues without resort to violence. I have no doubt whatsoever that the Inter-American Court of Human Rights can make a significant contribution to the effort of legitimatizing the human rights debate in our hemisphere, depoliticizing the enforcement process and creating a climate in which justice and fairness can prevail. This is no easy task, and we certainly cannot do it without your help and without this Organization's recognition that it has a vital institutional role to play in the field of human rights. The opportunity is now, with so many democratic governments represented at this table. Let us grasp this opportunity, if only to make this a better world for our children and for their children. We have so little to lose by giving it a try, and so much to gain if we succeed.

APPENDIX VI

PRESENT STATUS OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

AMERICAN CONVENTION ON HUMAN RIGHTS
"PACT OF SAN JOSE, COSTA RICA"

Concluded at San José, Costa Rica on November 22, 1969, at the Inter-American Specialized Conference on Human Rights

Entered into force on July 18, 1978

SIGNATORY COUNTRIES	DATE OF SIGNATURE	DATE OF DEPOSIT OF INSTRUMENT OF RATIFICATION OR ADHERENCE	DATE OF ACCEPTANCE OF JURISDICCION OF COURT
Argentina	02/II/84	05/IX/84	05/IX/84
Barbados	20/VI/78	05/XI/81	
Bolivia		19/VII/79	
Chile	22/XI/69		
Colombia	22/XI/69	31/VII/73	21/VI/85
Costa Rica	22/XI/69	08/IV/70	02/VII/80
Dominican Rep.	07/IX/77	19/IV/78	
Ecuador	22/XI/69	28/XII/77	24/VII/84
El Salvador	22/XI/69	23/VI/78	
Grenada	14/VII/78	18/VII/78	
Guatemala	22/XI/69	25/V/78	09/III/87
Haiti		27/IX/77	
Honduras	22/XI/69	08/IX/77	09/IX/81
Jamaica	16/IX/77	07/VIII/78	
Mexico		24/III/81	
Nicaragua	22/XI/69	25/IX/79	
Panama	22/XI/69	22/VI/78	
Paraguay	22/XI/69		
Peru	27/VII/77	28/VII/78	21/I/81
United States	01/VI/77		
Uruguay	22/XI/69	19/IV/85	19/IV/85
Venezuela	22/XI/69	09/VIII/77	24/VI/81

American Convention on Human Rights had not as yet been adopted. It was adopted in 1969. The Protocol was signed in 1967. In 1967 it was by no means clear that a human rights court would eventually be created. That the Commission would be established was a given, if only because such a body already existed. Moreover, and this is particularly relevant, the drafters of the Protocol of Buenos Aires, anticipating the possibility that a Court or some other institution might emerge from the future Convention, did the only thing smart lawyers could do under the circumstances: they drafted Article 112, paragraph 2, in the following terms: "An inter-American convention on human rights shall determine the structure, competence and procedure of this Commission, as well as those of other organs responsible for these matters." The Commission, of course, is the body listed in Article 51(e) of the OAS Charter and the "other organs responsible for these matters" can reasonably be deemed to refer to the Court -- for there is no other organ mentioned in the Convention that fits this description. What we have here is what in the law is known as an incorporation by reference, which suggests, at the very least, an intention by those who drafted the Protocol of Buenos Aires to treat the organs that would emerge from the Convention as equals. They could not do it any more expressly than they did, since no one had any assurance in 1967 that the 1969 Convention would establish a Court.

I have engaged in this little bit of legal analysis only to demonstrate that the elevation of the Court to an OAS organ would be an action constituting a rectification merely of an unavoidable omission and that it should not therefore be equated with other full scale Charter amendments that may or may not raise issues of substance or principle. It would also be an act of great symbolic importance to the OAS.

One final word on this subject, Mr. President. It has to do with the fact that the formal designation of the Court as an OAS organ cannot, and would not, change the Court's jurisdiction with regard to states that have not ratified the Convention or accepted the tribunal's jurisdiction. The Court's jurisdiction would continue to be governed by the Convention and its Statute, which makes clear beyond any doubt that no state is subject to the Court's jurisdiction which (a) has not ratified the Convention <u>and</u> (b) expressly accepted its jurisdiction as well. The fears voiced on this subject by some representatives on this Council are therefore not justified.

Permit me now to turn to a different subject of great importance to the Court at this time. As I already had occasion to note in my presentation to the General Assembly in Guatemala, the Court currently confronts a very serious financial crisis. I realize, of course, that the Organization as whole faces serious financial problems, but the 20% across-the-board budget cuts mandated by the OAS (10% this year and 10% next year) hit the Court particularly hard. This is due to the fact that the Court's 1980-81 start-up budget and those that followed were very small, and rightly so, because the Court did not have much work. Now that our work load has significantly increased, our already small budget is being automatically reduced to a level that has a paralyzing effect on the Court and its ability to properly discharge its obligations. The General Assembly, in its resolution on the Court, has recognized the seriousness of this problem and concluded that high priority should be given

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The Court, Mr. President, is an instrument that can contribute immensely not only to the promotion of human rights in our hemisphere, but also to the depolitization of a great many human rights issues that now unnecessarily stir discord in the political bodies of this Organization, sometimes before the legal issues have been finally adjudicated by the judicial body competent to do so. Now that the level of massive violations of human rights has been significantly reduced in our hemisphere, it is important to increase dramatically the flow of individual cases from the Commission to the Court, thereby reducing the number of cases involving violations that now go to the General Assembly from the Commission before the Court has dealt with them. This will require, of course, that more countries ratify the Convention and that more of them accept the jurisdiction of the Court. But the failure of many states to do so at this moment has to do less with their internal human rights conditions than with sheer bureaucratic inertia. The Council representatives from those countries could play an important role in overcoming some of these bureaucratic obstacles merely by sending appropriate reminders from time to time.

Of course, as I have already noted, the depolitization of the human rights debate within the Organization could also be significantly advanced if some of the political organs were to utilize the advisory jurisdiction of the Court in appropriate situations.

Mr. President, distinguished representatives: My fellow judges and I, who have the honor to serve on the Inter-American Court of Human Rights, are neither so naive nor inexperienced as to think that the Court or, for that matter, any judicial institution, can solve all or even most human rights problems confronting our hemisphere. The causes giving rise to these problems are many -- they are political, social, economic, etc. -- and courts, whether national or international, are institutionally and constitutionally ill-equipped to deal with causes of societal ills. They deal with symptoms instead. Like medical doctors, who also treat mainly symptoms, courts can do a great deal of good without being able to affect the underlying causes. For example, there is a great need, in our hemisphere, to legitimize the human rights debate, to give the people of our region some tangible examples of international human rights justice, and to demonstrate that it is possible to resolve many human rights issues without resort to violence. I have no doubt whatsoever that the Inter-American Court of Human Rights can make a significant contribution to the effort of legitimatizing the human rights debate in our hemisphere, depoliticizing the enforcement process and creating a climate in which justice and fairness can prevail. This is no easy task, and we certainly cannot do it without your help and without this Organization's recognition that it has a vital institutional role to play in the field of human rights. The opportunity is now, with so many democratic governments represented at this table. Let us grasp this opportunity, if only to make this a better world for our children and for their children. We have so little to lose by giving it a try, and so much to gain if we succeed.

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THE ORGANIZATION OF AMERICAN STATES

The purposes of the Organization of American States (OAS) are to strengthen the peace and security of the Hemisphere; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member states; to provide for common action on the part of those states in the event of aggression; to seek the solution of political, juridical, and economic problems that may arise among them; and to promote, by cooperative action, their economic, social, and cultural development.

To achieve these objectives, the OAS acts through the General Assembly; the Meeting of Consultation of Ministers of Foreign Affairs; the three Councils (the Permanent Council, the Inter-American Economic and Social Council, and the Inter-American Council for Education, Science, and Culture); the Inter-American Juridical Committee; the Inter-American Commission on Human Rights; the General Secretariat; the Specialized Conferences; and the Specialized Organizations.

The General Assembly holds regular sessions once a year and special sessions when circumstances warrant. The Meeting of Consultation is convened to consider urgent matters of common interest and to serve as Organ of Consultation in the application of the Inter-American Treaty of Reciprocal Assistance (known as the Rio Treaty), which is the main instrument for joint action in the event of aggression. The Permanent Council takes cognizance of matters referred to it by the General Assembly or the Meeting of Consultation and carries out the decisions of both when their implementation has not been assigned to any other body; monitors the maintenance of friendly relations among the member states and the observance of the standards governing General Secretariat operations; and, in certain instances specified in the Charter of the Organization, acts provisionally as Organ of Consultation under the Rio Treaty. The other two Councils, each of which has a Permanent Executive Committee, organize inter-American action in their areas and hold regular meetings once a year. The General Secretariat is the central, permanent organ of the OAS. The headquarters of both the Permanent Council and the General Secretariat is in Washington, D.C.

The Organization of American States is the oldest regional society of nations in the world, dating back to the First International Conference of American States, held in Washington, D.C., which on April 14, 1890, established the International Union of American Republics. When the United Nations was established, the OAS joined it as a regional organization. The Charter governing the OAS was signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires, which entered into force in February 1970. Today the OAS is made up of thirty-two member states.

MEMBER STATES: **Antigua and Barbuda, Argentina, The Bahamas,** *(Commonwealth of)*, **Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica,** *(Commonwealth of)*, **Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, Venezuela.**