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Title/Style of Cause: Nicaragua v. Costa Rica
Doc. Type: Decision
Decided by: President: Florentin Melendez;
First Vice-President: Paolo Carozza;
Second Vice-President: Victor Abramovich;
Commissioners: Evelio Fernandez Arevalos, Clare K. Roberts, Paulo Sergio Pinheiro, Freddy Gutierrez Trejo.
Dated: 8 March 2007
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I. SUMMARY

1. On February 6, 2006, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission", "Commission" or "IACHR") received a communication from the State of Nicaragua which alleged that the State of Costa Rica has committed violations of Articles 1(1) (Obligation to respect rights), 8 (Right to a fair trial), 24 (Right to equal protection), and 25 (Right to judicial protection) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"); Articles 2, 7, 8, and 28 of the Universal Declaration of Human Rights; Articles II (Right to equality before law) and XVIII (Right to a fair trial) of the American Declaration of the Rights and Duties of Man; and Article 9 of the Inter-American Democratic Charter, which refers to the elimination of all forms of discrimination, due to the alleged failure on the part of the State of Costa Rica to fulfill its duty to ensure protection for the human rights of the Nicaraguan migrant population under its jurisdiction.

2. By virtue of the fact that both the State of Costa Rica and the State of Nicaragua deposited their declarations concerning recognition of the competence of the Commission to receive and examine communications from one state against another, on February 13, 2006, the IACHR decided to process the communication in accordance with Articles 45 et seq. of the Convention and to transmit the communication presented by the State of Nicaragua to the State of Costa Rica.

3. The Commission held a hearing on the case on July 18, 2006, in the framework of its 125th Regular Session and placed itself at the disposal of the parties with a view to reaching a friendly settlement. On September 7, 2006, owing to the fact that the State of Costa Rica

mentioned on that occasion that it was not timely to initiate the friendly settlement procedure, the Inter-American Commission, in keeping with Article 41(4) and (6) of its Rules of Procedure, decided to conclude its intervention in the friendly settlement procedure and to continue to process the interstate communication.

4. In light of the fact that the considerations on admissibility and merits are closely connected in the case, the Commission decided, pursuant to Article 37(3) of its Rules of Procedure, to defer its treatment of admissibility until the debate and decision on the merits, particularly since the Commission found from its examination of the arguments and evidence presented by both States that the allegation regarding the existence of a generalized practice of discrimination against the Nicaraguan migrant population in Costa Rica was neither manifestly groundless nor obviously out of order.

5. The Commission considered it necessary to receive information from both states on the merits of the allegations in order to determine if there is enough evidence to verify the existence of a practice of discrimination tolerated by the State of Costa Rica, to the point where it would be futile to attempt to exhaust the remedies under domestic law. Having examined the arguments and evidence presented during the merits stage of the case, the Commission finds that the evidence presented by the State of Nicaragua is not sufficient to show the existence of a generalized practice of discrimination against the Nicaraguan migrant population in Costa Rica, and, therefore, it was not appropriate to assume that no suitable and effective remedies exist to repair the violations alleged in this case.

6. Accordingly, the Commission concludes that the allegations of the Nicaraguan State concerning violation of the rights enshrined in Articles 1(1) (Obligation to observe rights), 8 (Right to a fair trial), 24 (Right to equal protection), and 25 (Right to judicial protection) of the American Convention on Human Rights, are inadmissible under Articles 46 of the Convention and 31 of the Rules of Procedure of the IACHR.

II. PROCESSING BY THE COMMISSION

7. On February 6, 2006, the Inter-American Commission received a communication from the State of Nicaragua[FN1] “denouncing the State of Costa Rica [...] for breach of the duty to offer due guarantees for the protection of human rights contained in the American Convention on Human Rights and other international treaties [...] to the detriment of Nicaraguan citizens resident in Costa Rica.”[FN2] The Commission registered the communication with the number PI 01/06 (Interstate Petition 01/06).

[FN1] The communication is signed by José Antonio Tijerino Medrano and María Cecilia Contreras Benavides, who were accredited to represent the State of Nicaragua in this case by note MRE/DM-DGOI/079/01/06 of January 27, 2006, from the Ministry of Foreign Affairs of Nicaragua, received on February 6, 2006.

[FN2] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 1.

8. On February 6, 2006, the Commission also received a note from the Permanent Mission of Nicaragua to the Organization of American States (OAS),^[FN3] in which it enclosed a copy of the note sent to the Secretary General of the OAS, which, according to the communication of the State of Nicaragua, was received by the General Secretariat of the Organization on Friday, February 3, 2006. The purpose of the note to the Secretary General was to bring to his attention the declaration of January 26, 2006,^[FN4] in which the State of Nicaragua recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention. Furthermore, the note requests the Secretary General to transmit the contents of that declaration to the other states parties to the Convention and the members of the Organization of American States, to which end it enclosed a photocopy of Official Gazette of Nicaragua (La Gaceta) No. 22 of January 26, 2006, in which the declaration was published.

[FN3] Note MPN-OEA/2006 of February 6, 2006, received on February 6, 2006.

[FN4] Note MPN-OEA/2004 of February 3, 2006.

9. On February 9, 2006, the Commission received a note from the Permanent Mission of Nicaragua to the Organization of American States in which it requested information about the subsequent processing of the interstate communication. ^[FN5]

[FN5] Note MPN-OEA-2014 of February 8, 2006, received on February 9, 2006.

10. On February 13, 2006, the Commission decided to transmit to the State of Costa Rica the communication presented by the State of Nicaragua together with its annexes, including the copy of the note addressed to the General Secretariat by the State of Nicaragua bringing to its attention the declaration concerning recognition of the competence of the Commission to receive and examine interstate communications. On that occasion the Commission informed both parties that the communication of the State of Nicaragua would be processed in accordance with the procedure set down in Articles 45 et seq. of the American Convention and, in keeping with Articles 30(3) and 48 of its Rules of Procedure, requested the State of Costa Rica to present a reply to the interstate communication within two months, counted from the date of transmission of said communication. The note in which the instant interstate communication and its annexes were conveyed to the State of Costa Rica was transmitted on February 15, 2006.

11. On February 24, 2006, the State of Nicaragua sent a note to the Commission to request it to rectify the steps taken in the proceeding in the instant interstate communication inasmuch as the communication was not lodged under Articles 45 et seq. of the Convention, but pursuant to Articles 48 to 50 of the Convention. On that occasion, the State of Nicaragua mentioned that it “invokes, for this case, the procedure determined by the Inter-American Court of Human Rights in the Case of Viviana Gallardo et al, on which occasion Costa Rica, a state party, filed an

application against Costa Rica before the Inter-American Court of Human Rights, which ordered said state to proceed in accordance with Articles 48 to 50 [of the Convention]”[FN6].

[FN6] Note MPN-OEA/2033 of February 24, 2006, received on February 24, 2006.

12. On March 24, 2006, the State of Nicaragua sent a note to the Commission in which it again asked the Commission to comply with its request with respect to the processing of the instant interstate communication[FN7]. Furthermore, in a note of March 31, 2006, the State of Nicaragua requested the Commission to rectify the processing of this communication since “the measures adopted by the Executive Secretariat are not in keeping with the petition or complaint of Nicaragua or with the Convention inasmuch as, before taking the matter to the Court, the State of Nicaragua decided to comply with Articles 48 to 50, which are obligatory according to Article 61 of said Convention.”[FN8] The State of Nicaragua reiterated this request in notes dated May 11, 2006,[FN9] May 16, 2006,[FN10] and several other notes, as well as at the public hearings held by the Commission on July 18 and October 18, 2006.

[FN7] Note MPN-OEA/2052 of March 24, 2006, received on March 24, 2006, which transmits an unnumbered note of March 22, 2006.

[FN8] Note MPN-OEA/2057 of March 30, 2006, received on March 31, 2006, which transmits an unnumbered note of March 14, 2006.

[FN9] Unnumbered note of May 11, 2006, received on May 12, 2006.

[FN10] Unnumbered note of May 16, 2006, received on June 13, 2006.

13. On March 31, 2006, the Commission wrote to the State of Nicaragua to inform it that at its 124th Session, the IACHR considered its submissions in connection with the processing of the instant interstate communication and resolved to await the reply of the State of Costa Rica in order then to adopt decision on the arguments regarding the processing of the interstate communication.

14. On April 6, 2006, the State of Nicaragua sent a note to the Commission requesting an explanation as to why it had been informed that the period granted to the State of Costa Rica would expire on April 15, 2006, when the note in which the Executive Secretariat transmitted the communication to the State of Costa Rica was dated February 13, 2006.[FN11] On April 7, 2006, the Commission informed the State of Nicaragua that the note of February 13, by which the communication presented by the government of Nicaragua was brought to the attention of the government of Costa Rica, was actually transmitted on February 15. Therefore, the two-month period granted to the State of Costa Rica began to run on February 15 and was due to expire on April 15, 2006.

[FN11] Note MPN-OEA/2066 of April 6, 2006, received on April 6, 2006, which transmits note MRE/DM-DGOI/385/04/06 of April 4, 2006.

15. On April 18[FN12] and April 20,[FN13] 2006, the State of Nicaragua wrote to the Commission to request information as to whether or not State of Costa Rica had presented its reply to this interstate communication in the requisite time and manner. On April 20, 2006, the State of Nicaragua again wrote to the Commission, requesting that it proceed without delay and create the working group mentioned in Article 36 of the Rules of Procedure of the IACHR, since it regarded “the failure of the State of Costa Rica to answer the petition lodged by Nicaragua as a submission thereto, as an acceptance of the serious allegations it contains.”[FN14]

[FN12] Note MPN-OEA/2075 of April 18, 2006, received on April 18, 2006.

[FN13] Unnumbered note of April 19, 2006, received on April 20, 2006.

[FN14] Unnumbered note of April 20, 2006, received on April 20, 2006.

16. On April 20, 2006, the Commission wrote to the State of Nicaragua to inform it that, as yet, the IACHR had received no response from the State of Costa Rica. On April 25, 2006, the State of Nicaragua wrote to the Commission reiterating its request that it declare its acceptance that the facts alleged by the State of Nicaragua in its interstate communication were true.[FN15]

[FN15] Unnumbered note of April 23, 2006, received on April 25, 2006. An almost identical note, also dated April 23, 2006, was received on May 17, 2006. In the latter note the State added that it did not accept and would protest any request for an extension made after April 15.

17. On April 24, 2006, the State of Costa Rica presented to the Commission a request for an extension of 15 days to submit its reply to this communication.[FN16] On April 27, bearing in mind the importance of affording both states the opportunity to express their opinion with respect to this interstate communication, the Commission decided to grant the State of Costa Rica a single extension of eight days to respond to the communication of the State of Nicaragua, and set May 5, 2006, as the deadline for receiving the reply of the State of Costa Rica. This decision was communicated to both parties on April 27, 2006.

[FN16] Note DM-170-06 of April 24, 2006, received on April 24, 2006.

18. On May 1, 2006, the State of Nicaragua submitted a note advising the Commission of its position on the decision of the latter to grant an extension to the government of Costa Rica, inasmuch as said request was "time-barred and after the time limit." [FN17] In that note, the Nicaraguan State requests the Commission to annul the extension granted. This position was reiterated by the Nicaraguan State in the brief containing its observations on the reply of the State of Costa Rica to this interstate communication.[FN18]

[FN17] Note MRE/DM-DGO/471/04/06 of April 28, 2006, received on May 1, 2006.

[FN18] Unnumbered note of May 26, 2006, received on May 26, 2006.

19. On May 3, 2006, the Commission wrote to the State of Nicaragua to inform it that the Commission and its Executive Secretariat had acted in an absolutely objective and impartial manner in this case and that the Commission's processing of this communication was in accordance with the Convention and the Rules of Procedure of the IACHR. Furthermore, the Commission noted that all the Executive Secretariat's decisions on the processing of this interstate communication are consulted with the Inter-American Commission, or with its President, and have their full backing.

20. On May 5, 2006, the State of Costa Rica delivered to the Commission its reply to the interstate communication lodged against it by the Nicaraguan State.[FN19] This reply was transmitted that same day to the State of Nicaragua, which was given one month to present its observations.

[FN19] Note from the Mission of Costa Rica DE-039-06 of May 5, 2006, received on May 5, 2006, enclosing the note from the Ministry of Foreign Affairs and Worship DM-179-06 of April 28, 2006.

21. On May 15, 2006, the Commission wrote to both States to invite them to a hearing to be held during its 125th Session in Guatemala, in order to address matters concerning the admissibility of this interstate communication.

22. On May 26, 2006, the State of Nicaragua presented to the Commission its observations on the reply of Costa Rica to the interstate communication.[FN20] The Commission forwarded those observations to Costa Rica on May 31 and granted it one month to submit its observations.

[FN20] Unnumbered note of May 26, 2006, received on May 26, 2006.

23. On June 1, 2006, the State of Nicaragua sent a note to the Commission with observations on the way in which the IACHR has processed this interstate communication.[FN21] On June 7, 2006, the President of the Commission wrote to the State of Nicaragua in reply to the notes requesting the Commission to rectify its processing of this interstate communication, and informed it that the Commission was of the opinion that the processing was in keeping with the American Convention and the Rules of Procedure of the IACHR.

[FN21] Unnumbered note of May 31, 2006, received on June 1, 2006.

24. The State of Nicaragua submitted additional information in briefs dated May 9, 2006, and June 5, 2006. For its part, on June 12, 2006, the State of Costa Rica wrote to the Commission in order to bring to its attention the press release issued by the Ministry of Foreign Affairs and Worship of Costa Rica on June 7, 2006, in which the government of Costa Rica reiterated its profound respect for the independence and autonomy of the Inter-American Commission.[FN22]

[FN22] Ministry of Foreign Affairs and Worship of Costa Rica, press release of June 7, 2006, transmitted to the IACHR via note DE-057-06 of June 12, 2006, received on June 13, 2006.

25. On July 5, 2006, the State of Costa Rica sent the Commission its response[FN23] to the request for observations that the Commission made to it on May 31, 2006, when it transmitted the observations of the State of Nicaragua to the reply of the Costa Rican State to this interstate communication. This response from Costa Rica was conveyed to the State of Nicaragua that same day, July 5, 2006, and the latter was given one month to present its observations.

[FN23] Note DM-183-06 of June 29, 2006, received on July 5, 2006.

26. On July 18, 2006, the Inter-American Commission on Human Rights, meeting at its 125th Session in Guatemala City, Guatemala, held a public hearing to address issues pertaining to the admissibility of this interstate communication. (Copies of the minutes and audio recordings of this hearing were transmitted to both states parties on August 22, 2006). After the hearing, the President of the Commission placed himself at the disposal of the parties for reaching a friendly settlement. The delegations of both parties agreed to give their reply to the Commission after they had consulted with the appropriate authorities in their respective States. On July 19, the Commission ratified in writing, to both parties, its decision to place itself at their disposal with a view to reaching a friendly settlement of the matter, and granted the respective governments two weeks to express their interest in initiating the procedure provided at Article 48(1)(f) of the Convention.

27. On July 26, 2006, the Inter-American Commission received an amicus curiae brief from the Office of the Human Rights Ombudsman of Nicaragua in connection with this interstate communication and, on July 27, 2006, transmitted this document to both parties.

28. On July 31, 2006, the Commission conveyed to Costa Rica the documents that the State of Nicaragua presented at the hearing held on July 18, 2006 in Guatemala, which contained the written version of its arguments as well as a series of annexes and evidentiary material.

29. On August 2, 2006, the State of Nicaragua sent the Commission its response to the request for observations made to it on July 5, 2006,[FN24] by the Commission when it forwarded the response of the State of Costa Rica of June 29, 2006.

[FN24] Unnumbered note of August 4, 2006, sent by electronic mail on August 1, 2006, and again transmitted via Note MPN-OEA/2129 of August 3, 2006, which the Permanent Mission of Nicaragua to the OAS sent on August 2, 2006.

30. On August 4, 2006 the Commission received a note dated July 24, 2006, in which the government of Nicaragua expressed its willingness to accept the offer of the IACHR to initiate a friendly settlement procedure.[FN25] On August 7, 2006, the Commission received a note dated August 4, 2006, in which the government of Costa Rica thanked the Commission for its offer but informed it that it was not timely at this juncture to initiate the friendly settlement procedure, bearing in mind the comments expressed after the hearing by the representatives of the State of Nicaragua to different media organizations.[FN26] On August 8, 2006, the Commission forwarded to the State of Costa Rica the note in which the Nicaraguan State accepted the invitation of the Commission to initiate a friendly settlement procedure and also transmitted to the State of Nicaragua the note whereby the Costa Rican State indicated that it was not timely at this juncture to initiate the friendly settlement procedure.

[FN25] Note MRE/DM/815/07/06 of July 24, 2006, transmitted via Note MPN/OEA/2130 of August 2, 2006, sent by the Permanent Mission of Nicaragua to the OAS on August 4, 2006.

[FN26] Note DM-240-06 of August 4, 2006, received on August 7, 2006.

31. On August 10, 2006, the Commission received a note in which the State of Costa Rica transmitted to the Commission in writing the arguments and observations of its representatives at the hearing held in Guatemala on July 18, 2006;[FN27] the Commission forwarded said information to Nicaragua on August 11, 2006. In this connection, on August 23, 2006, the State of Nicaragua wrote to the Commission requesting it to declare this brief from Costa Rica as not received because it was time-barred and constituted an edited version of the oral submissions at the hearing.[FN28] On September 7, 2006, the Commission informed the State of Nicaragua that, pursuant to Article 48 (e) of the American Convention, the IACHR may receive, if it so requests, oral or written statements from the parties concerned at any time in the proceeding. Furthermore, the Commission drew attention to the fact that the audio from the hearing is part of the record in the case and when it issues its decision on the matter, the Commission will take all of the opinions expressed by both parties into consideration.

[FN27] Note of July 18, 2006, transmitted via note DM-239-06 of August 3, 2006, received on August 10, 2006.

[FN28] Unnumbered note of August 21, 2006, transmitted via Note MPN-OEA/2136 of August 23, 2006, received on August 23, 2006.

32. On September 7, 2006, in view of the fact that the State of Costa Rica said that it was not timely at this juncture to initiate a friendly settlement procedure, the Inter-American

Commission, in accordance with Article 41(4) and (6) of its Rules of Procedure, decided to terminate its intervention in the friendly settlement procedure and continue to process the interstate communication. At the same time, bearing in mind the close connection between the considerations on admissibility and merits in the case, the IACHR, in keeping with Article 37(3) of its Rules of Procedure, decided to open the case, assign it number CI 01/06 (Interstate Case 01/06), and defer its treatment of admissibility until the debate and decision on the merits. Thus, in accordance with Article 38(1) of its Rules of Procedure, the IACHR requested the State of Nicaragua to present its additional observations on merits, and gave it two months to do so.

33. On September 7, 2006, the Inter-American Commission also decided to invite the two parties to a public hearing to address issues relating to merits in the case. The hearing was held on October 18, 2006, in the framework of Commission's 126th Regular Session. (Copies of the minutes and audio recordings of this hearing were transmitted to both states parties on November 9, 2006). During the hearing, the State of Costa Rica requested the Commission to suspend the hearing on the grounds that the Commission was not competent to examine the instant case because the State of Nicaragua had not formally and officially recognized the competence of the IACHR to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention. On that occasion, the President of the Commission informed both states parties that their arguments regarding the competence of the Commission in connection with this case would be analyzed in due course by the IACHR and requested that the hearing continue.

34. On October 19, 2006, the State of Nicaragua wrote to the Commission to confirm and submit documentation to show that on February 3, 2006, in a communication addressed to the Secretary General of the Organization of American States, it transmitted a note apprising him of the declaration concerning recognition by the State of Nicaragua of the competence of the Commission, and requesting him to transmit the contents of that declaration to the other states parties to the Convention and the members of the Organization of American States.[FN29] Said information was forwarded to the State of Costa Rica on October 23, 2006.

[FN29] Note MPN-OEA/2164/2006 of October 19, 2006, received on October 19, 2006.

35. On October 20, 2006, the State of Costa Rica wrote to the Commission in order to furnish additional information connected with the Fifth Meeting of the Binational Commission in the framework of which the Vice Ministers of Costa Rica and Nicaragua resumed talks to strengthen ties of friendship, cooperation, and joint development on migration and other relevant issues.[FN30] Said information was forwarded to the State of Nicaragua on October 23, 2006.

[FN30] Note DE-148-06 of October 19, 2006, received on October 20, 2006.

36. On October 23, 2006, the Commission forwarded to the State of Costa Rica the documents that the State of Nicaragua presented to the Commission at the hearing held on

October 18, 2006, which contained the written version of its arguments as well as a series of annexes and evidentiary material. That same day, the Commission transmitted to the State of Nicaragua the documents that the State of Costa Rica presented to the Commission at the hearing held on October 18, 2006, which contained the written version of its arguments as well as a series of annexes and evidentiary material.

37. On October 18, 2006, in the framework of the hearing, the State of Nicaragua had requested the Commission for an extension to present its observations on merits in the case. On October 23, 2006, the Commission wrote to both states parties to inform them that it had decided to grant a 15-day extension to the State of Nicaragua so that it might present its arguments on merits in the interstate case. That period started to run on the date that the period originally granted expired. Accordingly, the deadline for presentation of submissions on merits was put back until November 21, 2006.

38. On October 26, 2006, the Inter-American Commission wrote to the Secretary General of the Organization of American States to inquire if the State of Nicaragua deposited with the General Secretariat a declaration concerning recognition of the competence of the Commission to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention. The Commission also asked the Secretary General to inform it if, in the event that it had received said declaration, the General Secretariat transmitted a copy of it to the member states in keeping with Article 45 of the American Convention on Human Rights. In response to this inquiry, on October 27, 2006, the Director of the Department of International Legal Affairs -which is under the immediate orders of the Secretary General and supervises the Office of International Law- wrote to the Inter-American Commission to inform it that "on February 6, 2006 the General Secretariat received a note, which is enclosed, in which the Government of Nicaragua informs that in a declaration of January 26, 2006, it added a third paragraph to Declaration 49 of January 15, 1991, concerning the American Convention on Human Rights, in which it recognized the competence of the Commission to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention. Today, in accordance with Article 45 of the American Convention on Human Rights, a copy of that declaration will be transmitted to the member states of the Organization." [FN31] On November 1, 2006, the Commission wrote to both parties in this case in order to convey to them the inquiry made to the General Secretariat as well as the reply to that inquiry. On that occasion, the Commission informed the States of Nicaragua and Costa Rica of its decision to defer treatment of this matter until the debate and decision on the merits of the case.

[FN31] Note SG/DILA of October 27, 2006, received on October 27, 2006.

39. On October 26, 2006 the Commission received a note from the State of Costa Rica in which it reiterated its request that the IACHR declare itself incompetent to take up the interstate communication and expressed its categorical rejection of the competence of the Inter-American Commission to examine the communication presented by the State of Nicaragua against it on

February 6, 2006.[FN32] The Commission forwarded this note to the State of Nicaragua on November 1.

[FN32] Note DE-161-06 of October 25, 2006, received on October 26, 2006.

40. On November 3, 2006, the State of Costa Rica requested the Commission for information on the progress of the instant case, in response to which the Commission wrote to both states on the same day to advise them that “on September 7, 2006 the Inter-American Commission, in accordance with Article 37(3) of its Rules of Procedure, decided to defer its treatment of admissibility until the debate and decision on merits. In that connection, pursuant to Article 38(1) of its Rules of Procedure, the Commission requested the State of Nicaragua to submit its observations on merits. The pertinent portions of those observations would be transmitted to the State of Costa Rica so that it might present its comments in accordance with the above-cited Article 38(1) of its Rules of Procedure”.

41. On November 6, the Commission received a note from the State of Nicaragua in which the latter enclosed the Official Minutes of the Fifth Meeting of the Costa Rica-Nicaragua Binational Commission and said that the minutes in question are neither evidence nor constitute additional information on the present interstate case.[FN33] The Commission conveyed this note to the State of Costa Rica on November 8.

[FN33] Note MPN-OEA/2176 of November 3, 2006, received on November 6, 2006.

42. On November 9, 2006, the Commission received a note from the State of Nicaragua in which it reiterated that it duly deposited its declaration with the General Secretariat of the Organization of American States in a timely manner and recalled that the State of Costa Rica in its initial observations on the instant interstate communication accepted that the State of Nicaragua brought said declaration to the attention of the General Secretariat of the OAS on February 3, 2006, and, therefore, in its opinion, by virtue of the principle of openness, there was no detriment to the State of Costa Rica.[FN34] This information was transmitted to the State of Costa Rica on November 10, 2006.

[FN34] Unnumbered note of November 7, 2006, transmitted via Note MPN-OEA-2187 of November 9, 2006, and received on November 9, 2006.

43. On November 21, 2006, the Commission received a note from the State of Nicaragua in which its presented its observations on merits in the case[FN35]. This note was forwarded on November 22 to the State of Costa Rica, which was granted two months to submit additional observations on merits in accordance with Article 38 (1) of the Rules of Procedure of the IACHR.

[FN35] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

44. On January 19, 2007, the State of Costa Rica wrote to the Commission to request an extension of 15 days to present its observations on the Nicaraguan State's arguments on merits.[FN36] That same day, the Commission notified both parties of its decision to grant the requested extension of 15 days to the State of Costa Rica, which extension would start to run on the date that the period originally granted to the Costa Rican State to presents its submissions on merits expired. Accordingly, the deadline for presentation of arguments on merits was put back until February 5, 2007.

[FN36] Note DM-022-07 of January 17, 2007, received on January 19, 2007.

45. On January 16, 2007, the representatives of the State of Nicaragua wrote to the Commission to request a hearing in the framework of the 127th Session of the IACHR to address "questions of admissibility, merits and other petitions" relating to the case.[FN37] In that respect, on January 29, 2007 the Commission informed the State of Nicaragua that, having given consideration to its request and bearing in mind the stage of the proceeding and the fact that the Commission had twice held hearings on this case, it decided that it was not appropriate on this occasion to hold the hearing requested. The Commission also asked the State of Nicaragua to send any new information or facts that it deemed relevant and were not included in the record of the case in reference.

[FN37] Unnumbered note of January 15, 2007, received on January 16, 2007 and again transmitted by the Permanent Mission of Nicaragua to the OAS on January 16, 2007, in Note MPN-OEA, unnumbered.

46. On February 2, 2007 the State of Costa Rica wrote to the Commission to request that the IACHR declare, immediately and without delay, that it was not competent to take up the instant case; declare the communication presented by the State of Nicaragua to be obviously out of order and inadmissible; pronounce its opinion on the preliminary objections submitted by the Costa Rican State; express its position on the irregularities in the procedure; and clarify who, if any, were the victims in the petition.[FN38] On February 6, 2007 the Commission informed the State of Costa Rica that, as it had been notified on November 1, 2006, the IACHR decided to defer its treatment of this matter until the debate and decision on merits. That same day, February 6, the Commission transmitted the communication of the State of Costa Rica to the State of Nicaragua, together with its annexes, and also the reply that the Commission sent to the Costa Rican State.

[FN38] Note DM-027-07 of January 19, 2007, received on February 2, 2007.

47. On February 5, 2007, the State of Costa Rica presented to the Commission its observations on merits in the case,[FN39] which were transmitted to the State of Nicaragua through its Permanent Mission to the OAS on February 6, 2007. In that connection, February 7, 2007, the Commission received a note from the State of Nicaragua in which the representatives of the State of Nicaragua said that they did not consider themselves officially notified of the observations that the State of Costa Rica presented on the merits of the matter because the fax by which the Executive Secretariat transmitted said observations to the Nicaraguan State had reached the Ministry of Foreign Affairs in an incomplete state. For its part, on February 21, 2007, the Commission informed the State of Nicaragua that the communication of February 5, 2007, in which the State of Costa Rica presented its additional observations on the merits of the case, was transmitted to the Permanent Mission of the Republic of Nicaragua to the Organization of American States on February 6, 2007, and that, in accordance with the practice of the Inter-American Commission, transmission to the Mission amounts to notification of the State. The State of Nicaragua was also informed that the document was sent by courier to the Ministry of Foreign Affairs of Nicaragua on February 7 and newly transmitted in full by fax on February 8, 2007.

[FN39] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, and received on February 5, 2007.

48. On February 28th, 2007 the Commission received a note[FN40] by which the State of Nicaragua presented its observations in relation to the merits position of the State of Costa Rica. This note was transferred to the State of Costa Rica on March 7th, 2007.

[FN40] Unnumbered note of February 27th, 2007, received on February 28th, 2007.

III. POSITIONS OF THE PARTIES

49. The interstate communication presented by the State of Nicaragua alleges that the “persons injured by the human rights violations are the following:

- i. Natividad Canda Mairena, a Nicaraguan national, brutally mauled by two Rottweiler dogs, on November 10, 2005, at the entrance to the cemetery in Lima, Cartago, Costa Rica. [...]
- ii. José Ariel Urbina Silva (sic),[FN41] murdered in Guácima, Alajuela, Costa Rica, on December 4, 2005.
- iii. José Antonio Martínez Urbina, grievously injured in the same incident in which Urbina Silva (sic) was murdered; admitted to the Men’s Surgical Ward of Mexico Hospital, San José, Costa Rica.

- iv. Francisco Angulo García, grievously injured in the same incident in which Urbina Silva (sic) was murdered; admitted to the Men's Surgical Ward of Alajuela Hospital, San José, Costa Rica.
- v. Rito Antonio Obando, who sustained injuries by stoning in the same incident in which Urbina Silva (sic) was murdered.
- vi. Elder Angulo García, who sustained injuries by stoning in the same incident in which Urbina Silva (sic) was murdered.
- vii. The Nicaraguan migrant population in a vulnerable situation in Costa Rica.”[FN42]

[FN41] Throughout the processing of this communication the State of Nicaragua has referred to this alleged victim as “José Ariel Urbina Silva”, whereas the State of Costa Rica uses the name “José Ariel Silva Urbina”. The IACHR concludes from the official judicial documents in the record that his name is in fact José Ariel Silva Urbina.

[FN42] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 9-10.

50. The Commission notes that the interstate communication presented by the State of Nicaragua refers to three separate situations, distinctions for which are made in the descriptions of the positions of the parties, as follows:

- i. The particular situation of Mr. Leopoldo Natividad Canda Mairena.
- ii. The particular situation of Messrs. José Ariel Silva Urbina, José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando, and Elder Angulo García.
- iii. The situation of the Nicaraguan migrant population in a vulnerable situation in Costa Rica.

A. Position of the State of Nicaragua[FN43]

[FN43] In this section the Commission describes the position of the State with respect to the facts alleged in the instant communication. The positions of the State on the admissibility of the case and the competence of the Commission are described in the ions devoted in this report to the analysis of those questions.

Position of the State of Nicaragua on the case of Mr. Leopoldo Natividad Canda Mairena

51. The State of Nicaragua alleges in its interstate communication that on November 10, 2005, Mr. Leopoldo Natividad Canda Mairena had died, “brutally mauled, in long and public agony, by two Rottweiler dogs in the workshop owned by Mr. Fernando Zúñiga located at the entrance to the cemetery in Lima, Cartago, Costa Rica”[FN44]. The State of Nicaragua alleges that the incident “lasted approximately two hours and was witnessed by the owner of the workshop and the two dogs, Mr. Fernando Zúñiga Mora; the security guard, Luis Hernández; the head of the security company, Hugo Ceciliano Rodríguez; armed policemen, firefighters, and

curious onlookers.” The interstate communication also mentions that Mr. Canda Mairena “bled to death shortly afterwards in Max Peralta Hospital, with some 200 wounds in which bones were exposed, which caused his cruel and inhuman demise.” The State of Nicaragua attaches, inter alia, video recordings of the incident, the forensic medical report issued on December 5, 2005, by the Forensic Pathology Section of the Forensic Medicine Department of the Judicial Investigation Agency of Nicaragua (OIJ), as well as photographs taken at the autopsy.

[FN44] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 10 - 13.

52. The Nicaraguan State adds in its interstate communication that the policemen who witnessed the incident "simply acted as bystanders and, worse yet, if proven, prevented, according to an eyewitness, the intervention of third parties to aid the victim [...]. Testimonies given to the press and a video recording of the events, which was repeatedly broadcast in both Nicaragua and Costa Rica, suggest that the armed policeman had the opportunity to rescue Canda and even to shoot the dogs, since the animals withdrew to a sufficient distance to enable them to do so without endangering the victim of the attack.” The interstate communication presented by the State of Nicaragua also cites a Report of the Judicial Investigation Agency, according to which the death of Mr. Canda Mairena “could have been averted if the policeman who were at the emergency had seized at least two opportunities that arose before the firefighters acted using a fire hose.”[FN45] The State of Nicaragua alleges that, in spite of the foregoing, only two of the eight policemen have been prosecuted in connection with this case.

[FN45] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 14.

53. The State of Nicaragua argues that “the merely passive presence of armed police, as the authority of the State of Costa Rica at the incident, the delay of the OIJ in reporting its findings on the matter,[FN46] the public statements of government authorities playing down the incident, the failure to press charges, and the absence of a proceeding before a competent tribunal clearly show that the rules of due process are being violated and, in particular, that there has been a delay of justice in a case which, given its dimensions and complexity, warrants rapid responses and effective remedies from State of Costa Rica.”[FN47] Therefore, the State of Nicaragua alleges violation by the Costa Rican State of Articles 8 and 25 of the American Convention (Judicial Protection), due to the fact that the “OIJ allowed more than 70 days to pass before it presented the requisite report on the supposed investigations that it has carried out as a result of the human rights violations in which Mr. Natividad Canda Mairena lost his life. [It further argues that] the inexplicable delay in presenting the report and the additional six months granted to the Office of the Prosecutor to formally press criminal charges against those responsible constitute a delay of justice.”[FN48]

[FN46] The allegations of the State of Nicaragua cited in the instant report make frequent references to the OIJ, which are the Spanish initials of the Judicial Investigation Agency [Organismo de Investigación Judicial] in Costa Rica.

[FN47] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 19-20.

[FN48] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 36 and 37.

54. The State of Nicaragua also claims that Mr. Natividad Canda Mairena has been the victim of the discrimination to which Nicaraguan migrants who reside in Costa Rica are subjected. To show that the persons who witnessed the incident knew that Mr. Canda Mairena was Nicaraguan, the State cites a press clipping from Nuevo Diario newspaper of February 21, 2006, in which Mrs. Cipriano Mercedes Canda Mairena, says that her brother, Natividad, was the victim of an act of revenge by the security guard at Mr. Zúñiga's workshop, Guillermo Hernández, who is the father-in-law of another sibling who resides in Costa Rica, Regino Antonio Canda Mairena.”[FN49]

[FN49] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 39.

55. As an annex to the interstate communication, the State of Nicaragua provided a video to show what happened to Mr. Canda Mairena and the alleged passive reaction of the policemen. The video contains recordings of a series of television news programs broadcast in Nicaragua and Costa Rica. The selected recordings show how different television media covered the news of Mr. Natividad Canda Mairena's death, showing images of the attack, as well as opinions of people in both countries expressed through telephone calls made by viewers and in live interviews.

56. To demonstrate that the alleged discrimination occurred both at the time of the incident and during the processing of the case by the Costa Rican judicial authorities, the State of Nicaragua mentioned by way of an example a similar case that occurred on January 25, 2006, in which a Costa Rican minor aged seven (Jorshan Brown) was attacked by Rottweiler dogs in Puerto Limón, Costa Rica. In this incident, according to the State of Nicaragua, "the dog involved was promptly destroyed." Furthermore, the State of Nicaragua mentions that in this case the medical report was produced less than 72 hours after the attack, whereas in the case of Mr. Natividad Canda Mairena there was a delay of almost 2 months before the forensics report was included in the case file. Accordingly, the State of Nicaragua alleges violation by the State of Costa Rica of Article 24 of the American Convention (Right to equal protection), and states as its reasoning that “despite the seriousness of the incident, the treatment it received was different to that given, for example, to the case of the boy Jorshan Brown.”[FN50]

[FN50] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 36.

57. Another example that purportedly demonstrates the discrimination of which Mr. Canda Mairena was allegedly a victim, according to the State of Nicaragua, is the fact that "the police of the State of Costa Rica acted differently in the early hours of October 26, 2006, when the Costa Rican citizen, Cristian Rodríguez Nazareno, attempted to enter the workshop owned by Mr. Fernando Zúñiga, at the entrance to the cemetery in La Lima, Cartago, in circumstances similar to those of the Canda Mairena case; on this occasion, they shot at the Rottweiler dogs, killing one of them, and, so, saved his life, which they could have done in the case of the aforementioned Mr. Canda, who unfortunately died as a result of the attack by those dogs because the State police patently acted with passive negligence." [FN51]

[FN51] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

58. In its arguments on merits in the case, the State of Nicaragua drew attention to the fact that in this case "approximately one year has passed and the Office of the Prosecutor has only indicted two policeman, leaving uncharged six others who also committed offences by omission because they merely stood by as witnesses to the horrendous incident in which Natividad Canda was attacked by two Rottweiler dogs, to the satisfaction of the security guard and of the owner of the workshop and the dogs." [FN52] Based on the foregoing, in its interstate communication the State of Nicaragua contends that "in the particular circumstances of this case [...] there has been a delay of justice." [FN53]

[FN52] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

[FN53] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 15.

Position of the State of Nicaragua on the case of Messrs. José Ariel Silva Urbina, José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García

59. As regards Messrs. José Ariel Silva Urbina, José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García, all of whom are Nicaraguan citizens originating from the Department of Boaco, the State of Nicaragua alleges that on December 4, 2005, they were in a bar called Los Espejos, located in Guácima, Alajuela, in Costa Rica. According to the petition, there were some 25 to 30 other persons, presumably Costa Ricans, also in the bar. In its submissions, the State of Nicaragua described what happened in the bar as follows: "At approximately between 11:00 and 12:00 at night, without reason a group of Costa Ricans launched a verbal attack with xenophobic remarks against the six Nicaraguans who

were in the place, and began to insult them with coarse and offensive comments that caused feelings to run high because at least a sizeable portion of the persons present began to hurl abuse and encouraged the insults started by the group in question. For that reason, the six Nicaraguans decided to vacate the bar and leave the area. The first to leave the bar was José Ariel Urbina Silva (sic), a situation of which the group that had started the insults took advantage to verbally abuse the young Nicaraguan, who responded verbally. The aggressors in the bar moved from words to stones and for that reason the Nicaraguans opted to withdraw. Their assailants pursued them and two individuals caught up with them; one of them lunged at José Ariel Urbina Silva (sic) and, subsequently, caught hold of José Antonio Martínez Urbina. Another individual, holding a knife, attempted to attack Elder José Angulo García but his brother, Francisco Angulo García intervened in his defense and was injured by this attacker. Even though they had been assaulted with a knife, they were stoned by the crowd that surrounded them, without anyone coming to their defense or aid.”[FN54]

[FN54] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 23-24.

60. Later, in the framework of the public hearing held on July 18 in Guatemala, the State of Nicaragua furnished a video recording that contained a behind-the-scenes account of the events that occurred outside Los Espejos bar in Guácima, Alajuela after the Nicaraguan citizens decided to leave, presumably in reaction to the insults and verbal abuse prompted by their nationality. The video includes an interview with one of the victims, Mr. José Antonio Martínez, who describes how he was attacked in the street and confirms the version of the events that the State of Nicaragua presented to the Commission.

61. According to the interstate communication presented by the State of Nicaragua, as a consequence of the attack, Mr. José Ariel Silva Urbina died; Mr. José Antonio Martínez Urbina was admitted to hospital and treated for different injuries including some caused by a cutting and stabbing weapon; Mr. Francisco Angulo García was admitted to hospital and treated for multiple wounds caused by a cutting and stabbing weapon; while Messrs. Rito Antonio Obando and Elder Angulo García sustained minor injuries caused by impact of stones. The State of Nicaragua also mentions in the interstate communication that Mr. Francisco Angulo García was admitted to the Psychiatric Hospital because of problems assimilating what happened.

62. As to the reasons that allegedly prompted this incident, the State of Nicaragua argues that it may be concluded from the testimonies of the four surviving victims that the incident that occurred on December 4, 2005, "constitutes a xenophobic attack inasmuch as it arose from the insults and comments concerning nationality, an incident that cannot be considered an individual attack given the clear participation of 25 to 30 persons, presumably Costa Ricans, who were at the scene of the incident." The Nicaraguan State adds that the assailants were aware of the nationality of the victims, who mentioned in their testimonies that some of the persons at the scene knew them. Accordingly, the State of Nicaragua categorizes what happened as hate crimes.

63. The State of Nicaragua alleges violation on the part of the Costa Rican state of Articles 8 and 25 of the American Convention as a consequence of the fact that the "inexplicable delay" in the presentation of the report of the judicial investigation agency and the granting of an additional six months to the Office of the Prosecutor to formally charge those responsible constitute a delay of justice.[FN55] Furthermore, the State of Costa Rica claims that in addition to a delay of justice there have also been procedural faults, in as much as the person allegedly responsible for the death of José Ariel Silva Urbina has reportedly been released as a result of a precautionary measure.

[FN55] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 36 and 37.

Position of the State of Nicaragua on the Nicaraguan migrant population in a vulnerable situation in Costa Rica

64. As regards the Nicaraguan migrant population in Costa Rica, the State of Nicaragua argues that "the circumstances that have surrounded the case of Natividad Canda, as well as the murder of José Ariel Urbina and the attacks on Francisco Angulo García, Elder José Angulo García, José Antonio Martínez Urbina, Rito Obando and other companions, are merely outward symptoms of a much deeper underlying situation rooted in sentiments of xenophobia, intolerance, and rejection that reign in some sectors in Costa Rica, despite the solidarity and generosity that prevails in the vast majority of the noble Costa Rican people." [FN56]

[FN56] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 26 - 27.

65. In that connection, the State of Nicaragua alleges that the deaths of Messrs. Natividad Canda Mairena and José Ariel Silva Urbina are consequences of the prevailing absence of guarantees in Costa Rica arising from visible attitudes of xenophobia and discrimination.[FN57] It further alleges that these acts "generated a situation that demonstrates that the phenomenon goes further than might seem at first sight, since opinions and actions have emerged that demonstrate deep-rooted discrimination and xenophobia in Costa Rica." [FN58]. The Nicaraguan State adds that the "Canda case and, in particular, the Urbina Silva (sic) case, are two incidents of human rights violations that, while certainly very important, are nonetheless symptomatic of the climate of xenophobia that has existed and been accepted in Costa Rica for many years, as well as of the failure of the Costa Rican authorities to take steps against it. Accordingly, even had the Canda case not occurred, it is the treatment of this case and of a subsequent hate crime that resulted from it and from the climate of xenophobia that Costa Rica has failed to tackle properly, that constitutes a violation of human rights." [FN59]

[FN57] Written submissions presented by the State of Nicaragua in the framework of the hearing held by the Commission on October 18, 2006, p. 2.

[FN58] Written submissions presented by the State of Nicaragua in the framework of the hearing held by the Commission on October 18, 2006, p. 10.

[FN59] Written submissions presented by the State of Nicaragua in the framework of the hearing held by the Commission on October 18, 2006, p. 16.

66. The State of Nicaragua adds that "if the judicial authorities of Costa Rica had acted with urgency in the Canda case, which was rife with discrimination, xenophobia, and impunity, the Guácima lynching would surely have been avoided as would any other acts that may come about as a result of the impunity of those responsible for injuries originated by xenophobia and discrimination. The danger of not taking exemplary measures to counter the climate of xenophobia is that more hate crimes could be committed against Nicaraguans." [FN60] The Nicaraguan State also says that "the failure to adopt effective measures to ensure prompt justice and prevent impunity stimulates, at least indirectly, greater discrimination on the basis of nationality, which encourages intolerant sectors to continue their campaign of xenophobia and discrimination, exposing the migrant population to greater peril and risk." [FN61]

[FN60] Written submissions presented by the State of Nicaragua in the framework of the hearing held by the Commission on July 18, 2006 in Guatemala, p. 27.

[FN61] Written submissions presented by the State of Nicaragua in the framework of the hearing held by the Commission on October 18, 2006, p. 44.

67. According to the State of Nicaragua, "the inaction of the justice system and of the State itself in the investigation, prosecution, and punishment of those responsible in the horrific death of Natividad Canda Mairena, which occurred in a context of xenophobia that prevails in certain sectors in Costa Rica [...] intensified the climate of intolerance and discrimination in certain segments of Costa Rican society, which led to an atmosphere of "permissiveness" toward any attack on a Nicaraguan." [FN62]

[FN62] Unnumbered note of May 26, 2006, received on May 26, 2006.

68. The State of Nicaragua argues that the State of Costa Rica failed its obligation to ensure rights contained in Article 1(1) of the American Convention (Obligation to respect rights), manifested by the, at least remiss presence of armed police officers, who failed to protect the rights to life, humane treatment and security. The armed police officers -agents of the Costa Rican state- witnessed the horrific killing of Mr. Canda Mairena and did not shoot the dogs; in other words, the lives of the latter were given priority over the life of a human being. The failure to adopt effective measures to ensure that justice is promptly served and to avoid impunity stimulates, at least indirectly, greater discrimination for reasons of nationality, which encourages

intolerant sectors to continue their campaign of xenophobia and discrimination, exposing the migrant population to greater dangers.”[FN63]

[FN63] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 35 and 36.

69. To demonstrate that the cases of Messrs. Canda Mairena and Silva Urbina are not isolated incidents, the State of Nicaragua, in a note of June 5, 2006, drew the Commission's attention to another case that, according to its arguments, is an example of the delay of justice and impunity that exists in Costa Rica. The case in question concerns Ms. María José González Quintanilla, a Nicaraguan woman who, according to the enclosed press clipping, reportedly brought charges of sexual abuse against the Administrator of Calle Real Prison in Liberia, Costa Rica, where Ms. González Quintanilla was an inmate and worked as an assistant in the kitchen. The State of Nicaragua says that this trial is being held without due process guarantees.[FN64] Furthermore, in its brief on merits, the Nicaraguan State makes reference to another case which it points to as an example of discrimination and xenophobia. The case is that of Mr. Roger López González, “who, on September 25 of the year in progress, presented himself at the Consulate General of Nicaragua, bearing Costa Rican Resident’s Card 270-116248-51245, and, in a clear state of alarm reported that he had been the victim of attacks and death threats from a Costa Rican citizen in an incident that occurred in La Aurora, Heredia, Costa Rica, Mr. López Rodríguez claimed, had been reported to the offices of the OIJ, according to record 06-001969-0059-PE of the Office of the Assistant Prosecutor for Heredia. In light of the obvious danger and insecurity which Mr. López said he was in at that time, he said that he had decided to put up the property he owned for sale due to the fact that he could not continue to live in Costa Rica because of the constant threats, not only to himself, but also to his family, whom he had had to move to Nicaragua for safety. Mr López has since left Costa Rica after 17 years of legal residence.”[FN65]

[FN64] Unnumbered note of June 5, 2006, received on June 8, 2006.

[FN65] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

70. According to the State of Nicaragua, “in certain sectors there has arisen a marked climate of verbal violence, intolerance, and xenophobia as is apparent from publications produced by groups interested in stirring up hate and even violence against Nicaraguans in Costa Rica.”[FN66]. To shed light on the situation of supposed xenophobia that is allegedly encouraged in Costa Rica, the State of Nicaragua mentions in its interstate communication that on the days following the death of Mr. Canda Mairena a number of “jokes” and xenophobic displays appeared on different Internet web sites. By way of an example it mentions an electronic mail message dated November 11, 2005, which says, "Due to the recent events of bravery and heroism that showed that the dog is the Costa Rican's best friend (today more than ever), all of the below signed wish to present to the legislative assembly a bill to change the yiguirro [the

national bird of Costa Rica] thanks to the heroic dogs Oso and Hunter “Rottweiler” (sic), who took the initiative, cast fear aside, and redefined Costa Rican culture and valor against the invasion of the neighbors to the north. We propose that each Costa Rican family (not crossbred) should have two dogs. That the nicas should be vaccinated against rabies (for the sake of the dogs’ health). That the statute of Juan Santamaría be replaced with one of the Rottweilers that are the new national heroes, that a monument be erected in the Park of la Merced and that a demonstration be held every weekend led by these two puppies and anyone else who can come to La Carpio. Be a Costa Rican, take courage and pass on this message.”[FN67] The interstate communication presented by Nicaragua cited several other electronic mail messages in this vein. Furthermore, among the documents presented in the interstate communication, the Nicaraguan State includes a photograph reportedly circulated in Costa Rica, which shows a Rottweiler next to the national flag of Costa Rica, with the following legend: Hail to Our National Hero. O, noble dog, your Rottweiler breed, is an expression of love for us, as long as your eyes are on a nica, you will always be our national hero.”

[FN66] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 20.

[FN67] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 20 - 21.

71. In two videos provided by the State of Nicaragua (one presented with the interstate communication, and the other at the hearing of July 18 in Guatemala) there are also references to xenophobic electronic mail messages and jokes against Nicaraguans inspired by the attack on Mr. Canda Mairena. Through the images and the various interviews contained in the videos, the State of Nicaragua describes the feeling of vulnerability of Nicaraguan citizens in Costa Rica, the discrimination they experience on a daily basis, and, in particular, their employment opportunities and working conditions.

72. The State of Nicaragua has also attached to its interstate communication a comic strip published in Prensa Libre newspaper of November 23, 2005, which says: "Nica congressmen reportedly coming to talk about dog attacks. Set the dogs on them and don't let them go!"[FN68] in similar fashion, according to the Nicaraguan press,[FN69] jokes such as the following allegedly circulated in Costa Rica: “A Rottweiler came down from heaven and ate a nica. Wouldn't it be nice if 600,000 came down to clean up Costa Rica?;” “Why did they turn the hoses on the dogs? To wash away the bad taste.” The State of Nicaragua also reports that leaflets with a photograph of the dogs were circulated for the presidential elections, as were fake bank bills with a photograph image of the dogs.

[FN68] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 22.

[FN69] La Prensa newspaper of November 26, 2005. Press report enclosed as an annex to the communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006.

73. Nicaragua has also presented a series of documents designed to show that the generalized perception of the Nicaraguan migrant population in Costa Rica is discriminatory. In this connection, the State of Nicaragua presented the findings of a poll conducted by the Institute of Social Studies on Population (IDESPO) of the Universidad Nacional de Costa Rica. The poll was reportedly carried out by telephone, covered 600 Costa Ricans aged 18 or over from all over the country between August 3 and 10, 2005, and had a margin of error of 4% and a level of significance of 95%. According to the results of the poll, 88% of Costa Ricans admit that Nicaraguan immigrants suffer discrimination.[FN70]

[FN70] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 47.

74. The State of Nicaragua also drew the attention of the Commission to the results of a nationwide telephone poll conducted by the Institute of Social Studies on Population of the Faculty of Social Sciences of the Universidad Nacional in November, 2003,[FN71] to examine the perceptions of Costa Ricans with respect to Nicaraguan immigration. It was concluded from the survey that Costa Ricans perceive Nicaraguans as hard-working people from humble backgrounds, and the vast majority rated their work as important; however, there was also a large proportion of the Costa Ricans polled (33%) who do not regard Nicaraguan labor as necessary because it is harmful to, and means fewer jobs, for Costa Rican workers. According to the poll, Costa Ricans perceive Nicaraguans as ungrateful people with bad habits. According to this report, only half of the Costa Ricans polled consider that Nicaraguans have equal rights as persons, and they large majority (74%) are degrees that the Nicaraguan population suffers discrimination. Furthermore, according to the poll one of the aspects that most concerns Costa Ricans is their impact on social security in the country, in particular with respect to education and health. Thus, 79% of those polled consider that the Nicaraguan population poses a risk to the country's social security system.

[FN71] "La Población Costarricense de la GAM y su percepción sobre la inmigración nicaragüense y su impacto en Costa Rica". Telephone poll conducted by the Institute of Social Studies on Population of the Faculty of Social Sciences of the Universidad Nacional in November 2003, presented as Annex 4 of the documents furnished by the State of Nicaragua at the hearing held on July 18, 2006.

75. The State of Nicaragua has also presented to the Commission a report of June 2006 likewise prepared by the Institute of Social Studies on Population of the Faculty of Social Sciences of the Universidad Nacional.[FN72] According to this report, which is based on interviews conducted in March 2006, 77% of the persons thought that there was "much" discrimination against immigrants of Nicaraguan origin in Costa Rica, while 71% considered that there was little or no discrimination against persons of Colombian origin. According to this report, Costa Ricans do not consider that discrimination against immigrants targets all immigrant

groups equally. When the Costa Rican population was consulted about what rights immigrants should enjoy, more of those interviewed were in favor of Colombians, rather than Nicaraguans, having access and exercising the rights to public education (83.0% v. 81.9%), public health care services (73.3% v. 68.7%), bank loans (66.3% v. 62%), obtaining nationality (65.6% v. 58.1%) organizing into groups or associations to protect their rights (57.3% v. 51.0%) and bringing their families to live with them (48.5% v. 37.5%).

[FN72] “Identidades nacionales, integración y ciudadanía: percepciones hacia la inmigración”. Institute of Social Studies on Population of the Faculty of Social Sciences of the Universidad Nacional, presented as Annex 5 of the documents furnished by the State of Nicaragua at the hearing held on July 18, 2006.

76. The State of Nicaragua also offers as evidence the book “Otros Amenazantes. Los nicaragüenses y la formación de identidades nacionales in Costa Rica”, by the Costa Rican sociologist Carlos Sandoval García.[FN73] The book constitutes a study of how the media have presented the Nicaraguan community as a "problem" and a "threat" and examines how this media representation has to do with the traditional creation of the Nicaraguan as the “other” in the Costa Rican imagery. Accordingly, the book explores how the historical representations of Costa Rican nationality over recent centuries have underscored the "unique" nature of Costa Rica and also identify it with certain ethnic attributes, such as being inhabited by the most "white" population in Central America, which also speaks the "best" Spanish in the region, while historically Nicaraguans have been characterized for their "different" Spanish and dark skin. The book offers numerous examples of how the Nicaraguan population in Costa Rica is frequently "racialized" and criminalized, and analyzes different ways in which Nicaraguan women have been associated with prostitution. It also analyzes how jokes play a key role in the translation of “racialized” discourse to conventional wisdom and daily life. The author mentions that immigrants are perceived in Costa Rica as threats to the national identity, as the persons that commit most crimes, and as being responsible for exhausting the resources of the healthcare system. Moreover, according to this book, the health authorities in Costa Rica attribute certain diseases exclusively to the presence of "foreigners" and not to the health conditions that exist in the country.

[FN73] Sandoval García, Carlos: “Otros Amenazantes. Los nicaragüenses y la formación de identidades nacionales in Costa Rica”. Editorial de la Universidad de Costa Rica, San José, Costa Rica: 2006 (First edition: 2002). Presented as Annex 6 of the documents furnished by the State of Nicaragua at the hearing held by the Commission on July 18, 2006.

77. The State of Nicaragua also bases its arguments on a document prepared by José Luis Rocha Gómez, a consultant for the Latin American and Caribbean Demographic Center (CELADE), published by the United Nations,[FN74] which analyzes the attitudes toward Nicaraguan migrants and migration policies of officials in positions of influence in both Costa Rica and Nicaragua, and offers recommendations on migration policy designed to reduce the

adverse effects and enhance the positive consequences of migration. The document offers an analysis according to which the perception of government officials in Nicaragua is that as the country of origin they are the main losers because it causes a major drain of human capital, increasing numbers of families are broken up, and the human rights of Nicaraguans abroad are not observed. On the other hand, the perception of the Costa Rican authorities, according to this study, is that migration has a negative impact on the labor market, on social and immigration services, and on national security. According to this document, while for Nicaraguans the problem of irregular immigrants is the fault of restrictive policies in Costa Rica, for Costa Ricans immigrant irregularity stems from the desire to evade controls. Furthermore, the study finds that while agencies in Costa Rica consider that Nicaragua abandons its nationals abroad, the Nicaraguan authorities take satisfaction from their progress.

[FN74] Rocha Gómez, José Luis: “Análisis de percepciones y aportes para una política de migraciones internacionales en Nicaragua”. CELADE-UNFPA Cooperation Agreement. Santiago, Chile, January, 2006. Annex 7 of the documents furnished by the State of Nicaragua at the hearing held by the Commission on July 18, 2006.

78. The State of Nicaragua adds that the perception of Costa Rican citizens is that the violence and lack of security that exist in their country are caused by the Nicaraguans who live there. However, the Nicaraguan State argues that it is not true that Nicaraguan migrants are responsible for the majority of crime in Costa Rica and, to support this argument, cites in its interstate communication the First National Human Development Report (NHDR) prepared by the United Nations Development Programme (UNDP) in 2005, according to which, the number of foreigners serving prison sentences totals less than 10% of the prison population, and Nicaraguans account for less than 6% of convicted prisoners.[FN75]

[FN75] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 50.

79. In addition, the State of Nicaragua says that the press in Costa Rica has attributed to the Nicaraguan migrant population partial responsibility for the situation of the Social Security Fund, contributing to a climate of animosity toward migrants, and it adds, in relation to the Social Security health care services, that a practice exists in Costa Rica where, if a person is suspected of being an illegal, rather than receiving assistance, they are reported to the Office of Migration and Nationality, to be subjected to the full penalty of the law.[FN76]

[FN76] Unnumbered note of May 26, 2006, received on May 26, 2006, pp. 17 - 18.

80. The Nicaraguan State also makes reference to a series of studies by different agencies from which it might be concluded that there is generalized discrimination in Costa Rica against

the Nicaraguan migrant population. In this respect, the State of Nicaragua cites in its interstate communication an associated press report of August 22, 2005, which describes the conclusions of a joint study released by the Paniamor Foundation and Save the Children. According to the press report, the aforementioned organizations are concerned “at the discrimination against migrant children, especially of Nicaraguan origin, in education and health as well as in terms of participation. They are excluded from the exercise of those rights. [...] In order to enter the education system they must have certificates of studies from Nicaragua and approval from the Ministry of Foreign Affairs, which they must present to the Ministry of Education.”[FN77]

[FN77] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 45.

81. The State of Nicaragua also attaches to its interstate communication the concluding observations of the Committee on the Rights of the Child on the third periodic report of Costa Rica submitted under Article 44 of the Convention on the Rights of the Child. On that occasion, the Committee on the Rights of the Child recommended that the State of Costa Rica give particular attention to children belonging to vulnerable groups, i.e. indigenous populations, migrants, and those living in rural areas, and that funding be identified for programmes aiming at alleviating their disadvantage. Furthermore, the Committee mentioned its concern “at the limited access of indigenous children, migrant children and those living in rural areas, to basic education and health services, and at their low standard of living. The Committee also regretted the absence of information in the State party’s report on the implementation of its previous recommendation regarding the protection of children of migrant families in irregular situations against discrimination. [...] The Committee is concerned at information received whereby migrant children are still neither eligible for scholarships, nor entitled to take part in students’ councils.”[FN78]

[FN78] Committee on the Rights of the Child. Thirty-ninth session. United Nations CRC/C/15/Add.266, 21 September 2005. Report presented as an Annex the communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006.

82. The Nicaraguan State also presents a report prepared by Ms. Adilia Eva Solís, which was delivered to the Commission at a hearing held on March 4, 2005.[FN79] The report describes the difficulties encountered in Costa Rica by undocumented migrants, such as the requirements set by the Educational Development Directorates, which prevent the enrollment of children and adolescents if they or their parents do not have a temporary or permanent residence permit, in addition to the overexploitation of undocumented migrants in the workplace. Furthermore, according to the report, even though by disposition of the Costa Rican Social Security Fund medical services are to be provided to anyone who needs them, regardless of their migratory status, staff of the Costa Rican Social Security Fund report to the General Directorate of Immigration persons who go for a medical consultation and are found not to have a legal residence permit. The report also recognizes the efforts of the Costa Rican State to ensure the

basic rights of migrants, such as the creation of the Office of the Ombudsman and the design of public healthcare policies for the migrant population. The aforesaid report also notes that the Constitutional Court has disposed of a large number of actions for amparo against the requirement that boys and girls have a residence permit in order to be able to enroll in school, and has admitted such actions, ruling that such a requirement violates the right of children to education.

[FN79] Annex 3 of the documents furnished by the State of Nicaragua at the hearing held on July 18, 2006.

83. The State of Nicaragua also attached to its observations on merits in this case a report that the Rapporteurship on Migrant Workers and their Families of the IACHR published based on its visits to Costa Rica in 2001 and 2002. In its presentation, the State of Nicaragua cites this report and makes particular reference to the situation of discrimination against migrant workers, especially Nicaraguans, arising from practices in the general population. The State asserts based on the report the existence of discriminatory attitudes that consist of mistreatment by State officials; harassment, suspicion, and stigmatization by the local population; and abuse and discrimination in the labor market, in particular as regards wages and benefits. The State of Nicaragua concurs with the final observations and recommendations of the Rapporteurship, which mention that in Costa Rica situations exist that violate the human rights of migrant workers in different spheres, and note the existence of “a certain degree of discrimination against persons of Nicaraguan origin.” The Rapporteur also called for educational campaigns to be organized to inculcate tolerance and a sense of the value of immigrants’ contributions to Costa Rican society, as well as for steps to be taken to impede labor-related abuses. It also exhorted Costa Rica to carry out international commitments on refugees and torture victims. Furthermore, it urged Costa Rica to revise the immigration legislation to ensure that it not discriminate among migrant workers based on their social status. It also called on the Costa Rican government to apply the corresponding procedure to each person, based on the distinctions drawn in the national legislation among rejection, deportation, and expulsion. In turn it urged the State of Costa Rica to ensure the right to due process in each immigration proceeding, inform migrant workers about the legislation in place on these matters, and guarantee consular assistance. Finally, the Rapporteur urged the State of Costa Rica “to head up a campaign to build a cohesive society in which the human rights of all inhabitants of Costa Rica, including migrant workers, are respected and guaranteed.”

84. The Report of the Rapporteurship that the Nicaraguan State cites as a basis for its arguments, also recognizes the fundamental importance of highly positive practices adopted by the State of Costa Rica that benefit migrant workers and their families, such as the 1998 immigration amnesty and the agreements the Government of Costa Rica signed with Nicaragua and which are aimed not only at regularizing migratory flows, but also seek mechanisms to address the vulnerability of these persons, as well making available a series of services and benefits to migrant workers and their families, irrespective of their immigration status. The Report of the Rapporteurship also highlighted the importance of the decisions in the

Constitutional Chamber of the Supreme Court of Justice for the effective protection of the rights of migrant workers and their families in Costa Rica.

85. As confirmation that the above-alleged discrimination is generalized and affects the entire migrant population in Costa Rica, the State of Nicaragua mentions that the Law on Migration and Nationality (Law 8487 published on December 12, 2005, and entered into force on August 12, 2006) violates rights recognized in the Convention and other international human rights treaties. Consequently, the Nicaraguan State argues that the State of Costa Rica, whether by act or by omission, is an accessory to the acts of discrimination and xenophobia caused by the entry into force of the aforementioned law.[FN80]

[FN80] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

86. With respect to the contents of the law in question, the State of Nicaragua notes critically, inter alia, that: a) the law permits the arrest or deportation of any foreigner who is unable to show that they are in Costa Rica legally when required to do so by the Immigration Police; b) a foreigner's residence permit can be ordered cancelled if they have entered the country evading immigration controls; c) the law punishes any persons or companies that employ illegal immigrants as workers or provide accommodation to illegal immigrants; d) it makes distinctions based on economic status or cultural condition; e) it widens the area in which the immigration authorities may enforce the rule of "administrative refusal of entry," which would permit operations to be conducted in predominantly agricultural areas with a massive presence of Nicaraguan migrants; f) it violates due process guarantees because it does not provide any recourse against certain decisions of the immigration authorities; g) immigration policy is considered a matter of public security; h) the law does not establish the maximum lengths of time that foreigners may be held in custody under the control of the Immigration Police.

87. As a basis for these arguments, the State presents to the Commission several reports and opinions expressed by international agencies and organizations on the Nicaraguan Migration Law. Furthermore, the Nicaraguan State cites in its interstate communication remarks by the presidential candidates during their election campaigns criticizing the law. In that regard, the State of Nicaragua quotes campaign statements made by the current President of the Republic, Óscar Rafael de Jesús Arias Sánchez, who reportedly described the law as "draconian and Gestapo-like." [FN81] In later briefs, the Nicaraguan State says that the declarations of the President of the Republic should be taken as basic proof that xenophobia and discrimination exist in Costa Rica.

[FN81] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 53.

88. Finally, the State of Nicaragua argues that, coupled with the comments of President Arias, the fact that the State of Costa Rica has mentioned in its reply to the interstate communication that it does not overlook the fact that both countries face enormous challenges to prevent the rise of xenophobia between the two nations constitutes an admission by the Costa Rican State of the existence of xenophobia.[FN82]

[FN82] Unnumbered note of May 9, 2006, received on May 9, 2006 and unnumbered note of May 26, 2006, received on May 26, 2006, pp. 6 - 8.

B. Position of the State of Costa Rica[FN83]

[FN83] In this section the Commission describes the position of the State with respect to the facts alleged in the instant communication. The positions of the State on the admissibility of the case and the competence of the Commission are described in the sections devoted in this report to the analysis of those questions.

Position of the State of Costa Rica on the case of Mr. Leopoldo Natividad Canda Mairena

89. In its reply to the interstate communication of Nicaragua, the State of Costa Rica did not present arguments on the events in connection with Mr. Natividad Canda Mairena, and merely stated that the matter is being examined by the Judicial Branch in Costa Rica. The State of Costa Rica mentioned that the investigation of the case remains open and that evidence has been collected, together with witness testimony, expert opinions, and reports from the agencies that took part in the rescue, among other measures. The Costa Rican State also mentioned that the family of Mr. Natividad Canda Mairena filed an individual criminal complaint. In this respect, the State of Costa Rica reiterated its public expressions of regret at what happened to Mr. Canda Mairena, saying that “the circumstances of this tragedy will be investigated thoroughly in accordance with the procedures in force, and those responsible will receive the punishments prescribed by law.”[FN84]

[FN84] Note DE-039-06 of May 5, 2006, received on May 5, 2006, pp. 10 - 11.

90. In the brief containing its arguments on merits,[FN85] the State of Costa Rica mentioned that the case of the “death of Mr. Canda Mairena, is at an intermediate phase of the criminal proceeding in which two persons have been formally indicted.” The State of Costa Rica added in connection with the death of Mr. Natividad Canda Mairena that two persons had been charged with the crime of unintentional homicide by culpable omission, and that the preliminary hearing has been set for March 21, 2007, which showed that the authorities have continued to proceed diligently in the case. According to the State, based on the results of said hearing, the judge overseeing the intermediate stage would determine if the matter should go to trial.

[FN85] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

91. As an annex to its observations on merits in the case, the Costa Rican State presented to the IACHR a copy of the indictment and request for the opening of trial proceedings that the Assistant Prosecutor for Cartago filed against two officers of the public security forces for the crime of “unintentional homicide by omission” of which Mr. Leopoldo Natividad Canda Mairena was allegedly the victim. The alleged responsibility of the officials is based on the fact that they had the obligation and clear possibility to fire on the dogs, bearing in mind their position with respect to the animals, the visibility at the time, and other considerations.

92. According to the State of Costa Rica, “in none of the cases questioned by the State of Nicaragua has there been a delay of justice, violation of due process guarantees, or, much less, impunity, “apparent” or otherwise [...] and, furthermore, should any doubt exist, in spite of the explanations provided, the parties concerned have recourse to the Constitutional Court.”[FN86] In that connection, the Costa Rican State invokes the objection alleging failure to exhaust domestic remedies in the instant case.

[FN86] Note DM 183-06 of June 29, 2006, received on July 5, 2006, p. 6.

93. The State of Costa Rica confirmed that electronic mail and mobile telephone text messages circulated which alluded to the death of Mr. Natividad Canda Mairena, and through a press release issued by the Ministry of Foreign Affairs and Worship,[FN87] it expressed its profound disapproval for the contents of said messages that sought to make fun of an exceptionally distressing tragedy. The State of Costa Rica underscored in the aforesaid press release that “there are many day-to-day examples of harmonious and respectful coexistence between Costa Ricans and Nicaraguans. As far as human rights are concerned, the hospitals of Costa Rica do not inquire about nationality and provide, just as other institutions do, generous and humanitarian assistance.”

[FN87] Ministry of Foreign Affairs and Worship. Press release of November 17, 2005. Annex 15 to Note DE-039-06 of May 5, 2006, received on May 5, 2006.

Position of the State of Costa Rica on the case of Messrs. José Ariel Silva Urbina, José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García

94. In its reply to the interstate communication of Nicaragua, the State of Costa Rica mentioned that the matters concerning Mr. José Ariel Silva Urbina and other persons injured in

the same incident are being examined by the Judicial Branch in Costa Rica. In addition, the State of Costa Rica reiterated its public expressions of regret at the events that befell Mr. José Ariel Silva Urbina, saying that “the circumstances of this tragedy will be investigated thoroughly in accordance with the procedures in force, and those responsible will receive the punishments prescribed by law.”[FN88]

[FN88] Note DE-039-06 of May 5, 2006, received on May 5, 2006, pp. 10 - 11.

95. The State of Costa Rica merely mentioned that “the alleged culprit of this crime was identified two days after the acts that gave rise to the instant case were committed [...], however, since the liberty of a person is at stake, Costa Rican law provides that the concurrence of a number of circumstances is required to allow a preventive incarceration order” [...]. In the instant case it was not determined that the person named as the suspect was a flight risk or intended not to submit to the proceedings, since he had a stable job and family life. Therefore, there was no need, according to the appraisal of the circumstances made by the competent judge, to deprive him of liberty on a preventive basis.”[FN89] Furthermore, the Costa Rican State explained that “the events of December 4, 2005, were categorized on December 6 of that same year, that is, two days after the incident, as one count of unintentional homicide and two counts of attempted homicide, in accordance with the classifications contained in the Costa Rican criminal code [...] and not three months afterwards.”[FN90]

[FN89] Note DE-039-06 of May 5, 2006, received on May 5, 2006, pp. 22-23.

[FN90] Note DE-039-06 of May 5, 2006, received on May 5, 2006, pp. 23-24.

96. In the brief containing its arguments on merits,[FN91] the State of Costa Rica informed the Commission that the case of “the death of Mr. Urbina Silva (sic), has been given sufficient forward impetus by the authorities and that corresponding interest on the part of the victims and the witnesses has been lacking. However, according to information provided by the Office of the Prosecutor General, thanks to the latest steps taken to find all of the witnesses in the case of the death of Mr. José Ariel Silva Urbina, five eyewitnesses were located to take part in an identity parade to make a physical identification of the accused man, set for February 2, 2007. The criminal summons sought by the prosecution will be decided based on the results of that proceeding.” The Costa Rican State also explained that it is necessary to investigate not only the death of Mr. Silva Urbina, but also other offences, such as grievous injuries that other aggrieved parties may have sustained, so as to have sufficient evidence to indict the accused for the various crimes that might have been committed. Based on the foregoing, the Costa Rican State says that the Office of the Prosecutor has insisted on locating all of the witnesses and aggrieved parties in order to build a solid case.

[FN91] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

97. The State of Costa Rica submits that “in none of the cases questioned by the State of Nicaragua has there been a delay of justice, violation of due process guarantees, or, much less, impunity, “apparent” or otherwise [...] and, furthermore, should any doubt exist, in spite of the explanations provided, the parties concerned have recourse to the Constitutional Court.”[FN92] In that connection, the Costa Rican State invokes the objection alleging failure to exhaust domestic remedies in the instant case.

[FN92] Note DM 183-06 of June 29, 2006, received on July 5, 2006, p. 6.

Position of the State of Costa Rica on the Nicaraguan migrant population in a vulnerable situation in Costa Rica

98. According to the arguments of the State of Costa Rica, the information on the context in the country with respect to immigration serves further to highlight that the individual cases mentioned in the communication of Nicaragua are instances that are isolate, not only from each other, but also in relation the overall situation in the country and the way in which immigrants are generally treated.[FN93]

[FN93] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, p. 11.

99. In its reply to the interstate communication, the State of Costa Rica argues that "it is not reasonable to assert, much less assume as an absolute truth, that xenophobia and discrimination were at the root of the events alleged in the communication.”[FN94] The State of Costa Rica adds that it has publicly repudiated any display of xenophobia which, it says, are manifestations of minority sectors expressed in private and do not reflect the actions of the State or the sentiments of the majority of Costa Ricans.

[FN94] Note DE-039-06 of May 5, 2006, received on May 5, 2006, p. 25.

100. For the State of Costa Rica, “the deaths of Mr. Natividad Canda Mairena and Mr. José Ariel Silva Urbina are incidents that [the State] regrets and it shares the concern that they be clarified. However, they are isolated cases in Costa Rican society and in no circumstances were they framed by a context of xenophobia or discrimination.”[FN95]

[FN95] Note DM 183-06 of June 29, 2006, received on July 5, 2006, p. 6.

101. The State of Costa Rica mentioned in its reply to the communication of Nicaragua that there are reiterated displays of solidarity with the Nicaraguan people, and notes, for example, that in the 1980's the country was a refuge for many Nicaraguans who fled the dangers of the internal conflict that was being waged in their country; that in 1998 and 1999 Costa Rica implemented an immigration amnesty program for Central Americans in which the status of 152,000 people, 97% of whom were of Nicaraguan origin, was regularized; that the Costa Rican Social Security Fund provides emergency, pregnancy, and child delivery care to nationals and foreigners alike, even if the latter do not pay worker-employer contributions; that basic education in the country is free and compulsory for all minors without any discrimination; and that the Constitutional Court has consistently held in a number of judgments that foreigners and nationals have equal rights except where political rights are concerned.[FN96]

[FN96] Note DE-039-06 of May 5, 2006, received on May 5, 2006, p. 27.

102. In its observations on merits in the case,[FN97] the State of Costa Rica provided the Commission with information designed to show that it has responded with progressive measures to ensure the rights of the migrant population. The Costa Rican State says that, without understating the added social and cultural challenges faced by the migrant population as a result of the fact that Costa Rica has a large proportion of foreigners in its population, mainly of Nicaraguan nationality (who reportedly comprise 90%), broadly speaking, the challenges faced by the migrant population in Costa Rica are the same as those faced by Costa Rican nationals.

[FN97] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, pp. 11 et seq.

103. The Costa Rican State says that it has progressively developed a legal framework and a complex institutional framework that systematically and broadly guarantee the rights of immigrants.[FN98] As an example, the State of Costa Rica mentions a congressional bill that it prepared in consultation with sectors of civil society and pertinent international agencies in order to introduce reforms to the Migration Law currently in force. It also mentions with respect to the Constitutional Court, which became part of the country's institutional framework in 1990, that its decisions on the rights of foreigners (health, labor, education, access for students to scholarships, etc.) are another example of the gradual development of the country in this area.

[FN98] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, p. 12.

104. As regards access to rights for immigrants in Costa Rica, the State of Costa Rica refers in the brief containing its observations on merits,[FN99] to the constitutional framework established to protect these rights. In first place, it mentions that Article 19 of the Constitution provides that, with the exception of political rights, foreigners have the same individual and social rights and obligations as Costa Ricans. For its part, Article 33 of the Constitution in Costa Rica recognizes the equality of all persons before the law and expressly prohibits any distinctions contrary to human dignity. In that connection, the Costa Rican State cites a judgment of the Constitutional Court (Judgment 5965-94), which ruled that the Constitution embraces, first and foremost, the principal of equality of fundamental rights, and clearly excludes other possibilities for generic legal rules applicable to foreigners (such as those based on the condition of reciprocity or on discrimination). On this premise, the Constitutional Court interpreted that the right to equal treatment recognized in Article 33 of the Constitution must be considered a fundamental right held by nationals and foreigners alike, and not only the former.

[FN99] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, pp. 14 and 15.

105. In addition, the Costa Rican State assures the Commission that its Constitution includes a recognition of fundamental rights and permits access for all persons residing in its territory, without distinction as to nationality, to, inter alia, public health services, with first-rate specialists and drugs; special protection for minors; free preschool, primary, and secondary education paid for by the State; public universities of recognized academic excellence subsidized by the State; scholarships and school grants [bonos escolares] for both Costa Ricans and foreigners; programs providing decent housing, and labor legislation that requires employers to ensure certain basic conditions for their workers and a minimum wage. Furthermore, under the Constitution, all persons who reside in Costa Rican territory enjoy all the rights recognized in the Constitution and international treaties, subject only to the exceptions and restrictions provided in the Constitution and constitutional laws.

106. With respect to the observations of the State of Nicaragua on the Law on Migration and Nationality (Law 8487), the State of Costa Rica explained in its brief containing its observations on merits that said law is founded on the legitimate exercise by Costa Rica of its sovereignty and the discretion enjoyed by all states to determine the rules authorizing or governing the conditions under which foreigners may stay in their territory, which authority is recognized by the Inter-American Court of Human Rights in Advisory Opinion OC-18/03. Furthermore, the State of Costa Rica underscores that it has presented a proposed law to reform the General Law on Migration and Nationality, the purpose of which is to make its text consistent with the current

immigration situation and the requirements outlined by different national and international actors in the area of human rights and public security.

107. In the brief containing its observations on merits,[FN100] the State of Costa Rica furnishes the Commission with information on how Nicaraguans under its jurisdiction are ensured their rights in labor, education, health, and culture-related areas.

[FN100] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, pp. 16 et seq.

108. With respect to the right to work, the State of Costa Rica notes that this right is enshrined in Article 56 of the Constitution and that workers are also entitled to a number of basic working conditions, including a minimum wage, a maximum working day and week, vacations after a period of continuous work, and the right to a weekly period of rest, among others. Article 68 of the Constitution provides that "there shall be no discrimination as regards salary, benefits, or working conditions between Costa Ricans and foreigners, or with respect to any group of workers." the Costa Rican State also says that the Constitutional Court (in Judgment 1999-00616) ruled that a provision that required all employers to ensure that at least 90% of their employees were Costa Ricans was unconstitutional. The Constitutional Court confirmed that the right to work is a universal right and not only held by those of a particular nationality, and that the State has a duty to seek to ensure conditions so that everyone might have an honest, useful, and suitably remunerated occupation without discrimination on the basis of salary, benefits, or working conditions between Costa Ricans and foreigners. The Constitutional Court added in its judgment that the Constitution demands a full employment policy, which would be fictitious or nonexistent were it simply based on the exclusion of foreigners from positions of work.

109. The State of Costa Rica added that the prohibition against discrimination in the workplace is not only recognized in the Constitution but also in other regulatory provisions, such as the Labor Code (Article 622) and Law 2694 of 1960 (Article 1). The State also noted that Law 8107 of July 18, 2001, added a new title (Title 11, Prohibition to Discriminate) which consolidated a system of protection against discrimination in the workplace on behalf of workers who are not Costa Rican nationals.

110. As regards the right to education, the Costa Rican State says that there are migrant children of all ages in its education system, where minors of Nicaraguan origin represent around 4% of the total student population in the country, from preschool to third grade and in diversified education (secondary). It mentions that in 2001 alone, the Ministry of Public Education invested a total of 3,605.20 million colones in education for the migrant population and in the wake of various rulings by the Constitutional Court the benefits in the form of student scholarships for this child population have increased. The State of Costa Rica says that there are certain distinguishing features that shape the profile of Nicaraguan students due to the low enrolment ratio in comparison with the national average in Costa Rica, and, in response, the State has designed initiatives, such as the so-called "Aula Abierta" [Open Classroom] program, to provide

special instruction at schools with particular attention to the immigrant population and overage students.

111. On the subject of the right to housing, the State of Costa Rica presented the IACHR with a series of figures to show that in the period from 1989 to 2004, the State processed the applications of 5,379 families with at least one foreign member that applied for a Family Housing Grant [Bono Familiar para la Vivienda].

112. As to the right to health, the Costa Rican State observes that in accordance with the policy and institutional framework in place in Costa Rica, health services are available for anyone who needs them. The State admits that at present no undocumented foreigner can be assured of receiving such services in any category because the procedure requires a residence card or a work permit. Therefore, their access to services is sometimes limited by their irregular status. However, the State of Costa Rica mentions that the Constitutional Court has guaranteed this right without distinction as to nationality through its consistent case law and has ruled that health services must be guaranteed for all inhabitants of the Republic, regardless of their immigration status or their eligibility for admittance to the social security system. The State says that according to information from the Costa Rican Social Security Fund, the healthcare spending on foreigners in 2001 accounted for approximately 5% of total social security spending on health. The State adds that at the local community level primary health care is provided by Basic Comprehensive Healthcare Teams (EBAIS) and that access for immigrants to this system is facilitated by the fact that no requirements of any kind need be met. Furthermore, the State says that emergency healthcare is provided irrespective of the migratory status of the patient, although for consultations and internment the patient must have insurance. Finally, the State of Costa Rica cites the report of the Rapporteurship on Migrant Workers and their Families of the IACHR, published in 2002 following its visit to Costa Rica, which notes that while the State recognizes that in many cases undocumented migrant workers do not seek health services for fear of being deported, the government has a policy of not refusing health services to any person seeking them.[FN101]

[FN101] IACHR Annual Report 2002. Fourth Progress Report of the Rapporteurship on Migrant Workers and their Families in the Hemisphere. Chapter V, par. 247.

113. As regards the right to culture of the immigrant population in Costa Rica, the Costa Rican State says it has made efforts to improve the perception of the immigrant population in the country. For example, it mentions a documentary produced by the Costa Rican Cinematographic Production Center in 1998 entitled "Más allá de las fronteras" [Beyond our borders], which deals with the situation of young Nicaraguan migrant women who come to Costa Rica to work as domestic servants. It also mentions the support provided by the state for independent initiatives that work to raise awareness about the problems faced by immigrants, as in the case of a play entitled "El Nica".

114. The State of Costa Rica, after describing the legal framework governing the rights of migrants in its territory, says that the rights of migrants are also justiciable and enforceable, in

particular through the remedies of habeas corpus and amparo. In this connection, the Costa Rican State cites Article 48 of its Constitution, which enshrines the right of all persons, without distinction between Costa Ricans and foreigners, or based on the migratory status of the latter, to file a petition of habeas corpus to ensure the liberty and well-being of persons or to present an action for amparo to protect or repair other rights enshrined in the Constitution and international human rights instruments. Both actions must be brought before the Constitutional Chamber of the Supreme Court Justice. The State adds that neither remedy is subject to formal procedural requirements and both are disposed of in record time by the Constitutional Chamber of the Supreme Court Justice. Furthermore, according to the State of Costa Rica these remedies operate without prejudice to other actions provided in the body of laws for protection of human rights in other areas, such as labor-related lawsuits in the ordinary courts, administrative proceedings before the State, actions to protect proprietary claims, etc.

115. The State of Costa Rica observes that through the jurisprudence of the Constitutional Court protections for the basic rights of health and education have been broadened and developed for all the country's inhabitants, be they foreigners or nationals, which has led to the availability of emergency healthcare and child delivery services for all persons no matter if they contribute to the social security system or not. The State notes, furthermore, that the rulings of the Constitutional Court have favored the rights of migrant children and recognize that every child in the territory of the Republic is entitled to all of the benefits contained in the Convention on the Rights of the Child

116. In its brief containing its observations on merits in the case, the State of Costa Rica mentions that supplementing the various mechanisms for protection of human rights of migrants in Costa Rica are a series of good state practices in the area of immigration, including the 1999 Immigration Amnesty, the activities of the Permanent Forum on Migrant Populations, and the management of migratory flows by the Technical Area on Migrant Labor of the Ministry of Labor, among others.

117. With respect to the Immigration Amnesty, the State of Costa Rica notes that by June of 1999 around 152,000 Central Americans, 97% of them of Nicaraguan origin, had taken advantage of the amnesty to regularize their migratory status and become residents. With respect to the activities of the Technical Area on Migrant Labor of the Ministry of Labor and Social Security, the State mentioned that field research projects have been carried out since approximately since 1996 to study developments in the labor market and to determine the real situation with respect to the labor conditions of migrants in the country, especially Nicaraguans, with particular attention given to monitoring seasonal agricultural programs. As regards the Permanent Forum on Migrant Populations, the Costa Rican State explains that this forum was created in 1995 among the offices of the Ombudsman to discuss the situation of the migrant population Costa Rica, as well as possible responses by the State to deal with this phenomenon.

118. Based on the foregoing, the State of Costa Rica says that it is fair to conclude that there is no structural vulnerability for immigrants, but that, to the contrary, it has been the practice of the State to try to respond to the needs of the foreign population in the country.[FN102] According to the State of Costa Rica, based on a careful analysis of the arguments presented by the State of Nicaragua it may be reasonably concluded that the allegations, while regrettable and requiring

the due attention of the Costa Rican authorities, are not sufficient to assert that there exists in Costa Rica the climate of discrimination and xenophobia that the State of Nicaragua seeks to create.

[FN102] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, p. 28.

119. While the State of Costa Rica recognizes that one of the consequences of the massive immigration of Nicaraguans to its territory is that certain sectors of the population regard immigrants with distrust, it maintains that that is a logical consequence of migration that occurs in any country with large migrant flows. In that connection, the State of Costa Rica once more cites the report that the Rapporteurship on Migrant Workers and their Families of the IACHR published in 2002 following its visit to Costa Rica, which explains that the interaction between the local population and resident foreigners may often cause friction as a result of competition, resentment, or lack of understanding. In this respect, it should be noted that migrant workers, especially undocumented ones, are especially vulnerable to expressions of xenophobia and discrimination that are latent in every society. However, the Rapporteurship observes that the discrimination suffered by migrant workers and their families does not reflect a State policy, but rather has to do with a negative predisposition with respect to migrant workers on the part of the population.[FN103] A similar interpretation of the phenomenon can be found in a 2002 Study prepared by the Inter-American Development Bank, which the State of Costa Rica cites in its observations on merits, and according to which the results –and especially the high levels of participation in the labor market suggest that Nicaraguans, like other groups of immigrants who have chosen to migrate, are vulnerable rather than excluded.[FN104]

[FN103] IACHR Annual Report 2002. Fourth Progress Report of the Rapporteurship on Migrant Workers and their Families in the Hemisphere. Chapter V, pars. 145 and 147.

[FN104] Funkhouser, Edward et al. Social Exclusion of Nicaraguans in the Urban Metropolitan Area of San Jose. Costa Rica. BID, 2002, p. 3. Cited by the State of Costa Rica in its Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, p. 31.

120. The Costa Rican State also cites a study published by the Central American Population Center in 2006, which says that “several recent government efforts have moved in the direction of a more integrated social policy towards Nicaraguan migrants. These include a Program on the Improvement of Quality of Life and the Integration of Migrants in Costa Rica undertaken by the Second Vice-President of Costa Rica. In addition, the 2002-2006 National Development Plan includes a specific component addressing the welfare of Nicaraguan migrants and members of the Costa Rican and Nicaraguan governments have produced a draft Binational Policy on Migration.”[FN105]

[FN105] Marquette, Catherine M. Nicaraguan Migrants in Costa Rica. Población y Salud en Mesoamérica. Electronic bulletin. Volume 4, No. 1, Technical Report 1. July-December, 2006., p. 16. Cited by the State of Costa Rica in its Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, p. 40.

121. The State of Costa Rica also refers to the role of the press, in particular to its social responsibility in propagating stereotypes that shape public opinion. In this connection, the State of Costa Rica cites and presents as evidence several articles published in the Nicaraguan press, and argues that they disseminate messages of hate, stir up irresponsible nationalist sentiment, and even go so far as to urge Nicaraguans to take up arms on Costa Rican soil.

122. Finally, the State of Costa Rica says that “both States should take steps to continue constructing a positive, though complex, relationship between the two nations. This is a shared responsibility and should be reflected by national agreements. For its part, the Costa Rican State undertakes to continue to move forward in providing effective protection for the human rights of foreigners, 90% of whom are of Nicaraguan origin; as well as engaging in dialogue in binational forums to look for ways to strengthen human development in both countries.”[FN106] It should also be noted that the State of Costa Rica has emphasized that to say that both Nicaragua and Costa Rica face enormous challenges to prevent the rise of xenophobia between the two nations is not an admission that a climate of xenophobia exists [...]; quite the contrary, it constitutes a recognition of the real situation between the two nations with the sound intention for the two states to adopt preemptive measures to strengthen relations between the two peoples. To ignore this reality, rather, would be to support it.”[FN107]

[FN106] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007, p. 35.

[FN107] Note DM 183-06 of June 29, 2006, received on July 5, 2006, p. 3.

IV. ANALYSIS

A. Preliminary considerations concerning the processing of this interstate communication

123. In this section the Commission analyzes the rules that authorize and govern the processing by the Commission of cases in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention.

124. The American Convention, at Section 3 of its Chapter V, establishes the competence of the Inter-American Commission on Human Rights. Article 44 of the Convention refers to the authority of the Commission to process petitions that contain denunciations of violation of the Convention by a State Party, which may be lodged by any person or group of persons, or any

nongovernmental entity legally recognized in one or more member states of the Organization. For its part, Article 45 of the Convention clearly determines the competence of the Commission to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention, provided that both the state party that presents the communication and the state party against which it is presented shall have declared, upon depositing their instrument of ratification of or adherence to the Convention, or at any later time, that they recognize the competence of the Commission to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention. Declarations concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.

125. Articles 46 and 47 of the Convention, for their part, concern the admissibility requirements to be met by both petitions presented under Article 44 and communications lodged pursuant to Article 45. Next, Section 4 of the Chapter V of the American Convention governs all the aspects of the procedure to be followed by the Commission upon receiving a petition submitted in accordance with Article 44 or upon receiving a communication presented pursuant to Article 45, if they alleged violation of any of the rights protected by the Convention.

126. Furthermore, Article 48 of the Rules of Procedure of the IACHR provides that when a state party to the American Convention that has accepted the competence of the Commission to receive and examine such communications against other states parties lodges a communication against another state, the Commission shall transmit it to the state party in question whether or not it has accepted the Commission's competence. If it has not accepted that competence, the communication shall be transmitted in order that the state concerned may exercise its option to recognize the competence of the Commission in the specific case that is the subject of the communication. Furthermore, according to the aforesaid Article 48, if the State in question has accepted the Commission's competence to consider a communication from another state party, the respective procedure shall be governed by the provisions concerning the processing of all petitions lodged with the Commission, insofar as they apply.

127. It may be concluded from the foregoing that both the American Convention and the Rules of Procedure of the IACHR have provided that communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention, are governed by the same rules of procedure and must meet the same requirements as petitions containing denunciations or complaints that are presented by any person, provided that they also satisfy the specific requirements set forth in article 45 of the Convention, the foregoing without prejudice to the fact that the applicable procedures and requirements must take into consideration the special characteristics and purposes of the mechanism for communications between states.

128. In presenting its communication, the State of Nicaragua said that it did so "specifically in accordance with the requirements set down in Articles 61 (1), (2), and 48 to 50 of the American Convention on Human Rights". At the same time, the Nicaraguan State requested that "this petition be processed in accordance with Articles 48 to 51 of the American Convention on Human Rights and, therefore, that the State of Costa Rica be requested to provide a report." Furthermore, the State of Nicaragua said that its interstate communication was in keeping with the terms of the appropriate form of the IACHR as an obligatory prior step to the introduction of

cases referred to the Inter-American Court of Human Rights. The State of Nicaragua invokes, for this case, the procedure determined by the Inter-American Court of Human Rights in the Case of Viviana Gallardo et al.”

129. Throughout the proceeding in this case, the State of Nicaragua has held that the communication that it presented against the State of Costa Rica should not have been processed under Articles 45 et seq. of the Convention, but pursuant to Article 61 of the American Convention on Human Rights, which only makes reference to Articles 48 to 50 of that instrument.

130. In this connection, the Commission notes that the American Convention is an integral whole that must be interpreted in its entirety, and the Commission is required to apply and comply with each and every one of the articles that the Convention contains. It is the duty of the organs of the system to ensure the international protection that the Convention provides, taking into account the totality of the framework agreed on by the states. Accordingly, if Article 45 of the Convention specifically recognizes the competence of the Commission to admit and examine communications between states, and Articles 46 and 47 expressly set out the requirements to be fulfilled by such communications in order to be admitted by the Commission, in no circumstances could the IACHR ignore these articles and process an interstate communication solely under Articles 48 to 51 of the Convention as the State of Nicaragua has requested. Moreover, Article 48 (a), invoked by the State of Nicaragua, provides that if the Commission considers the communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations. Accordingly, Article 48 itself compels the Commission to make a determination on admissibility, and to do so in accordance with Articles 46 and 47 of the Convention.

131. As the State of Costa Rica has mentioned, application of Article 45 of the Convention is an obligatory and logical prerequisite since otherwise the competence to be exercised by the Commission would not exist.

132. The Commission also recalls that the Matter of Viviana Gallardo et al.,[FN108] to which the State of Nicaragua refers, is a case that originated from the action of a state party that submitted to the Court for consideration a case of possible violation of human rights enshrined in the Convention imputable to the same state, that recognized ipso facto the competence of the Court to examine cases concerning interpretation or application of the Convention. On that occasion, the State said that it "formally waives the requirement of the prior exhaustion of the domestic legal remedies and the prior exhaustion of the procedures set forth in Articles 48 to 50 of the Convention," in other words, processing by the Inter-American Commission. It declared the purposes of that waiver was "to enable the Court to 'consider the instant case immediately and without any procedural obstacle.'" In that instance, the Inter-American Court decided unanimously not to admit the application of the Government of Costa Rica, requesting the Court to examine the matter of Viviana Gallardo et al., but to grant the subsidiary plea of the government of Costa Rica and refer the matter to the Inter-American Commission on Human Rights. Therefore, the case of Viviana Gallardo et al. confirms the need to exhaust the proceeding before the Commission.

[FN108] I/A Court H.R., In the Matter of Viviana Gallardo et al. Series A No.G 101/81.

133. In reaching its decision in the Matter of Viviana Gallardo et al., the Court also concluded that the procedures before the Commission cannot be dispensed with in this kind of case without impairing the institutional integrity of the protective system guaranteed by the Convention. The Court further found obiter dictum that "[t]hese procedures may therefore not be waived or excused unless it were to be clearly established that their omission, in a specific case, would not impair the functions that the Convention assigns to the Commission, as might be the case when a matter is initially presented by a State against another State and not by an individual against a State." [FN109] However, such exceptional circumstances must be demonstrated and it would be wrong to conclude that the proceeding before the Commission could be dispensed with in all interstate cases. In any case, the State of Nicaragua presented its communication to the Commission and requested it to process it in accordance with Articles 48 to 50 of the Convention and, in so doing, accepted the processing of the communication by the IACHR in the terms established by the Convention, including a determination as to the competence of the IACHR and the admissibility of this communication.

[FN109] I/A Court H.R., In the Matter of Viviana Gallardo et al. Series A No.G 101/81, par. 25.

134. Based on the foregoing, the Inter-American Commission considers that in processing the instant interstate communication under Articles 45 et seq. of the Convention, it acted in full accordance with the provisions contained in the American Convention and in its Rules of Procedure.

135. The State of Nicaragua has also protested the decision of the Commission to grant an extension to the State of Costa Rica to present its reply to the interstate communication, even though the extension was requested after the time limit for the Costa Rican State to submit its reply had expired. The Commission is aware that the time limit for the State of Costa Rica to submit its reply to this interstate communication expired on April 15, 2006, with no reply forthcoming from said State. Then, on April 24, 2006, the State of Costa Rica sought an extension of 15 days to present its reply and on April 27 the Commission decided to grant a single extension of eight days for the State of Costa Rica to respond to the interstate communication.

136. However, in the practice of the Inter-American system for protection of human rights both the Commission and the Court have determined that a delay in meeting a deadline may be overlooked provided that the delay is not considered excessive within the necessary limits of time and reasonableness. "The Court has exercised flexibility vis-à-vis the periods established in the Convention and in its Rules of Procedure [...] and has often granted extensions requested by the parties when they have shown reasonable cause." [FN110] Thus, this is not the first time that the organs of the system have granted an extension to a party, even after the time limit has expired, provided there has been reasonable cause to do so. [FN111] In the instant case, the

Commission finds that the delay of State of Costa Rica in presenting a request for an extension cannot be considered excessive.

[FN110] I/A Court H.R., Loayza Tamayo Case. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, par. 34.

[FN111] See I/A Court H.R., Castillo Páez Case. Preliminary Objections. Judgment of January 30, 1996. Series C No. 24, pars. 34, 35 and 36. See also I/A Court H.R., The “Panel Blanca” Case (Paniagua Morales et al). Preliminary Objections. Judgment of January 25, 1996. Series C No. 23, pars. 37 and 39.

137. Above all, the Commission takes the view that, particularly since this is a case between states, it is especially important to exercise flexibility with time limits so as to preserve the possibility of balanced exchanges between the two states in the interests of attaining justice. As this is a case in which the relations between two OAS member states are at stake, the Commission considered it essential to listen to the opinions of both states on the matter, since the effects of not hearing one of the parties in this case by reason of an expired deadline could have seriously affected relations between these two neighboring nations. In this connection it is worth recalling the position adopted by the Court in the sense that “the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved.”[FN112].

[FN112] I/A Court H.R., Cayara Case. Preliminary Objections. Judgment of February 3, 1993. Series C No. 14, par. 42; The “Panel Blanca” Case (Paniagua Morales et al). Preliminary Objections. Judgment of January 25, 1996. Series C No. 23, par. 38.

138. It is on the basis of these principles that the Commission considers that to grant an extension to the State of Costa Rica, so that it might present its observations on the communication that the State of Nicaragua lodged against it, was fully justified within the limits of time and reasonableness necessary to preserve a balance between justice and legal certainty. Therefore, the Commission strenuously rejects the allegations in which the Nicaraguan State denounces an “apparent partiality of the Executive Secretariat toward the Respondent State” and reiterates that both the Commission and its Executive Secretariat have acted in an absolutely objective and impartial manner in processing this communication and have proceeded at all times within the limits set forth in the American Convention and the Rules of Procedure of the IACHR.

139. The State of Costa Rica, on the other side, asserted that it is convinced that there has been a series of irregularities in the processing of the instant communication[FN113], and thus the Commission will analyze these assertions.

[FN113] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.P. 10.

140. In first place, the Costa Rican State alleges irregularities connected with the decision of the Commission to join its examination of admissibility and merits as provided in Article 37(3) of its Rules of Procedure. In that regard, the Costa Rican State has mentioned that the note of the Executive Secretariat “would appear to suggest a connection between the ‘non-acceptance’ of the friendly [settlement] procedure and the joinder of the admissibility stage with the debate and decision on merits.”[FN114] The State of Costa Rica adds that the Commission never justified that joinder and thereby violated a fundamental requirement in the proceeding.

[FN114] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

141. The Commission notes that Article 37(3) of its Rules of Procedure empowers it, in exceptional circumstances, to open a case but defer its treatment of admissibility until the debate and decision on the merits. The above-cited article also provides that the case shall be opened by means of a written communication to both parties. Furthermore under its Rules of Procedure, the Executive Secretariat is authorized to receive and process the correspondence addressed to the Commission. However, the applicable rules do not require the Secretariat to inform the parties in writing which exceptional circumstances the Commission weighed in reaching its decision to join the stages on admissibility and merits in the case. The IACHR considers that those exceptional circumstances are amply attested in the instant report and utterly rejects any accusation that the Commission has committed irregularities in processing this communication based on the misinterpretation of a note transmitted by its Executive Secretariat.

142. In addition, the State of Costa Rica has mentioned that it finds it unacceptable that the letter notifying it of the decision of the Commission to convene a hearing and join the stages on admissibility and merits should have been entitled "Interstate Case 01/06 Nicaragua v Costa Rica" without any basis for doing so.[FN115] In that respect, the Commission is mindful that the above-cited Article 37 of the Rules of Procedure of the IACHR, empowers the Commission to open the "case" but to defer its treatment of admissibility until the debate and decision on the merits. Upon reaching the stage on merits, all petitions and communications received by the Commission are registered as "cases" pursuant to the provisions contained in Articles 37(2) and 37(3) of its Rules of Procedure.

[FN115] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

143. Finally, the State of Costa Rica has also protested the decision of the Commission to convene a hearing before the time limit granted to the State of Nicaragua to present its observations on merits had elapsed.[FN116] On this point, Article 38 of the Rules of Procedure of the IACHR, in establishing the applicable procedure for cases in the merits stage, provides at paragraph five that “[i]f it deems it necessary in order to advance in its consideration of the case, the Commission may convene the parties for a hearing.” Moreover, Article 62 of the Rules of Procedure provides that “[h]earings on petitions or cases shall have as their purpose the receipt of oral or written presentations by the parties relative to new facts and information additional to that which has been produced during the proceeding. The information may refer to any of the following issues: admissibility; the initiation or development of the friendly settlement procedure; the verification of the facts; the merits of the matter; follow-up on recommendations; or any other matter pertinent to the processing of the petition or case.” The Commission considers that hearings are the opportune moment for parties to present any document, witness testimony, expert opinion, or evidence in connection with the case. Therefore, there was no rule or reason to prevent the IACHR from convening a hearing when it did. It is worth noting, furthermore, that the Commission did not exclude the possibility that the State of Costa Rica present its written arguments in the time duly allotted for that purpose.

[FN116] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

B. Competence of the Commission under Article 45 of the American Convention

144. The first paragraph of Article 45 of the American Convention requires the express acceptance for its organs to examine interstate communications. As the Inter-American Court has held, the Convention is unique among international human rights instruments in making the right of private petition applicable against State Parties as soon as they ratify the Convention; no special declaration to that effect is required for individual petitions, although it must be made for inter-State communications.[FN117]

[FN117] I/A Court H.R., In the Matter of Viviana Gallardo et al. Series A No.G 101/81, par. 22.

145. In this case the communication was presented by the State of Nicaragua against the State of Costa Rica and, therefore, it is necessary to determine if both states have declared their recognition of the competence of the Commission to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention.

146. The second paragraph of Article 45 of the Convention states, in first place, that communications presented by virtue of said article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. Accordingly, the Commission must ascertain if the State of Nicaragua made such a declaration.

147. According to the information in the record, on February 6, 2006, Nicaragua presented a note to the General Secretariat in which it announced that the Government of the Republic of Nicaragua had added a third paragraph to Declaration 49 of January 15, 1991, concerning the American Convention on Human Rights, by which it declared that it recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention, under the terms of Article 45 thereof.

148. The second paragraph of Article 45 of the Convention states, in second place, that the Commission shall not admit any communication against a State Party that has not made such a declaration. Accordingly, the Commission must ascertain if the State of Costa Rica made such a declaration.

149. According to the information in the record, the State of Costa Rica deposited with the General Secretariat of the OAS its declaration of acceptance of the competence of the Commission to receive and examine communications between states on July 2, 1980. The Costa Rican State deposited this declaration at the same time as it presented its instrument of ratification of the Convention, a fact disputed by neither of the parties.[FN118]

[FN118] The text of the declaration of the State of Costa Rica reads as follows: “That Costa Rica declares that it recognizes, without conditions and while the American Convention on Human Rights remains in effect, the competence of the Inter-American Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of human rights established by the cited Convention”.

150. The third paragraph of Article 45 of the Convention does not establish a requirement but the power of states to decide if their declarations concerning recognition of competence are made to be valid for an indefinite time, for a specified period, or for a specific case.

151. A reading of the declarations made by both states to recognize the competence of the Commission to receive and examine communications between states leads to the conclusion that neither of them exercised the option to establish time constraints or any other limits on the competence of the Commission. The Commission analyzes below the moment at which those declarations came into effect.

152. Finally, the fourth paragraph of Article 45 of the Convention provides that declarations shall be deposited with the General Secretariat of the Organization of American States,[FN119] which shall transmit copies thereof to the member states of that Organization. Accordingly, the

Commission must verify if both states made the necessary deposit with the General Secretariat and if the latter duly transmitted them to the OAS member states.

[FN119] The foregoing is consistent with the Charter of the OAS, Article 112 of which provides, "The General Secretariat shall also perform the following functions: (f) Serve as depository of inter-American treaties and agreements, as well as of the instruments of ratification thereof".

153. As mentioned in the preceding paragraphs, Costa Rica deposited with the General Secretariat of the OAS its declaration of acceptance of the competence of the Commission to receive and examine communications between states on July 2, 1980, and neither of the parties in this case have disputed that deposit.

154. As to the deposit by the Nicaraguan State of its declaration of acceptance of the competence of the IACHR, the Commission notes that the State of Nicaragua, upon presenting its interstate communication, said that its declaration of recognition of the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the American Convention on Human Rights, was published in Official Gazette, La Gaceta, No. 22 of January 31, 2006 and "brought to the attention of the General Secretariat of the Organization of American States on February 3 of the year in progress, so that its contents might be transmitted to the States Parties to the Convention and the Member States of the Organization"[FN120].

[FN120] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 3-4.

155. On lodging its interstate communication with the IACHR on February 6, 2006, the State of Nicaragua also presented a copy of the note that it sent to the Secretary General of the OAS and which, according to the communication of the State of Nicaragua, was received by the General Secretariat of the Organization on Friday, February 3, 2006. The purpose of the note to the Secretary General[FN121] was to bring to his attention the declaration of January 26, 2006,[FN122] and request that he transmit to the other states parties to the Convention and the members of the Organization of American States the contents of said declaration, to which end the note also enclosed a photocopy of Official Gazette, La Gaceta, No. 22 of January 31, 2006, in which the declaration was published

[FN121] Note MPN-OEA/2004 of February 3, 2006.

[FN122] The text of the declaration of the State of Nicaragua reads as follows: "The Government of Nicaragua declares that it recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that

another State Party has committed a violation of human rights set forth in this Convention under the terms of Article 45 of the aforesaid Pact”.

156. The Commission further notes that, upon transmitting to the State of Costa Rica the interstate communication presented by Nicaragua, it also forwarded a copy of the note that the State of Nicaragua sent to the Secretary General in order to deposit its declaration of acceptance of the competence of the Commission, together with a copy of the publication in the Official Gazette. The State of Costa Rica has not questioned the authenticity of the aforesaid communications of the State of Nicaragua nor the confirmation of receipt on the part of the OAS General Secretariat.

157. Furthermore, the Commission observes that in the brief containing its reply to the interstate communication from Nicaragua, presented to the Commission on May 5, 2006, the Costa Rican State on several occasions cites the declaration by which the State of Nicaragua recognizes the competence of the Commission to receive and examine interstate communications, as well as the fact that the declaration of the State of Nicaragua was communicated to the General Secretariat of the Organization of American States on February 3, 2006, so that its contents might be transmitted to the states parties to the Convention and the members of the Organization.[FN123] By the same token, in the brief containing arguments and observations presented to the IACHR at the hearing of July 18, 2006, the State of Costa Rica again recognized that the declaration of the State of Nicaragua was communicated to the General Secretariat of the OAS on February 3, 2006, so that its contents might be transmitted to the states parties to the Convention and the members of the Organization.[FN124]

[FN123] Note DE-039-06 of May 5, 2006, received on May 5, 2006, p. 2.

[FN124] Note of July 18, 2006, transmitted via note DM-239-06 of August 3, 2006, received on August 10, 2006, p. 2.

158. However, five months later, in the framework of the hearing held on October 18, 2006, at the 126th Session of the IACHR, the State of Costa Rica requested that the Commission suspend the hearing, arguing that the latter was not competent to examine the instant communication. As the basis for its argument it presented a statement from the Office of International Law of the General Secretariat of the Organization of American States to the effect that said office had no record of additional acts on the part of the Government of Nicaragua in connection with the American Convention since the deposit of its declaration concerning the competence of the Inter-American Court of Human Rights on February 12, 1991. The Costa Rican State submitted on that occasion that the information provided by the Office of International Law constitutes information or supervening proof that there was no official record that the State of Nicaragua had formally deposited a declaration of recognition of the competence of the IACHR and, therefore, the note by which the Nicaraguan State presented its interstate communication against the Costa Rican State should be refused by the Commission.

159. The Commission observes that the note issued by the Director of the Office of International Law of the Organization of American States on September 30, 2006, does indeed indicate that State of Nicaragua deposited its instrument of ratification of the American Convention on September 25, 1979, and the instrument of declaration of the competence of the Inter-American Court of Human Rights on February 12, 1991. However, it mentions that the Office of International Law of the Organization of American States has no record of any additional acts on the part of the Government of Nicaragua relating to the American Convention.

160. Based on this statement from the Office of International Law of the OAS, the State of Costa Rica has argued that the presentation of the note in which the State of Nicaragua set out the instant interstate communication, as well as its subsequent processing by the Inter-American Commission on Human Rights, “in addition to a serious violation of the respective provisions in the Convention and -along with them- the basic principles of openness, bona fide and pacta sunt servanda, could not have come about in the absence of basic procedural prerequisites without a clear, elementary, and especially gross flaw in the proceeding, which has unquestionably impaired the procedural guarantees and possibilities of defense of the Costa Rican State.”

161. In this respect, the Commission reaffirms that upon receiving the original communication from Nicaragua it conducted a preliminary verification of the documentary records and considered that the Nicaraguan State had indeed deposited the declaration mentioned in Article 45 of the Convention with the Office of the Secretary General. For the sake of clarification, and faced with the aforesaid allegations on the part of the State of Costa Rica, which contradicted what the Commission had been able to verify from the record in the case, on October 26, 2006, the IACHR wrote to the Secretary General to enquire whether or not the State of Nicaragua had deposited with the General Secretariat its declaration of recognition of the competence of the Commission to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention. The Commission also requested the Secretary General to inform it if, in the event that he had received said declaration, the General Secretariat transmitted a copy of it to the member states in accordance with Article 45 of the American Convention on Human Rights.

162. In response to this inquiry, on October 27, 2006, the Director of the Department of International Legal Affairs - which is under the immediate orders of the Secretary General and supervises the Office of International Law[FN125]- wrote to the Inter-American Commission to inform it “that on February 6, 2006 the General Secretariat received a note, which is enclosed, in which the Government of Nicaragua informs that in a declaration of January 26, 2006, it added a third paragraph to Declaration 49 of January 15, 1991, concerning the American Convention on Human Rights, in which it recognized the competence of the Commission to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the Convention. Today, in accordance with Article 45 of the American Convention on Human Rights, a copy of that declaration will be transmitted to the member states of the Organization.”[FN126]

[FN125] Within the structure of the OAS, the Department of International Legal Affairs performs the function of depositary of inter-American multilateral treaties and the instruments of

ratification thereof that the Charter of the Organization confers upon the General Secretariat. The Department of International Legal Affairs is under the immediate orders of the Secretary General and composed of the following offices: (i) Office of International Law, and (ii) Juridical Cooperation Office (Technical Secretariat for Legal Cooperation Mechanisms). The Office of International Law performs the function of depositary of inter-American multilateral treaties and the instruments of ratification thereof that the Charter of the Organization confers upon the General Secretariat. Said office also performs the function of depositary of bilateral agreements entered upon by the organs of the OAS with the American States or with other Inter-American agencies or national entities of member states or observer countries, as well as with respect to agreements signed between member states, for which the General Secretariat has been designated depositary. The Office of International Law and its staff are under the overall direction, supervision, and control of the director of the Office of International Law, who answers to the director of the Department of International Legal Affairs, pursuant to the legal system of the Organization and the provisions of Executive Order 05-13 Rev 2.

[FN126] Note SG/DILA of October 27, 2006, received on October 27, 2006.

163. Thus, it was confirmed that the State of Nicaragua did indeed make the necessary deposit with the General Secretariat of its declaration of acceptance of the competence of the Commission in accordance with Article 45(4) of the Convention.

164. It should be clarified that the American Convention designated General Secretariat as its depositary and that, upon depositing their declarations of acceptance of the competence of the Commission, states are not required to perform any additional acts before any other department of the Organization. Accordingly, the Commission stands by its initial determination that the deposit made by the State of Nicaragua on February 6, 2006, was correctly performed and, therefore, the Nicaraguan State was empowered to present a communication in the terms set forth in Article 45 of the Convention.

165. Therefore, the IACHR does not subscribe to the arguments of the Costa Rican State in the sense that that “inasmuch as the formal deposit of the acceptance was not made [...] with the Office of International Law of the Department of Legal Affairs of the OAS, which is the organ that officially registers the deposit of respective international instruments, until October 26, 2006, and brought to the attention of the Permanent Missions to the OAS on October 27, 2006, it may be deduced that the essential requirement of openness recognized in public international law has not been met [...] so as to permit the recognition of the state party to be considered effective and, therefore, to provide legal certainty to other states in the inter-American system.”[FN127]

[FN127] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

166. In this respect, in the brief containing its observations on merits,[FN128], the State of Costa Rica reiterated its objection of lack of standing to sue, based not only on the arguments

outlined in the hearing held on October 18, 2006, and later briefs, but also on a new communication from the Director of the Office of International Law of the Organization of American States, which says "[...] that the note of the State of Nicaragua [...] recognizing the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right set forth in the American Convention was received by the Office of International Law of the Department of International Legal Affairs of the Office of the Secretary General on October 26, 2006, and communicated to the Permanent Missions to the OAS the following day, October 27, 2006." The aforementioned communication from the Director of the Office of International Law was brought to the attention of the Commission on February 5, 2007. With respect to this note, the Commission observes that it only mentions the date on which the Office of the Secretary General communicated to one of its dependencies the note that it received on February 6, 2006, but does not indicate the date on which the State of Nicaragua deposited the declaration.

[FN128] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

167. As mentioned, Article 45 (4) of the Convention provides that the General Secretariat of the Organization shall transmit copies of the declarations that it receives as depositary to the member states of the Organization. It arises from the communication of the Director of the Department of International Legal Affairs that said transmission was completed on October 27, 2006. Therefore, the Inter-American Commission must determine the legal effects of the declaration that the State of Nicaragua deposited on February 6, 2006, in view of the fact that the transmission of the declaration deposited by the State of Nicaragua was not confirmed by the General Secretariat until October 27 of that year.

168. To that end, the Commission considers it appropriate to refer to the provisions of the Vienna Convention on the Law of Treaties with respect to the deposit of instruments of ratification, acceptance, approval, or accession. According to Article 16 of the Vienna Convention, "Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon: a) their exchange between the contracting States; b) their deposit with the depositary; or, c) their notification to the contracting States or to the depositary, if so agreed".

169. In that regard, the Commission considers that the American Convention, in keeping with the Vienna Convention on the Law of Treaties, opts for the general rule that the act of deposit in itself establishes the legal link.[FN129] Even though the depositary has the duty to notify the states of the deposit of an instrument of ratification, this is solely for information purposes; notification is not a substantive part of the transaction by which the depositing state establishes treaty relations with other states. The act of deposit has the legal effect provided under the treaty even if its notification by the depositary is delayed or goes unnoticed. Similarly, late notification by a depositary of the date of a treaty's entry into force does not affect that date.[FN130]

[FN129] Regarding the considerations in this area taken into account by the International Law Commission, which prepared the draft Vienna Convention, see: De la Guardia, Ernesto: Derecho de los Tratados Internacionales. Editorial Ábaco de Rodolfo Desalma. Buenos Aires, 1997, p. 163.

[FN130] Aust, Anthony: Modern Treaty Law and Practice. Cambridge University Press, Cambridge, 2000, p. 270.

170. In the “Case concerning right of passage over Indian territory” resolved by the International Court of Justice, India, the respondent state, argued that the petition of Portugal, the complainant state, was filed before a copy of the Declaration of Portugal accepting the compulsory jurisdiction of the Court could be transmitted to other states parties. The International Court of Justice did not accept this argument and held that the contractual relation between the parties and the compulsory jurisdiction of the Court were established ipso facto by the fact of making a declaration. The Court added that a State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits its Acceptance with the Secretary-General. Moreover, the Court found that the declarant State was concerned only with the deposit of its Declaration with the Secretary-General and was not concerned with the duty of the Secretary-General.[FN131]

[FN131] International Court of Justice: Case concerning right of passage over Indian territory (preliminary objections). Judgment of 26 November 1957.

171. The Commission concurs with what the State of Costa Rica says in its reply to the instant interstate communication, that “the acceptance of the competence of the international organs takes effect when the declaration has been deposited with the Secretary General of the Organization, since that is the moment as of which the state has consented to the control of an international organ.”[FN132] it should be noted that on several occasions prior to the hearing of October 18, 2006, the State of Costa Rica reiterated its position in the sense that the deposit, rather than its transmission to the states, creates legal effects. Thus, the Costa Rican state said that the moment that “Nicaragua accepted and deposited that declaration [...] is when the acceptance actually took effect.”[FN133]

[FN132] Note DE-039-06 of May 5, 2006, received on May 5, 2006, pp. 12-13, citing Ana Salado Osuna in “Las restricciones a la aceptación de la competencia de los órganos internacionales de derechos humanos”.

[FN133] Note DM 183-06 of June 29, 2006, received on July 5, 2006, p. 2.

172. The Commission is also mindful of the fact that when the State of Costa Rica took receipt of the communication presented against it by the State of Nicaragua upon its transmission by the Commission, it also received a copy of the declaration duly deposited by the State of Nicaragua with the Secretary General, for which reason it cannot claim that the fact that its transmission by the General Secretariat did not occur until October 2006 had kept it in the dark or was in any way detrimental

173. As the State of Nicaragua points out, “The question of openness alleged on October 18 last [by the State of Costa Rica], is immaterial because it has occasioned no detriment to the State of Costa Rica, which was officially informed of the acceptance of the competence of the IACHR by the State of Nicaragua when it was notified of the petition of February 6 last; it continued to act and receive communications on said case, attended the hearing in Guatemala of July 18, 2006, without offering any manner of objections on this point and it is only now, on October 18, 2006, that it claims an apparent and timely lack of openness in connection with something of which it was made directly aware when it received a copy of the complaint of Nicaragua against the State of Costa Rica last February 6.”[FN134]

[FN134] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

174. In that connection, the argument of the State of Costa Rica regarding the supposed lack of competence of the Commission because the State of Nicaragua had failed formally to deposit the declaration of acceptance of competence, should have been submitted at the earliest possible procedural opportunity by the Costa Rican State. In view of the fact that the State of Costa Rica was notified, upon its receipt of the initial communication of the State of Nicaragua, that the respective declaration of acceptance of the competence of the Commission had been delivered to the General Secretariat, the Commission considers that any delay in the transmission of this declaration to the other member states of the OAS could not have impaired the rights of the State of Costa Rica, which was fully informed of the existence of the declaration and the respective deposit thereof.

175. In addition, the State of Costa Rica has argued that even if the State of Nicaragua had formally deposited the necessary declaration, the IACHR was not exempt from examining the procedural prerequisites of validity of that declaration, and asserted that the Commission was guilty of having omitted to conduct a prior assessment of its competence before it transmitted the interstate communication. On this point, the Commission reiterates that when it received the communication presented by the State of Nicaragua for alleged violations of rights protected in the Convention by the State of Costa Rica, the IACHR verified, in accordance with Article 45 of the Convention, that according to the record both the Nicaraguan State and the Costa Rican State had recognized the competence of the Commission and had deposited with the General Secretariat their respective declarations of acceptance of competence, which are the only “procedural prerequisites of validity” that the Commission is required to verify.

176. Given that sufficient proof was presented along with the communication of the receipt by the Secretary General, on February 6, 2006, of the note by which the State of Nicaragua had deposited its declaration of acceptance of the competence of the Commission, the Commission assumes that the General Secretariat has performed its duty as depositary. Even though the Commission was concerned to learn that there was a delay in the communication of this declaration to other member states, the Commission considers that said delay in the notification of other members cannot be imputed to the IACHR or affect the processing of this communication.

177. Based on the foregoing, the Commission finds that in processing this interstate communication it has observed all the rules contained in the Convention and its Rules of Procedure that govern the processing of communications in which a state party alleges that another state party has committed a violation of a human right set forth in the American Convention, and that the interstate communication under examination fulfils the requirements contained in Article 45 of the American Convention. Therefore, the Commission now turns to analyze if the admissibility requirements set forth in the Convention for processing individual petitions and communications between states have been met.

C. Competence of the Commission *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*

1. Competence *ratione personae*

178. Before initiating its analysis of its competence *ratione personae* the Commission feels it necessary to clarify that it is only competent to examine petitions or communications concerning alleged violations of human rights in connection with OAS member states. Accordingly, it will only examine the allegations contained in the first section concerning all the persons named in the communication presented by the State of Nicaragua as responsible for the acts denounced,[FN135] to wit:

i. The State of Costa Rica, “for the, at least, remiss conduct of the members of the Armed Police Corps present at the horrific death of Natividad Canda and for the passiveness, tardiness, and delay of justice;” “for failure to ensure due process guarantees before a competent judge and for the delay of justice in the case of the murder of José Ariel Urbina Silva (sic), the grievous injuries sustained by José Antonio Martínez Urbina and Francisco Angulo García and the stoning injuries inflicted on Rito Obando and Elder Angulo García”; “for failure to ensure to the persons subject to its jurisdiction the rights contained in the Pact of San Jose, in particular the rights to life, humane treatment, and security;” and for having “failed to fulfill its duty to contribute effectively to stop and eradicate --through mechanisms that go beyond mere declarations-- discrimination and xenophobia.”

ii. Mr. Fernando Zúñiga, “the owner of the dogs that are at his workshop and domicile at the entrance to the cemetery in Lima, Cartago and who opposed the shooting of the dogs that caused the violent death of Natividad Canda.”

iii. Mr. Luis Hernández, “security guard at the aforementioned workshop who initially refused the police admittance to said workshop.”

iv. Mr. Hugo Ceciliano Rodríguez, “chief of the security guard, Mr. Luis Hernández, for having prevented the shooting of the dogs because the owner did not approve their killing.”

v. The owners of the Internet portals, webmasters, participants in the Internet groups, and the persons who originated and reproduced the xenophobic jokes and messages, inciting racial hatred and discrimination, as well those who proposed hate crimes through that medium.”

[FN135] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 33-35. In addition, in its unnumbered note of May 26, 2006, p. 32, received on May 26, 2006, it reiterates its position regarding the responsibility of these persons.

179. The Inter-American Commission is not competent to determine individual responsibilities, whether of agents of the state or of third parties who participate in alleged violations. Rather, its competence is to determine the international responsibility of OAS member states. Therefore, the Commission is not authorized to examine the alleged responsibility of the persons named in sections ii, iii, iv and v of the preceding paragraph, as the State of Nicaragua requests in its communication. On the subject of acts allegedly committed by private individuals, the Commission is compelled to point out that it may only examine the direct responsibility of the State of Costa Rica as a result of the actions of its agents, or the indirect responsibility of the Costa Rican State arising from its failure to take action against acts of private individuals that violate rights recognized in the Convention.

180. In this connection, the jurisprudence of the Inter-American system is emphatic when it states that, “in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”[FN136]

[FN136] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, par. 172.

181. Having clarified this point, the Commission notes that the State of Costa Rica has been a party to the American Convention since April 8, 1970, when it deposited its instrument of ratification. For its part, the State of Nicaragua became a party to the American Convention on September 25, 1979, when it deposited its instrument of ratification. States parties to the Convention are empowered under Article 45 of the American Convention to present communications in which they allege that another state party has committed a violation of a

human right set forth in the Convention, provided that they declare that they recognize the competence of the Commission to receive and examine such communications.

182. The State of Costa Rica has argued, since October 18, 2006, that the State of Nicaragua lacks standing to sue under Article 45 of the American Convention because the deposit of its declaration of recognition of the competence of the Commission was not completed before the communication was presented. In the foregoing section, the Commission has established the full validity of the declaration of Nicaragua in accordance with Article 45 of the Convention since February 6, 2006.

183. Furthermore, among the evidence put forward during the stage on merits, the State of Costa Rica presented a press report according to which the attorney who is pursuing the case of the Canda family in the Costa Rican courts, was said to be upset that the Nicaraguan State had decided to take the case to the Inter-American Commission.[FN137] In this connection, the Commission considers it timely to recall that nothing in the Convention requires those who present a petition or a communication to be victims per se, or to have a personal, direct, or indirect interest in the decision on said petition or interstate communication. Nor does the Convention require the approval of the alleged victim or that petitioners present powers of attorney from alleged victims.

[FN137] El Nuevo Diario: “Apoyo a denuncia de Nicaragua ante IACHR” [Support for Nicaragua's petition to the IACHR]. Managua, Nicaragua. Press report of February 8, 2006. Presented by the State of Costa Rica at the hearing held on October 18, 2006.

184. In contrast to other systems for protection of human rights, the inter-American system allows various types of petitioners to present petitions on behalf of victims. Indeed, according to Articles 44 and 45 of the Convention, any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, as well as any state that declares that it recognizes the competence of the Commission to receive and examine communications between states, may lodge petitions or communications that allege that a State Party has committed a violation of a human right set forth in this Convention

185. Thus, by virtue of the fact that the State of Nicaragua deposited its declaration of recognition of the competence of the Commission to receive and examine communications between states, the IACHR is empowered to admit and examine the communication that it presented against the State of Costa Rica.

186. The interstate communication presented by the State of Nicaragua names the following persons as victims:[FN138]

- i. Natividad Canda Mairena
- ii. José Ariel Silva Urbina
- iii. José Antonio Martínez Urbina
- iv. Francisco Angulo García

- v. Rito Antonio Obando
- vi. Elder Angulo García
- vii. Nicaraguan migrant population in a vulnerable situation in Costa Rica.

[FN138] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 9-10.

187. The Commission finds that it is competent *ratione personae* to take up the cases connected with Messrs. Natividad Canda Mairena, José Ariel Silva Urbina, José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García, insofar as these alleged victims are individuals in respect of whom the State of Costa Rica undertook to observe and ensure the rights recognized in the Convention.

188. The Commission also feels compelled on this point to analyze if it is competent to examine the interstate communication presented against the State of Costa Rica inasmuch as it refers not only to the aforesaid duly identified alleged victims, but also to a widespread group of potential victims, namely the "Nicaraguan migrant population in a vulnerable situation in Costa Rica."

189. It should be recalled that, to date, the jurisprudence of the Commission has been guided by its interpretation of Article 44 of the American Convention, according to which, for a petition to be admissible, there must be specific individually identified victims or refer to a specific and set group of victims composed of distinguishable individuals.

190. For example, in Case 12.404 v Peru,[FN139] the Commission examined a petition in which the Ombudsman said that it was acting in representation in abstracto, *inter alia*, on the collective behalf of the women who were potential voters in the form of an *actio popularis*. In this case, the petitioners argued that said violations were committed to the detriment of a series of "direct" victims whom they identified by name, and also 892,868 potential women candidates and women voters in the electoral districts of La Libertad, El Callao and Ica, in Peru. On that occasion, the Commission admitted the petition only with respect to those victims who were duly individually identified and distinguished in accordance with the jurisprudence of the inter-American system.

[FN139] IACHR, Report N° 51/02 of October 10, 2002. Case 12.404, Janet Espinoza Feria et al. Peru.

191. Another precedent is provided by Case 11.553 v Costa Rica,[FN140] in which the Commission expressly stated that "[t]he liberal standing requirement of the inter-American system should not be interpreted, however, to mean that a case can be presented before the Commission in abstracto. An individual cannot institute an *actio popularis* and present a complaint against a law without establishing some active legitimation justifying his standing

before the Commission [...] It is not sufficient for an applicant to claim that the mere existence of a law violates her rights under the American Convention, it is necessary that the law have been applied to her detriment.”

[FN140] IACHR, Report N° 48/96 of October 16, 1996. Case 11.553, Emérita Montoya González. Costa Rica.

192. The Commission was of the same opinion in Case 11.625 v Guatemala.[FN141] The petition in that case was initially lodged in abstracto and alleged that several provisions in the Guatemalan civil code created distinctions between men and women which are discriminatory and violate the Convention. In turn, the petitioners claimed that Ms. María Eugenia Morales Aceña de Sierra had been directly affected by the challenged legislation, and also represented other women victims in Guatemala. In that case, the Commission considered that its competence refers to acts that affect the rights of a specific person or persons, and requested that the status of María Eugenia Morales de Sierra as the victim be formalized, in order to proceed to process the petition within its case system. The petitioners amended their original petition for a decision on the compatibility of the provisions and in its place sought a decision on the individual complaints of the named victim.

[FN141] IACHR, Report N° 28/98 of March 6, 1998. Case 11.625, María Eugenia Morales de Sierra. Guatemala.

193. With the development of the system for protection of human rights in favor of an interpretation that permits effective application of the guarantees set forth in the Convention, this position has gradually being complemented by one that recognizes the possibility of protecting a plurality of persons who had not previously been named, provided they are identifiable and distinguishable.[FN142] It is not necessary, therefore, to mention each individual by name, but to state objective criteria by which to distinguish the collection of identifiable persons as possible victims of violations by the fact of belonging to a group or community, without that entailing a class action on behalf of the entire population under the jurisdiction of the State, or a segment so vast as to render individual identification of the victims meaningless.

[FN142] I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Judgment of August 31, 2001. Series C No. 79.

194. Having said that, the above-described criteria have been developed in the framework of petitions lodged pursuant to Article 44 of the Convention. Accordingly, the Commission must examine if Article 45 of the American Convention can be interpreted under the same guidelines as Article 44; in other words, if communications between states, like individual petitions, must individually identify the alleged victims of a violation in order to be admitted, or if, to the

contrary, states are empowered to present communications in order to ensure the observance erga omnes by states parties of their obligations under the Convention, as a collective guarantee mechanism.

195. In this regard, the Commission observes that the wording of Articles 44 and 45 of the Convention, though similar, is not identical; the former provides that the Commission may admit petitions “containing denunciations or complaints of violation of this Convention by a State Party”, while the latter states that the Commission may admit communications “in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.” The Commission observes that the fact that for petitions presented pursuant to Article 44 the Convention refers to “denunciations or complaints of violation of this Convention,” whereas for communications presented under Article 45 the Convention refers to allegations concerning “a violation of a human right set forth in this Convention,” suggests an intention that states should be able to bring to the attention of the IACHR not only situations that have affected individual or identifiable victims but also generalized situations of widespread or systematic violation of human rights.

196. The foregoing does not mean that states may present to the Commission abstract cases that are not designed to protect the rights and freedoms of persons protected by the Convention; it only means that if a State party considers that another State party has committed generalized human rights violations it may turn to the Commission of to denounce this situation without the need to individually identify each possible victim.

197. The American Convention enshrines a system that constitutes a genuine regional public order the preservation of which is in the interests of each and every state party. The intention of the signatory states is the preservation of the system for protection of human rights, and if a State violates its obligation to ensure the human rights of the individuals under its jurisdiction it also violates its undertaking to other states. Therefore, the Convention has provided a mechanism that enables states to present communications to the IACHR in order to protect the regional system of human rights and contribute to the fulfillment of the guarantees recognized in the Convention.

198. In order that this collective guarantee mechanism might be effectively applied, the Commission must interpret it keeping in mind the position of the Inter-American Court, in the sense that states parties to the Convention must guarantee compliance with its provisions and its effects (effet utile) within their own domestic laws.[FN143] This principle applies not only to the substantive provisions of human rights treaties (in other words, the clauses on the protected rights), but also to the procedural provisions,[FN144] such as the one concerning the power of states to present communications alleging that another state has committed a violation of the Convention.

[FN143] I/A Court H.R., Constitutional Court Case. Competence. Judgment of September 24, 1999. Series C No. 55, par. 36.

[FN144] The European Commission of Human Rights was of the same opinion in Applications 15299/89, 15300/89 and 15318/89, Chrysostomos et al. v. Turkey (1991). Decisions and Reports, Strasbourg, C. E., vol. 68, pp. 216-253.

199. The Commission is required to interpret the Convention taking into account the object and purpose of the international system for protection of human rights. The provision that recognizes the competence of the Commission to receive and examine communications between states is a clause that is essential for the effectiveness of the international protection mechanism and, therefore, should be interpreted and applied in such a way that the guarantee that it establishes is genuinely practical and effective, bearing in mind the special nature of human rights treaties and their collective implementation. That provision enshrines the collective intention of the American States to guarantee the preservation of the inter-American public order in the area of human rights.

200. Thus, the Commission must interpret the mechanism enshrined in Article 45 of the Convention not as the right of a State with the purpose of enforcing observance of its rights or particular interests, but with the purpose of enabling the Commission to take steps against possible violations of the regional public order. It is this interpretation that permits the collective guarantee mechanism provided in Article 45 to be implemented.

201. The notion of collective guarantee recognized in human rights treaties has been aptly described by the Human Rights Committee in General Comment 31. The Committee observed that “every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are erga omnes obligations and that [...] there is a [stipulated] obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. In this connection, the Committee reminds States Parties of the desirability of making the declaration contemplated in article 41 [Article 41 recognizes the right of States parties to present communications claiming that another State Party is not fulfilling its obligations under the Covenant]. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article. [...] Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.”[FN145]

[FN145] HRC. General Comment No. 31. Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comments)

202. By the same token, the preamble and articles of the American Convention permit recognition of the existence of a regional public order that all States parties are obliged to ensure. The preamble of the Convention mentions the purpose of consolidating “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.”

203. The existence of a system of collective guarantee is also evinced by the fact that, in accordance with Article 35 of the American Convention, “[t]he Commission shall represent all the member countries of the Organization of American States,” which means that it exercises its control functions in representation of all the OAS member states.

204. Similarly, the European system of human rights has interpreted the provision on interstate petitions contained in the European Convention in the sense that when a state party presents a communication alleging a violation of the Convention it is not exercising a right of action to demand observance of its rights, but drawing the attention of the Convention to an alleged violation of the public order of Europe.[FN146] The Court has also held that the European Convention creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement".[FN147]

[FN146] European Commission of Human Rights: *Austria v. Italy*, App. No. 788/60, 4 Eur. Yearbook of H.R. 116, p. 140 (1961)

[FN147] European Court of Human Rights: *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A no. 25, p. 90, par.. 239.

205. The Inter-American Court has consistently held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.[FN148] Were a generalized practice of human rights violations to exist at present in one of the states parties to the Convention, and another state party were to present a communication denouncing those violations to the Commission, the IACHR considers that it could not insist that the denouncing state individually identify each of the victims of this generalized situation of violations because such a requirement would be contrary to the spirit of collective guarantee that shapes the American Convention on Human Rights.

[FN148] I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, par. 114.

206. In the instant case, the State of Nicaragua says that it turns to the IACHR because it has the “duty to protect its nationals and safeguard their human rights, wherever they may be, and the obligation to denounce the deplorable situation of discrimination and xenophobia of which Nicaraguans in the sister republic of Costa Rica are victims, irrespective of their situation or immigration status, which poses a high risk to the enjoyment and exercise of their fundamental freedoms and human rights.”[FN149] The Commission notes that the State of Costa Rica undertook to respect and ensure the rights recognized in the American Convention for all persons subject to its jurisdiction, regardless of their national origin.

[FN149] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

207. In the light of the foregoing considerations, the Commission concludes that it also has *ratione personae* competence to take up the interstate communication presented by the Nicaraguan State on behalf of the Nicaraguan migrant population in Costa Rica, irrespective of their situation or immigration status.

2. Competence *ratione loci*

208. The Commission is competent *ratione loci* to examine this interstate communication because it alleges violations of rights protected in the American Convention that are purported to have occurred within the territory of a state party to said treaty.

3. Competence *ratione temporis*

209. In this section the Commission must examine if the facts alleged in the petition occurred when the obligation to observe and ensure the rights set forth in the American Convention was in force for the Costa Rican State and when the competence of the Commission to examine allegations concerning violations of the Convention in the framework of an interstate communication had been established.

210. In this connection, in its reply to the interstate communication, the State of Costa Rica invoked the objection that the IACHR lacked jurisdiction because Nicaragua allegedly deposited its declaration of acceptance of the competence of the Commission after the facts. Thus, in the brief containing its reply to the interstate communication, the State of Costa Rica argued that “the declaration of acceptance by Nicaragua of the competence of the Commission was made after the facts: its petition seeks to violate the proper balance between the imperatives of protection and the principles of equity and legal certainty among the parties.”[FN150] In the brief containing its observations on merits, the Costa Rican State reiterated its objection that the Inter-American commission lacked jurisdiction to examine the communication presented by Nicaragua given “that the alleged acts occurred on a date after the disputed –or, to be more exact, prior to October 27, 2006, nonexistent– deposit by the State of Nicaragua of its acceptance of the discretionary competence of the Commission to take up interstate petitions.”[FN151]

[FN150] Note DE-039-06 of May 5, 2006, received on May 5, 2006, p. 11.

[FN151] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

211. For its part, the State of Nicaragua has argued that its declaration of February 2006 was included as a third paragraph to the declaration of 1991 and that the recognition of the

Commission's competence is governed exclusively by Article 45 of the Convention, which, the State argues, contains no restrictions on retroactive application, for example, despite Costa Rica's claims.[FN152]

[FN152] Written submissions presented by the State of Nicaragua at the hearing of July 18, 2006, p. 7.

212. In first place, the Commission notes that, as provided by the third paragraph of Article 45 of the Convention, states parties have the option of limiting their declaration of recognition of the competence of the Commission in order to make it valid for an indefinite time, for a specified period, or for a specific case. With regard to the two states concerned in this interstate communication, the Commission observes that neither of them exercised the option to establish time constraints or any other limits on the competence of the Commission.

213. Accordingly, the only time constraints on the competence of the Commission are those set forth in the Convention. The American Convention clearly provides that both the state that presents the communication and the state against which it is presented must recognize the competence of the IACHR to process communications between states in order for the Commission to exercise its competence in a particular case. In the instant case both states have recognized this competence.

214. The question that the Commission must now resolve is if its competence to examine the interstate communication dates from the day on which the state against which the communication was presented deposited its declaration of recognition of said competence (July 2, 1980), or from the day that the State that presented the communication deposited its declaration of recognition of the Commission's competence (February 6, 2006).

215. Given that the Convention provides that communications between states shall be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the competence of the Commission to examine communications between states, and if they are presented against a State party that has made such a declaration, the Commission considers that the Convention requires reciprocity in order for communications between states to be valid.

216. Based on this requirement, until it has been determined that the essential prerequisite of reciprocity exists, the Commission is not competent to examine possible violations of the American Convention in the framework of an interstate communication. It is as of February 6, 2006, that both states parties in this communication recognized the competence of the Commission to receive and examine communications between states and, therefore, the IACHR was competent from that point forward.

217. The fact that the Commission may not examine acts that occurred prior to the deposit of the declaration of recognition of competence of the Inter-American Commission is wholly consistent with the principle of non-retroactivity of international treaties set forth in Article 28 of

the Vienna Convention on the Law of Treaties of 1969, according to which, “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

218. Although, strictly speaking, Article 28 of the Vienna Convention applies to treaties, which are of a nature different to declarations concerning recognition of competence of an organ, this provision contains an important generally applicable principle of treaties: the principle of non-retroactivity of conventional provisions unless agreed otherwise by the states. The principle of non-retroactivity applies to all acts connected with a treaty, including declarations concerning the competence of an international organ such as the IACHR. The principle of non-retroactivity of international standards recognized in the Vienna Convention on the Law of Treaties has also been invoked by the Inter-American Court when it has had cause to make a decision on its competence by reason of time. The Court has determined based on this principle that it is competent only to examine acts that occur after the contentious jurisdiction of the Court is recognized.[FN153]

[FN153] I/A Court H. R., Case of Alfonso Martín del Campo Dodd. Preliminary Objections. Judgment of September 3, 2004. Series C No. 113, par. 85.

219. The foregoing does not preclude examination by the Commission of allegations concerning violations that predate the deposit of the declaration of acceptance of the competence of the Commission if said violations are continuous over time; in other words, if they continue to occur after the competence of the Commission is recognized. In this respect, the Inter-American Court has consistently held that it is possible to examine continuous violations without infringing the principle of non-retroactivity.[FN154]

[FN154] I/A Court H. R., Case of the Serrano Cruz Sisters. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, par. 64; I/A Court H. R., Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, par. 39.

220. Accordingly, the Commission has *ratione temporis* competence to examine any acts and omissions that have occurred since February 6, 2006, the date on which it was determined that both states parties in this communication recognized the competence of the Commission, in addition to the effects of possible violations. Furthermore, the Commission is competent to examine continuous violations that commenced before the date of the declaration of recognition but which have continued after said declaration of recognition

4. Competence *ratione materiae*

221. Finally, the Commission is competent *ratione materiae*, because the interstate communication alleges violations of human rights protected by the American Convention.

D. Admissibility requirements for the interstate communication

1. Characterization of the Facts Alleged

222. The Commission considers it timely to recall that that migration is a complex process and that the forms it takes respond to the economic, political, social and cultural interests of the countries of origin, of transit and of final destination, as well as the motivations and hopes of the migrants themselves. Like migration, xenophobia, that is, the irrational hatred of people foreign or perceived as foreign, is a complex social phenomenon.[FN155] When faced by this situation, it is the obligation of the States to adopt positive measures to revert or change any discriminatory situation that exists in society and to safeguard the rights recognized in the Convention for all persons under their jurisdiction without distinction for nationality.

[FN155] IACHR. Second Progress Report of the Rapporteurship on Migrant Workers and Their Families in the Hemisphere. April 16, 2001, par. 76.

223. In light of these considerations, the Commission finds that, prima facie, the communication describes allegations, which, if proven, could constitute violations of the rights protected by Articles 8 (Right to a fair trial), 25 (Right to judicial protection), and 24 (Right to equal protection) of the Convention, in connection with the general obligation to respect and ensure rights contained in Article 1(1) of said international instrument, inasmuch as they refer to the possible existence of a systematic practice of discrimination against all Nicaraguan migrants in Costa Rica.

224. As regards the alleged violation, asserted by the State of Nicaragua, of the rights recognized in Articles 2, 7, 8, and 28 of the Universal Declaration of Human Rights; in Articles II and XVIII of the American Declaration of the Rights and Duties of Man; and in Article 9 of the Inter-American Democratic Charter, the Commission observes that for the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself.[FN156]

[FN156] In issuing its opinion on the legal status of the American Declaration, the Court confirmed that for the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, par. 46.

225. Once the American Convention came into force for the State of Costa Rica it became the principal source of legal norms for application by the Commission insofar as the petition alleges violations of substantially identical rights in other instruments.[FN157] In this case, the rights

allegedly violated by the State of Costa Rica under the Universal Declaration and the American Declaration enjoy similar protection under the Convention. Therefore, given that in the instant case the violations alleged by the Nicaraguan State concern rights that are similarly protected by the aforesaid instruments, the Commission will only address the alleged violations of the standards contained in the Convention and not those contained in the Universal Declaration or the American Declaration.

[FN157] This is confirmed by the Commission in its jurisprudence. See, inter alia: IACHR Report 70/99 of May 4, 1999. Case 12.059 Carmen Aguiar de Lapacó. Argentina; IACHR Report N° 1/01 of January 19, 2001. Case 12.085 Ana Elena Townend Diez-Canseco et al. Peru; IACHR Report N° 87/99 of September 27, 1999. Case 11.506 José Víctor Dos Santos and Waldemar Jerónimo Pinheiro. Paraguay; IACHR Report N° 112/99 of September 27, 1999. Case 11.603 Álvaro Lobo Pacheco et al. (19 Merchants). Colombia.

226. It should be clarified that, pursuant to Article 29(d) of the Convention, this international instrument does not exclude or limit the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have. Thus, the American Declaration contains and defines the fundamental human rights referred to in the Charter, and the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms to the corresponding provisions of the Declaration. Therefore, in its analysis, the Commission may take into consideration the provisions of the Universal Declaration, the American Declaration and the Inter-American Democratic Charter, insofar as they may be pertinent to interpret the Convention and determine possible violations committed by the State of Costa Rica of the human rights that it enshrines.

227. However, this is not the proper stage in the proceedings to determine whether or not the American Convention has been violated. For the purposes of admissibility, the IACHR simply has to determine if the arguments set out in the petition could tend to establish a violation of the American Convention, as required under Article 47(b) thereof, and whether the petition is "manifestly groundless" or "obviously out of order," as paragraph (c) of the same Article provides. The standard by which to assess these extremes is different from the one needed to decide the merits of a petition. At this stage the IACHR need only perform a prima facie evaluation that does not imply any prejudgment or advance opinion on the merits of the petition. The Commission only performs a prima facie evaluation to determine if the petition tends to show an apparent or potential violation of a right guaranteed by the Convention but does not at this stage establish the existence of said violation. The examination of the nature of the allegations is a summary analysis that does not imply any prejudgment or advance opinion on merits. By establishing two clearly separate phases -one for admissibility and the other for the merits- the Commission's own Rules of Procedure reflect the distinction between the evaluation the Commission must make to declare a petition admissible, and the evaluation required to establish a violation.

228. Based on this analysis of the interstate communication, the Commission considers that the allegations of the State of Nicaragua do not correspond to the situations contained in Article

47(b) and (c) of the Convention and, therefore, meet the admissibility requirements set forth in the American Convention.

2. Duplication of proceedings and res judicata

229. Articles 46(1)(c) and 47(d) of the Convention establish as admissibility requirements, respectively, that the subject matter of the petition or communication is not pending in another international procedure for settlement, and that the petition or communication is not substantially the same as one previously studied by the Commission or by another international organization.

230. The Commission considers that the subject matter of the interstate communication is neither pending in another international procedure for settlement, nor substantially the same as a petition or communication previously studied by the Commission or by another international organization. Therefore, the requirements established at Articles 46(1)(c) and 47(d) of the Convention have been met.

3. Exhaustion of domestic remedies

231. Article 46(1)(a) of the Convention provides that for a communication lodged with the Inter-American Commission to be admissible in accordance with Article 45 of the Convention, it is necessary that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. This rule is designed to allow national authorities to examine alleged violations of protected rights and, as appropriate, to resolve it before it is taken up in an international proceeding. It should be clarified that the rule of exhaustion of domestic remedies applies in principle both to communications between states and to individual petitions.

232. 35. The prior exhaustion rule applies when there are actually available in the national system suitable and effective remedies to repair the alleged violation. In that connection, Article 46(2) specifies that the rule does not apply when: the domestic legislation of the state concerned does not afford due process of law for the protection of the right in question; the alleged victim did not have access to the remedies under domestic law; or there has been unwarranted delay in rendering a final judgment under said remedies. As Article 31 of the IACHR Rules of Procedure provides, when the petitioner invokes one of these exceptions, it is up to the State concerned to demonstrate that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

Allegations of the parties on the rule of exhaustion of domestic remedies:

233. The IACHR must first analyze the allegations of the parties with respect to exhaustion of domestic remedies. According to the interstate communication presented by the State of Nicaragua, "the Ministry of Foreign Affairs of Nicaragua, on behalf of the State, on November 17, 2005, and December 6, 2005, requested the Ministry of Foreign Affairs and Worship of Costa Rica to carry out a thorough, prompt, and exemplary investigation to punish those responsible for the brutal death of Natividad Canda Mairena and the murder for reasons of nationality of José Ariel Urbina Silva (sic). The Ministry of Foreign Affairs reiterated its

demands in communications of November 18, 2005 and January 30, 2006, requesting that all testimonies given to the press be preserved, guaranteeing that such acts did not go unpunished.”[FN158] On this point, the Commission reiterates that extrajudicial measures of this type cannot be considered a suitable recourse for the purposes of determining if the remedies under domestic law have been exhausted.

[FN158] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 13 and 14. The text of the letter of December 6, 2005, was also published in a press report in the newspaper El Nuevo Diario on December 7, 2005, which is attached as an annex to the communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006.

234. The State of Nicaragua also alleged in its interstate communication that "on one hand, the extreme poverty of the families of the victims and, on the other, the delay of justice validate the arguments with respect to exhaustion of domestic remedies.”[FN159]

[FN159] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 43.

235. As regards the supposed extreme poverty of the families of the victims, the State of Nicaragua alleged in its interstate communication that "the mother of Natividad Canda, Ms. Francisca Mairena, traveled from Nicaragua to Costa Rica and pursued proceedings at the OIJ but because she is very poor and does not have residence in Costa Rica it is presumed that she has since returned to Nicaragua. [...] [T]he members of the Canda Mairena family in Costa Rica and Nicaragua are very poor and, therefore, cannot be required to exhaust domestic remedies, in accordance with Advisory Opinion OC-11/90 of the Inter-American Court of Human Rights and the Judgment in the Godínez Cruz Case (Judgment on Preliminary Objections of June 26, 1987). [...] All the families of the Nicaraguan victims are clearly very poor and do not have resources to spend on judicial proceedings, in particular when we are faced with a delay of justice that makes exhaustion of domestic remedies impossible.”[FN160]

[FN160] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, pp. 39 and 40.

236. As to the alleged delay of justice, the State of Nicaragua contended that “the specific time limits in the proceedings in the cases of Canda and Urbina Silva (sic) et al. are excessively long and make the international control of human rights virtually impossible and pointless.”[FN161] In that connection, the State of Nicaragua mentioned that the judicial remedies available in Costa Rica have not been effective and have lacked the necessary procedural guarantees. To the extent that the available remedies are inadequate, the State of Nicaragua considers that there is no need to exhaust them.[FN162] The Nicaraguan State added that “Costa Rica is obligated, by all

available means, to protect all foreigners on its soil, [...] especially when their fundamental rights are at risk and the time limits provided in the domestic laws are very far from reasonable and [...] at odds with the urgency of the situation that calls for immediate measures, since acts of discrimination and xenophobia can lead to the loss of human life.”[FN163]

[FN161] Unnumbered note of May 26, 2006, received on May 26, 2006, p. 21.

[FN162] Written submissions presented by the State of Nicaragua in the framework of the hearing held by the Commission on October 18, 2006, pp. 48-53.

[FN163] Unnumbered note of May 26, 2006, received on May 26, 2006, pp. 2-5

237. In this connection, the State of Nicaragua considers that "the legitimacy of a law does not depend on its content but on its consistency with the standards of the international law of human rights. In that sense, the fact that there is a law in force in Costa Rica that permits such time limits, which at first sight seem excessively long, does not release the State of Costa Rica from its obligations under the Pact of San Jose and other instruments that provide for specific judicial guarantees and recognize the need to apply due process within a reasonable time.”[FN164] The State of Nicaragua asserts that “a reasonable time in situations of this type cannot be measured by the same yardstick as for other situations where the components of xenophobia and discrimination are not present. The delay of justice in this case could encourage sentiments of xenophobia and discrimination and make their precarious situation even more vulnerable.”[FN165]

[FN164] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 16.

[FN165] Communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006, p. 27.

238. Finally, in the brief containing its arguments on merits, the State of Nicaragua contended that the provisions on exhaustion of domestic remedies do not apply when “there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.”[FN166] Concretely, the Nicaraguan State claims that as of the date of presentation of its arguments on merits, “in the Canda case approximately one year has passed and the Office of the Prosecutor has only indicted two policeman, leaving uncharged six others who also committed offences by omission because they merely stood by as witnesses to the horrendous incident in which Natividad Canda was attacked by two Rottweiler dogs, to the satisfaction of the security guard and of the owner of the workshop and the dogs. [...] In the Urbina Silva (sic) et al. case, approximately 336 days have elapsed and the Office of the Prosecutor has not charged Juan Antonio Arguedas Calderón, the man who committed the murder and injuries; the annex to the reply of Costa Rica shows that as of March 8, 2006, 88 days after the crimes known as the La Guácima case, one of the aggrieved, Francisco José Angulo García was called on to give his statement.”[FN167]

[FN166] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

[FN167] Unnumbered note of November 21, 2006, received by electronic mail on November 21, 2006, and transmitted in the original via Note MPN-OEA/2195/2006 of November 29, 2006.

239. For its part, the State of Costa Rica did not waive the option to invoke the rule of exhaustion of domestic remedies, which waiver would have been valid in accordance with the precedents established by the IACHR and the Inter-American Court.[FN168] On the contrary, at the earliest possible opportunity in the proceeding before the Commission, the Costa Rican State contended that “domestic remedies have not been exhausted in either of the matters concerning the alleged violation of human rights by the Costa Rican State. Both cases are currently under examination by the appropriate judicial authorities [...]. The time taken in both investigations has been within lawful and reasonable limits in accordance with Costa Rican law and the demands of due process, particularly considering the complexity of the events and the type of rights that have been affected --and that could be affected-- by the judicial proceedings.”[FN169]

[FN168] IACHR, Report N° 69/05 of October 13, 2005. Petition 960/03 Iván Eladio Torres. Argentina, par. 42; I/A Court H. R., Case of Ximenes Lopes. Preliminary Objection. Judgment of November 30, 2005. Series C No. 139, par. 5; I/A Court H. R., Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, par. 49; and I/A Court H. R., Case of the Serrano Cruz Sisters. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, par. 135.

[FN169] Note DE-039-06 of May 5, 2006, received on May 5, 2006, pp. 14-15.

240. With regard to the argument of the Nicaraguan State according to which the penury of the families of the victims renders exhaustion of domestic remedies impossible, the State of Costa Rica claims that this exception is not applicable because “in publicly actionable crimes the prosecution is responsible for carrying out the investigation at the expense of the State, and for pressing charges if there is sufficient evidence to do so.”[FN170] Therefore, the State of Costa Rica holds that judicial proceedings in cases of this nature do not entail any financial cost for the victims or their families. Furthermore, the Costa Rican State says that it provides free technical assistance whenever it is needed by reason of the financial situation of the person, without any distinction based on the nationality of the victims or of those responsible for the punishable act. To corroborate said argument, the State of Costa Rica includes among its annexes a Record of Notification of Rights to the Victim in the case of Mr. Natividad Canda Mairena, from which it can be seen that the Office of the Attorney General offered his family advisory and representation services, which were refused because they already had access to such legal advisory services.[FN171] The State of Costa Rica also includes among its annexes a note by which Regino Canda Mairena, brother of the victim, grants power of attorney to his private lawyer to act in the case concerning the death of Mr. Natividad Canda Mairena[FN172] along with an identical note signed by Juana Francisca Mairena, the mother of Mr. Natividad Canda Mairena.[FN173] Furthermore, with regard to Mr. José Ariel Silva Urbina, the State of Costa

Rica says that it has repeatedly called on Francisco José Linares García to come for the necessary medical examination but he has not come forward.

[FN170] Note DE-039-06 of May 5, 2006, received on May 5, 2006, p. 18.

[FN171] Judicial Branch of Costa Rica, Office of the Attorney General, Office of the Assistant Prosecutor of Cartago, Case File 05-002259-0058-PE. Record "Notification of Rights to the Victim," presented by the State of Costa Rica as an annex to its Note DE-039-06 of May 5, 2006, received on May 5, 2006.

[FN172] Letter delivered in court on November 24, 2005, and presented by the State of Costa Rica as an annex to its Note DE-039-06 of May 5, 2006, received on May 5, 2006.

[FN173] Letter delivered in court on December 1, 2005, and presented by the State of Costa Rica as an annex to its Note DE-039-06 of May 5, 2006, received on May 5, 2006.

241. As regards the allegations of Nicaragua regarding a supposed delay of justice, the Costa Rican State insists that it has acted within the time limits prescribed by the Costa Rican code of criminal procedure. The Costa Rican State asserts that the cases of Messrs. Natividad Canda Mairena and José Ariel Silva Urbina are in the hands of the appropriate judicial authorities, in accordance with the due process established in its domestic law. The State of Costa Rica says, furthermore, that in none of the cases questioned by the State of Nicaragua has there been a delay of justice and violation of due process guarantees. On this point, the Costa Rican State argues, citing Judgment 6347-94 of its country's Constitutional Court, that the Constitution does not recognize a right to time limits, but "the fundamental right of all persons to have their case settled within a reasonable time, which has to be determined in each particular case, bearing in mind: the complexity of the matter, (...) the consequences of the delay for the parties, the guidelines and usual margins for the types of proceeding concerned, and the average standard time for the disposal of similar matters by the authorities in charge of those matters." [FN174]

[FN174] Written submissions presented by the State of Costa Rica at the hearing of October 18, 2006.

242. In the brief containing its arguments on merits the State of Costa Rica also claimed that the Costa Rican state judicial apparatus has responded effectively in the cases of the deaths of Messrs. Canda Mairena and Silva Urbina, and that the timely and effective state response has also followed the rules of due process. It added that "it is not the interested parties that have expressed discontent with the Costa Rican state apparatus and, in any case, should they be dissatisfied with the outcome of their petitions they can appeal or seek an annulment of the decisions in the criminal proceedings, or, in the event of a supposed delay of justice, they have the possibility to challenge any decisions or acts in that connection with the Constitutional Chamber of the Supreme Court of Justice." [FN175]

[FN175] Note DM-028-07 of January 19, 2007, transmitted via Note CROEA-011-07 of February 5, 2007, from the Permanent Mission of Costa Rica to the OAS, and received on February 5, 2007.

243. In keeping with the burden of proof, the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness.[FN176] If the State concerned does not present arguments on this requirement in a timely manner, it shall be assumed that it has waived the right to allege failure to exhaust domestic remedies and, therefore, to discharge the burden of proof incumbent on it.

[FN176] See: IACHR, Report N° 32/05 of March 7, 2005. Petition 642/03 Luis Rolando Cuscul Pivaral et al. (Persons Living with HIV/AIDS). Guatemala, pars. 33-35; I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, par. 53; Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, par. 33; and Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, par. 31.

244. As regards the domestic remedies that should be exhausted and the effectiveness thereof, the Costa Rican State initially told the Commission that it was unable to supply detailed information on sensitive matters that are at the judicial investigation stage because to do so would violate the rules of due process and the normal development of the criminal proceedings.[FN177] However, the State of Costa Rica mentioned the possibility of appeal to the Constitutional Chamber of the Supreme Court Justice to uphold any rights that they deem to have been violated, which remedy, according to the Costa Rican State, has not been exhausted in any of the cases.

[FN177] Note DM 183-06 of June 29, 2006, received on July 5, 2006, p. 4.

245. As to the effectiveness of the aforementioned constitutional appeal, the State of Costa Rica says that since 1989 the Constitutional Court has devoted itself not only to constitutional control, but also to the protection of the human rights recognized by the Constitution and the international instruments ratified by Costa Rica. It adds that the Constitutional Court has been fundamental for the progressive development of human rights in Costa Rica due to the erga omnes binding nature of its decisions, its readiness to receive and process petitions, its promptness, and its modification of said norms.[FN178]

[FN178] Note DE-039-06 of May 5, 2006, received on May 5, 2006, pp. 14-15

Considerations of the Commission on the alleged impossibility to exhaust domestic remedies do to the indigence of the victims

246. The Commission deems it timely to recall, in first place, that merely because a person is indigent does not, standing alone, mean that he does not have to exhaust domestic remedies, but that whether or not an indigent has to exhaust domestic remedies will depend on whether the law or the circumstances permit him to do so. That opinion was ratified by the Court in Advisory Opinion 11/90.[FN179] The Commission has reiterated in its jurisprudence that a declaration of indigence without any corroborating evidence is insufficient to establish that "indigence" prevented the Petitioner from invoking and exhausting domestic remedies.[FN180]

[FN179] I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11.

[FN180] IACHR Report N° 81/05 of October 24, 2005. Petition 11.862 Andrew Harte and Family. Canada.

247. In the instant case, the State of Costa Rica has shown that, as regards the identification of those responsible for the deaths of Messrs. Leopoldo Natividad Canda Mairena and José Ariel Silva Urbina, and the injuries to Messrs. José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García, these are matters for public action and, therefore, the State investigates them ex officio without the need for a private accusation. Furthermore, the State of Costa Rica has demonstrated that the alleged victims or their representatives had the opportunity to receive free technical assistance, which is provided for by law in cases of financial hardship without any distinction based on the nationality of the victims or of those responsible for the punishable act. The record also shows that the relatives of one of the alleged victims, Mr. Natividad Canda Mairena, has the access to advisory services from a private attorney.

248. In as much as the respondent state has shown that the remedies under domestic law were available for the injured parties in the cases of Messrs. Canda and Silva, it was up to the complainant state to demonstrate that they were unable to obtain the necessary legal assistance to protect or guarantee rights recognized in the Convention. Given that the State of Nicaragua has not provided any evidence that would enable the Commission to determine that the indigence of the victims prevented them from having access to the remedies under domestic law, the Commission concludes that this exception is not applicable.

Considerations of the Commission on the alleged unwarranted delay in rendering a final judgment under domestic remedies

249. The Commission finds it necessary to recall that, as a general rule, a criminal investigation and the respective proceeding should be carried out promptly in order to ensure the attainment of justice. However, at the same time, it is necessary to afford the machinery of the domestic courts the necessary time to properly weigh the arguments of all the parties, in order to

form a certain conclusion on the facts, and present a reasoned argument for their decisions. In spite of the fact that, as the Inter-American court has ruled, the rule of prior exhaustion must never lead to a halt or delay that would render international action [...] ineffective.[FN181] The ultimate purpose of the rule of prior exhaustion of domestic remedies is to give the State the opportunity to examine an alleged violation of a right protected in the Convention and apply the mechanisms under its internal law in order to remedy the situation before it is taken up in an international proceeding.

[FN181] I/A Court H.R., Velásquez Rodríguez Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, par. 93.

250. In the instant case, the events connected with the deaths of Messrs. Leopoldo Natividad Canda Mairena and José Ariel Silva Urbina, and with the injuries to Messrs. José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García, occurred on November 10, 2005, and December 4, 2005, respectively, and were brought to the attention of the Inter-American Commission on February 6, 2006. Accordingly, less than three months had elapsed between the events and the time the interstate communication was lodged with the Commission.

251. However, the Commission has previously mentioned that in examining exhaustion of domestic remedies a distinction must be made between the time the petition is lodged and the pronouncement on its admissibility. These two proceedings correspond to two different phases, which are easily distinguished based on the legal effects of Article 33 of the Rules of Procedure, which authorizes the Commission to ask the petitioner to complete the requirements omitted when the petition is incomplete or inadmissible.[FN182] In other words, as the petitioner has the opportunity to rectify deficiencies in the petition after it is presented, the prerequisite of prior exhaustion of domestic remedies must be fulfilled by the time the Commission examines that aspect.

[FN182] In this regard, see: IACHR Report N° 52/00 of June 13, 2000. Cases 11.830 et al. (“Dismissed Congressional Employees”). Peru; IACHR, Report N° 101/01 of October 11, 2001, Case 10.247 et al. (Extrajudicial Executions and Forced Disappearances). Peru; IACHR, Report N° 25/04 March 11, 2004. Case 12.361 Ana Victoria Sánchez Villalobos et al. Costa Rica.

252. Accordingly, in adopting a decision on exhaustion of domestic remedies, the Commission shall consider the status of domestic proceedings not at the time that it took receipt of the petition, but when it issues its report. In the course of processing the interstate communication, the Commission has received very limited information on the domestic judicial proceedings in the cases connected with this communication. From the scant information received to date, on which it is basing its decision in this case, the Commission finds with respect to both cases that the alleged culprits have been identified and, at least in the case of Mr. Natividad Canda Mairena, two policemen have been formally charged. The Commission considers that the State

of Nicaragua has not provided sufficient evidence from which to conclude that there has been a delay on the part of the Costa Rican judicial authorities in these cases, nor that said delay is unwarranted. Therefore, the exception of unwarranted delay is not applicable to the cases of Messrs. Leopoldo Natividad Canda Mairena, José Ariel Silva Urbina, José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García.

Considerations of the Commission on the impossibility to exhaust domestic remedies due to the alleged existence of a generalized practice of discrimination

253. The State of Nicaragua has alleged that the cases of Messrs. Leopoldo Natividad Canda Mairena, José Ariel Silva Urbina, José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García, are not isolated incidents but constitute evidence of the existence of a generalized practice of discrimination in Costa Rica. In that regard, the State of Costa Rica has alleged that the case is composed of "several closely interconnected matters: the crime against Natividad Canda; the wave of discrimination and xenophobia that the case generated, the fatal outcome of which was the murder of José Ariel Urbina Silva (sic) and the grievous injuries to five of his countrymen, among others, as well as the prevailing sense of impunity." [FN183] The Nicaraguan State adds that the "Canda case and, in particular, the Urbina Silva (sic) case, are two incidents of human rights violations that, while certainly very important, are nonetheless symptomatic of the climate of xenophobia that has existed and been accepted in Costa Rica for many years, as well as of the failure of the Costa Rican authorities to take steps against it. Accordingly, even had the Canda case not occurred, it is the treatment of this case and of a subsequent hate crime that resulted from it and from the climate of xenophobia that Costa Rica has failed to tackle properly, that constitutes a violation of human rights." [FN184]

[FN183] Unnumbered note of May 26, 2006, received on May 26, 2006, p. 20.

[FN184] Written submissions presented by the State of Nicaragua in the framework of the hearing held by the Commission on October 18, 2006, p. 16.

254. The State of Costa Rica, for its part, has denied the existence of a generalized situation and has insisted that "both the case of Mr. Natividad Canda Mairena and the case of Mr. José Ariel Silva Urbina are regrettable situations and isolated incidents. The assertion of the petitioner that these are acts permitted by the Costa Rican state is unacceptable, as is the affirmation that they occurred in a context of generalized discrimination and xenophobia." [FN185] In the brief containing its arguments on merits the State added that these have been sit isolated situations in a context of public policies which, while for obvious reasons cannot be perfect, are, nevertheless, favorable to the population of immigrants and foreign residents, in particular Nicaraguans, on Costa Rican soil.

[FN185] Note DM 183-06 of June 29, 2006, received on July 5, 2006, p. 3.

255. Based on its examination of the arguments and evidence presented by the two states, the Commission finds that the allegation of the existence of a generalized practice of discrimination against the Nicaraguan migrant population in Costa Rica is not manifestly groundless nor obviously out of order.

256. The Commission notes that these arguments have an effect on the question of exhaustion of domestic remedies since, in a widespread climate of discrimination such as the one alleged, the remedies available under domestic law could become illusory or ineffective for all Nicaraguans in Costa Rica, including Messrs. Leopoldo Natividad Canda Mairena, José Ariel Silva Urbina, José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García.

257. When the existence is alleged of a generalized practice of acts incompatible with the Convention which are shown to be officially tolerated, thereby rendering domestic proceedings futile, the exception to the rule of exhaustion of domestic remedies is applicable because it is reasonable to presume that no adequate or effective remedies exist to remedy a generalized situation.

258. Since its inception, the Inter-American Commission on Human Rights was aware that it could not insist that victims of widespread human rights violations meet the same requirements vis-à-vis exhaustion of domestic remedies. It was this reasoning that led the Second Special Inter-American Conference held in 1965[FN186] to adopt a rule of interpretation according to which in the event of systematic generalized violations, such a situation gives rise to a presumption *iuris tantum* that domestic remedies are neither suitable nor effective and, therefore, the requirement to exhaust them is dispensed with as a mere formality.

[FN186] OAS Official Records, OEA/Ser.C/I.13, p. 32.

259. One of the first instances in which the IACHR adopted a decision in that sense was in case 1684, analyzed by the Inter-American commission in 1971, which alleged the systematic use of torture in investigations carried out by the government of Brazil. The petition contained mentions of different individuals who were reportedly victims of the violations and, in turn, described a situation of mass violations in connection, for example, with 12,000 arbitrarily arrested political prisoners. On that occasion, the Commission resolved, in first place, that it was not necessary for this "general" human rights case to be disaggregated into several individual cases. In second place, the question of prior pronouncement being put to a vote, the Commission decided to absolve it by considering Case 1684 to be a "general case" of violations of human rights, thus exempting the Commission from requiring compliance with Article 9 (bis).d of its Statute, on exhaustion of internal remedies, in carrying out a full examination of the matter Second.[FN187]

[FN187] IACHR Annual Report 1973. Section 1, Part III Observations on Communications Received: Brazil.

260. Although the aforementioned case was decided before the Convention came into force, the Commission considers applicable the principal according to which it is not incumbent on the petitioner to exhaust domestic remedies in cases in which the existence of a generalized practice is alleged. The mechanisms established for examining isolated instances of alleged violations of the rights set forth in the convention are not appropriate for responding effectively to cases where it is claimed that the alleged violations occur as part of a generalised practice.

261. However, the Commission adds that in order to invoke this exception it is necessary to demonstrate prima facie the existence of the alleged practice. On this point, the Commission concurs with the position of the former European Commission of Human Rights, according to which it is not sufficient that the existence of supposed legislative measures or administrative practices be simply alleged; it is also necessary, in order to seek an exception to the rule of exhaustion of domestic remedies under such an argument, that the existence of the purported legislative measures and administrative practices be demonstrated with substantive proof.[FN188] Otherwise, it would be sufficient for any petition or interstate communication to allege the existence of a generalized practice of human rights violations in order to circumvent the requirement to exhaust domestic remedies contained in the Convention.

[FN188] European Commission of Human Rights: First Greek Case, 2nd decision on admissibility, Yearbook 1; Northern Ireland Case, decision on admissibility, Yearbook 15, 80. Ireland v. United Kingdom, Decision on admissibility, Yearbook 15, p. 242.

262. Therefore, the question as to whether or not the exception to the rule of exhaustion of domestic remedies is applicable due to the absence of a suitable and effective remedy is closely connected with the merits of the matter, that is, with the question of whether or not it is determined that a generalized practice of discrimination exists in Costa Rica to the point where the remedies provided by domestic law are futile.

263. The Inter-American Commission must exercise the utmost care in scrutinizing allegations that a systematic practice of human rights violations exists in an OAS member state because, if true, the allegations would mean that the individuals who are victims of said pattern of violations have very few or no means at the domestic level to protect themselves from said violations

264. At the same time, the Commission cannot ignore the particular gravity of accusing a state party to the Convention of having carried out or tolerated on its soil a systematic practice of discrimination. Accordingly, the Commission's evaluation is compelled to take this fact into account and conclusively demonstrate the truth of the allegations.

265. These are the exceptional circumstances that led to the Commission to open the case but defer its treatment of admissibility until the debate on the merits, giving both parties the opportunity to present arguments and evidence on the merits of the case, in order to determine if the existence was confirmed prima facie of a generalized practice of discrimination in Costa Rica

toward the Nicaraguan migrant population, which would make the exception to the rule of exhaustion of domestic remedies applicable.

Considerations of the Commission on elements that must coincide in order to corroborate the existence of a generalized practice of discrimination in Costa Rica to the detriment of the Nicaraguan migrant population

266. It falls to the Inter-American Commission to decide, based on the evidence presented during the stages on admissibility and merits in the framework of this interstate communication, if it has been shown sufficient proof to determine *prima facie* the existence of a regular pattern of discriminatory acts carried out as part of a state policy or with the tolerance of the State of Costa Rica, to the detriment of the Nicaraguan migrants in its territory.

267. That is, to determine the admissibility of this communication, the Commission must analyze if the acts alleged form part of systematic practice of discrimination toward the Nicaraguan migrant population in Costa Rica and if the Costa Rican State has adopted concrete measures connected with this said practice or if it has tolerated the existence of said practice. The Commission accepts the opinion of the European Court on this point, according to which “a practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches.”[FN189]

[FN189] European Court of Human Rights: *Ireland v. the United Kingdom*. 5310/71. 18 January 1978.

268. From the foregoing it may be deduced that the Commission must determine, first, if the acts alleged could constitute acts of discrimination. To that end, the Commission will take into account what the Inter-American Court has held with respect to the fact that Nowadays, “no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable.”[FN190]

[FN190] I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, par. 101.

269. The Commission will also bear in mind that not all difference in treatment can be considered discriminatory. As the Court has found,[FN191] no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications

selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.

[FN191] 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, par. 57.

270. At the same time, the Commission must determine if the acts alleged in the communication to be discriminatory constitute isolated or circumstantial acts, or if they are the consequence of a generalized practice. In this connection, the Inter-American court has noted that "the confirmation of a single case of violation of human rights by the authorities of a State is not in itself sufficient ground to presume or infer the existence in that State of widespread, large-scale practices to the detriment of the rights of other citizens." [FN192]

[FN192] I/A Court H.R., Gangaram Panday Case. Judgment of January 21, 1994. Series C No. 16, par. 64.

271. To corroborate the existence of said practice, the Commission must take several elements into account. The first element relates to quantity, that is, the alleged discriminatory acts must be perpetrated in such a quantity as to create a situation in which the human rights of a large sector of the population are being continuously violated or under constant threat. A second element relates to time, that is, the discriminatory acts alleged must occur regularly over a considerable period of time as part of a prolonged or habitual situation. A third element has to do with the existence of a pattern, which implies that the alleged acts of discrimination do not occur as an isolated matter or as a matter of chance or coincidence, instead they shall obey to certain common characteristics that connect them among each other and allow to conceptualize them as elements of the same situation. Lastly, there must be an element of official tolerance in the sense that the State has been remiss, evasive or negligent in respect to their obligations regarding the discriminatory acts alleged.

272. The Commission, therefore, proceeds to examine if the acts charged by the State of Nicaragua can lead the IACHR to conclude the existence prima facie of a pattern of discrimination to the detriment of the Nicaraguan migrant population in Costa Rica. Analysis to determine the existence of a sufficiently generalized practice of discrimination to render the exhaustion of remedies under domestic law futile

273. The Nicaraguan State has claimed that the case of Mr. Leopoldo Natividad Canda Mairena exemplifies the climate of xenophobia that exists and is accepted in Costa Rica. With regard to that case, based on information provided by the parties and the evidence in the record that was neither contested nor denied, the Commission takes the following facts as attested: On

November 10, 2005, Mr. Leopoldo Natividad Canda Mairena, a 26-year-old Nicaraguan national, was attacked by two Rottweiler dogs at the workshop owned by Mr. Fernando Zúñiga Mora, located at the entrance to the cemetery in La Lima, Cartago, Costa Rica. The incident was witnessed by the owner of the workshop and the dogs; the security guard, Luis Hernández; the head of the security company, Hugo Ceciliano Rodríguez; armed policemen, firefighters, and passersby. Thanks to the intervention of the firefighters and volunteers in the vicinity, Mr. Canda Mairena was taken to Max Peralta Hospital, where, later the same day, November 10, 2005, he died from his wounds.[FN193] The agonizing ordeal lasted approximately two hours. According to the coroner's report presented as evidence by the State of Nicaragua, the findings of autopsy No. A: 2005-2370 carried out on November 10, 2005, attributed Mr. Natividad Canda's death to the "multiple dog bites on both arms, modified by surgery, with lacerations of the muscles, arteries and veins leading to hemorrhagic shock." [FN194] The aforementioned coroner's report adds: "manner of death: accidental from a forensic point of view." From its reading of the coroner's report, the Commission further concludes that Mr. Canda Mairena died after receiving medical attention at Max Peralta Hospital.

[FN193] This was confirmed by the death certificate from the Civil Registry of the Republic of Costa Rica, No. 156991, presented as an annex to the communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006.

[FN194] Judicial Investigación Agency. Forensic Medicine Department. Forensic Pathology Section. Report DA: 2005-2370-P.F. Sum. 05-002259-058-PE of December 5, 2005.

274. According to several press reports, the security guard at the workshop protected by the dogs was well-known to Mr. Canda Mairena, since he is the father-in-law of his brother, Regino Canda Mairena. Based on the foregoing, the Commission can assume that at the time of the incident Mr. Natividad Canda Mairena's nationality was known; however, it cannot assume that his nationality had any implication in the events that led to his death.

275. As to the actions of the Costa Rican policeman who witnessed these events, even the prosecutor who is pursuing the case in Costa Rica has reached the conclusion that the police officials merely watched the incident and that they failed to shoot the dogs even though at least two of them had the opportunity to attempt to do so. However, based on the information in the record, the Commission cannot assume that the policemen did not shoot owing to the nationality of the victim and, therefore, there is no evidence of the existence of a discriminatory attitude due to his condition as a Nicaraguan citizen.

276. According to the facts alleged by the State of Nicaragua and not contested by the State of Costa Rica, into similar cases in which the victims of the dogs were Costa Ricans, the reaction of the authorities was different to that in the Canda case. Thus, in an attack on a Costa Rican child by a Rottweiler dog in January 2006 the dog was promptly destroyed. And in another incident at the workshop owned by Mr. Fernando Zúñiga, at the entrance to the cemetery in Lima, Cartago, on October 26, 2006, a Costa Rican citizen was also attacked by the same Rottweiler dogs and the Costa Rican police reportedly saved his life, killing one of the dogs. This disparate treatment in similar cases could be an indication that might enable the Commission to determine that the

case of Mr. Canda Mairena is an example of discrimination against Nicaraguans in Costa Rica. However, the Commission has received no information on the specific circumstances in which these two similar cases occurred. For example, the Commission has no information whatever on the policemen's relation to the victims and the dogs, or whether or not the policeman were aware of the nationality of the victims. Therefore, the Commission does not have sufficient evidence that there was discrimination in the way in which the police authorities acted in the case of Mr. Canda Mairena. For the IACHR to reach such a conclusion would be pure conjecture on its part.

277. The Commission notes with concern the declarations of a number of Costa Rican police authorities apparently aimed to diminish the seriousness of the events based on Mr. Canda Mairena's irregular status or alleged criminal record. For example, the Commission finds from a story published in "Al Día" newspaper of November 14, 2005, that the Director of the Public Security Forces of Cartago reportedly declared that "in 2005 alone Canda was up before the courts on eight occasions, suspected of auto theft, burglary, robbery, possession and abuse of drugs, and theft of electric cable. Also, the nica was an illegal immigrant and had been deported three times this year." [FN195] These statements on the part of the Costa Rican authorities are irresponsible and could have the effect of influencing public opinion, in order to justify the grave circumstances in which Mr. Canda Mairena died. However, it cannot be concluded that those declarations alone are sufficient to establish the international responsibility of the State of Costa Rica. In this respect, the Court has held that "the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, including a person's migratory status." [FN196] The Court has also ruled that "despite the seriousness of certain actions by inmates and their responsibility for some felonies, it is not admissible that power can be exerted in such a limitless way or that the State can use any proceedings to reach its objectives, without respecting law and morality." [FN197] The Commission hopes that the Costa Rican State will take the appropriate educational steps and administrative measures to punish such declarations and prevent their recurrence in the future.

[FN195] "Al Día" newspaper of November 14, 2005. Press report presented as an annex to the communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006.

[FN196] I/A Court H. R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, conclusion 6.

[FN197] I/A Court H.R., Durand and Ugarte Case. Judgment of August 16, 2000. Series C No. 68, par. 69.

278. As regards the steps taken by the Costa Rican judicial authorities to investigate the facts and punish those responsible for the death of Mr. Canda Mairena, both parties have supplied the Commission with very limited information. However, the Commission can deduce from the information available that forward steps have been made in the criminal investigation into the death of Mr. Natividad Canda Mairena. For example, February 8, 2006, was the date set for the reconstruction of events, [FN198] and February 24, 2006, saw the admission of the criminal complaint brought by Ms. Juana Francisca Mairena, the mother of Mr. Natividad Canda Mairena. [FN199] On November 22, 2006, the Assistant Prosecutor for Cartago filed an indictment and request for the opening of trial proceedings against two officers of the public

security forces for the crime of “unintentional homicide by omission” of which Mr. Leopoldo Natividad Canda Mairena was allegedly the victim. Thus, based on the information available, it is not possible to conclude that there was disparity in access to justice or negligence on the part of the Costa Rican judicial authorities because the victim was Nicaraguan. The State of Nicaragua has not put forward any evidence to show that essential proceedings were neglected, that the Costa Rican judicial authorities have acted in a biased manner, that witnesses have been disqualified for their nationality, or that any other circumstance has been verified to confirm the existence of negligence, bias, or discriminatory practices on the part of the judicial authorities in connection with this case.

[FN198] Annex 5 to Note DE-039-06 of May 5, 2006, received on May 5, 2006.

[FN199] Annex 6 to Note DE-039-06 of May 5, 2006, received on May 5, 2006.

279. Based on the foregoing, the Commission finds that it lacks sufficient evidence with which to determine conclusively that the circumstances surrounding the death of Mr. Leopoldo Natividad Canda Mairena or the treatment of this incident by the Costa Rican judicial authorities are an example of the practice of discrimination alleged to exist in Costa Rica.

280. The Nicaraguan State has alleged that the case of Mr. José Ariel Silva Urbina, in which Messrs. José Antonio Martínez Urbina, Francisco Angulo García, Rito Antonio Obando and Elder Angulo García were also injured, is likewise an example of the climate of xenophobia and discrimination that exists in and is accepted by the State of Costa Rica.

281. As regards this case, based on information provided by the parties and the evidence in the record that has not been contested or denied, the Commission takes the following facts as attested: On December 4, 2005, less than a month after the death of Mr. Leopoldo Natividad Canda Mairena, six Nicaraguan citizens were in Los Espejos bar in La Guácima, Alajuela, Costa Rica, where 25 to 30 other persons, the majority of them Costa Rican, were also present. At between midnight and 1 a.m., these six Nicaraguan citizens decided to leave the place because they were being verbally attacked with xenophobic remarks. Some of the persons who were on the premises decided to go out, continue their offensive remarks, and begin to physically assault the six Nicaraguan citizens by throwing stones at them.

282. Finally, a man who was identified as Juan Arguedas Calderón by the witnesses, Alejandro Gutiérrez Cambrero, Rito Antonio Obando Castellón, José Joaquín Arguedas Chavarría and Francisco Linares García, assaulted the Nicaraguan citizens José Ariel Silva Urbina, Antonio Martínez Urbina and Francisco Linares García with a knife, which resulted in the death of the former and the serious injury of the other two, who had to be rushed to hospital; one of them to México Hospital in the city of San José and the other to San Rafael Hospital in the city of Alajuela.

283. As regards the causes of these events, according to a report by “La Prensa” newspaper of December 6, 2005, “the jokes being told by two Costa Ricans about the death of a Nicaraguan in the jaws of two Rottweiler dogs resulted in the murder of José Ariel Silva Urbina”. The

newspaper cites the testimony of José Pablo Mendoza, who was reportedly with Mr. Silva Urbina on the night of the incident. According to said testimony, “the Costa Ricans were imitating a howling dog howls in allusion to the Nicaraguan Natividad Canda Mairena [...]. That upset (Ariel) and they began to have an argument [...]. The Nicaraguans, five in total, decided to leave the bar, and as they walked away some 30 people hurled abuse at them.”[FN200]

[FN200] “La Prensa” newspaper of December 6, 2005. Press report presented as an annex to the communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006.

284. The Commission finds that based on the information available it is possible to conclude that there was a close link between the Nicaraguan nationality of the victims in this case and the verbal and physical attacks that occurred in and outside the bar. The statements of witnesses show that the cause of the attacks that culminated in the death of Mr. Silva Urbina and the wounding of other Nicaraguan citizens is tightly associated with their Nicaraguan nationality. When incidents such as these occur and include threats of violence based on the nationality of the victims, in particular when those threats are proffered in public and by a group of persons, it is up to the State to conduct a prompt investigation of the facts with due diligence, not only of the attack on the life and physical integrity of the victims but also of the possibility that it was motivated by discrimination. In this respect, the Commission is of the opinion that, when it is suspected that discrimination for reasons of race, nationality or any other motive has induced violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.

285. The Commission has received very limited information on the domestic judicial proceedings which were initiated in Costa Rica to identify those responsible for these acts of violence. From the documents presented by the State of Costa Rica, the Commission has been able to deduce that as a result of the complaint made by Red Cross personnel to the Judicial Police, a criminal investigation was opened in which Mr. Juan Arguedas Calderón has been charged with the murder of Mr. José Ariel Silva Urbina and the attempted murder of Messrs. Antonio Martínez Urbina and Francisco Linares García. However, based on the testimonies collected by different news media, the Commission finds that some other witnesses claimed that before being assaulted with a knife they received a beating from a mob of Costa Ricans and the Nicaraguan citizens were also injured by stones thrown at them.[FN201]

[FN201] “La Prensa” newspaper of December 8, 2005. Press report presented as an annex to the communication of the State of Nicaragua of February 6, 2006, received on February 6, 2006.

286. As to the prosecution of Mr. Juan Antonio Arguedas Calderón for the crimes of aggravated homicide and two counts of attempted aggravated homicide to the detriment of Messrs. José Ariel Urbina Silva, Antonio Martínez Urbina, and Francisco José Linares García, the information in the record shows that on December 6, 2005, the prosecutor requested the

criminal court judge to order a search of the home of Mr. Juan Arguedas Calderón, in order to seize any evidence that might be found there. The criminal court ordered the search and seizure on December 6, 2006,[FN202] and it was carried out that same day.[FN203] The steps taken since February 2006 have been designed to identify all of the witnesses in the case on the grounds that locating all of the witnesses and aggrieved parties is necessary in order to build a solid case. On February 2, 2007, five eyewitnesses had been called to take part in an identity parade to make a physical identification of the accused man, the results of which would enable the prosecution to decide what type of criminal summons it would seek. The Commission has not received further updates on the state of this proceeding but the information available shows that the judicial authorities have been acting with the appropriate diligence in the case

[FN202] Annex 8 to Note DE-039-06 of May 5, 2006, received on May 5, 2006.

[FN203] Record of Search or Premises presented as Annex 9 to Note DE-039-06 of May 5, 2006, received on May 5, 2006.

287. The information in the possession of the Commission with respect to this incident and its ensuing judicial proceeding is so limited that it is unable to determine conclusively if the treatment that the Costa Rican State has given to these events constitutes an example of the practice of discrimination alleged to exist in Costa Rica.

288. Another case, which, according to the Nicaraguan State, constitutes an example of the climate of xenophobia and discrimination that exists in, and is accepted by, the State of Costa Rica is that of Ms. María José González Quintanilla, a Nicaraguan citizen who was an inmate at Calle Real Prison in Liberia, where she also worked as a kitchen assistant, and accused the administrator of the prison of sexual abuse. However, the only evidence that the State of Nicaragua has presented in connection with this case is a press report, and it has not provided the Commission with any information that would enable it to conclude that this alleged sexual abuse was in any way connected with her vulnerable situation as a result of being a member of the Nicaraguan migrant population. The State of Nicaragua has also neglected to supply any information that might enable the IACHR to conclude that the alleged victim did not have access to a judicial remedy because of her Nicaraguan nationality. The dearth of information received by the Commission on this case makes it impossible to say if it constitutes an example of a practice of discrimination that allegedly prevails in Costa Rica. Once again, the information made available to the Commission is not enough to presume the existence of a practice of discrimination on the part of the State of Costa Rica.

289. In similar fashion, the State of Nicaragua drew the attention of the IACHR to the situation of Mr. Roger López González, who reported to the Consulate General of Nicaragua that he had been the victim of attacks and death threats by a Costa Rican citizen, for which reason he felt compelled to return to Nicaragua after 17 years of legal residence in Costa Rica. However, the State of Nicaragua merely presented these allegations in a general manner in its brief without offering any evidence to enable the Commission to weigh the veracity of the allegations or conclude that the threats received had to do with his condition as a Nicaraguan migrant in Costa Rica. Furthermore, the Commission received no information that might enable it to determine if

Mr. López González reported these threats to the judicial authorities or what the reaction of the Costa Rican authorities was.

290. The State of Nicaragua has insisted that a situation of impunity reigns in violations committed against Nicaraguans, and by failing to adopt effective measures to prevent impunity, the State has prompted further discrimination and encouraged intolerant sectors to continue a campaign of xenophobia. The Inter-American Court has defined impunity as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention,” a situation that the State has the obligation to combat using all the legal means at its disposal.[FN204]

[FN204] I/A Court H.R., The “Panel Blanca” Case (Paniagua Morales et al). Judgment of March 8, 1998. Series C No. 37, par. 133

291. With respect to the alleged impunity, to demonstrate that the State of Costa Rica has violated the rights to a fair trial and judicial protection to the detriment of the Nicaraguan migrant population, it was incumbent on the State of Nicaragua to show, for instance, that investigations are not opened ex officio in cases where a Nicaraguan is the victim; or that when Nicaraguans turn to the administrative or judicial authorities they run the risk of deportation, expulsion, or deprivation of liberty. Alternatively it could have demonstrated that in specific cases Nicaraguans have been denied the free services of a public defender to act on their behalf, preventing them from upholding their rights. However, the State of Nicaragua presented no evidence in that respect and, rather, the record shows that the State of Costa Rica has investigated and offered free legal advisory services to victims of Nicaraguan origin. In that connection, the Commission notes that it has received only general allegations and the evidence in the record is not sufficient to conclude that the Costa Rican State is behaving in a remiss, evasive, or negligent manner with respect to the investigation and punishment of those responsible for human rights violations to the detriment of Nicaraguan citizens in Costa Rica

292. The Commission observes that the State of Nicaragua has provided no evidence that tends to demonstrate a practice of violence allegedly targeting persons of Nicaraguan origin in Costa Rica. The Commission is also at a loss to find examples in sufficient number to permit the presumption that such a practice exists. Nor has the State of Nicaragua brought to the attention of the Commission evidence of tolerance or acquiescence by the Costa Rican judicial authorities. For example, it has not been demonstrated that the criminal cases in which the victims are Nicaraguans are not being investigated, remain in impunity, assailants are punished with less severe penalties, or any other circumstances from which to presume acquiescence or tolerance on the part of the state.

293. The State of Nicaragua has also referred on several occasions to the attitude of the Costa Rican people to the Nicaraguan migrant population, which it alleges is discriminatory. States which, like Costa Rica, have a high number of immigrants under their jurisdiction cannot overlook the fact that those immigrants are in a vulnerable situation as regards the exercise of their human rights. This vulnerability is even greater when a state receives on its soil a large

number of citizens of another state because a negative predisposition towards the immigrant population often develops in the population of the host State. This negative predisposition is often accompanied by social stigmatization and, even though manifestations of xenophobia or discrimination may lie latent in any society, the migrant population is particularly vulnerable to such manifestations.

294. The Commission has received an abundance of information on the reactions of the Costa Rican population to the acts alleged in this communication and, based on that information, the Commission considers that the record duly accredits that certain sectors of the population in Costa Rica seized on the tragic circumstances in which Mr. Canda Mairena died to make public jokes and comments in different media, the contents of which illustrate a disturbing hostility toward the Nicaraguan migrant population that resides in Costa Rica. In response to these manifestations, the State of Costa Rica, through a press release issued by the Ministry of Foreign Affairs and Worship,[FN205] expressed its profound disapproval for the contents of said messages. In light of the foregoing, it is not possible to deduce that the State of Costa Rica has tolerated these practices.

[FN205] Ministry of Foreign Affairs and Worship. Press releases of November 17, 2005. Presented as Annex 15 to Note DE-039-06 of May 5, 2006, received on May 5, 2006.

295. Based on the information in the record, the Commission considers it demonstrated that there is a prevailing feeling of intolerance and rejection toward Nicaraguans among certain sectors in Costa Rica. Furthermore, the evidence presented by the State of Nicaragua also leads to the conclusion of the existence of a perception of vulnerability among Nicaraguans, who feel themselves to be the object of discrimination in Costa Rica. For example, from the interviews contained in the videos supplied by the Nicaraguan State it is possible to observe that Nicaraguan residents in Costa Rica attributed the circumstances in which Messrs. Canda Mairena and Silva Urbina died to their immigrant status. However, no evidence has been provided from which to conclude that these perceptions have translated into concrete practices. The Commission notes that any concrete practice of discrimination is prohibited and that states have the obligation to prevent, combat, punish, and eliminate discriminatory practices. However, unless they translate into discriminatory acts or omissions by reason of their causes or effects, the perceptions of the population do not constitute a practice that could be said to be grounds for establishing the international responsibility of the state.

296. The State of Nicaragua has also furnished abundant information from which it can be seen that national, regional, and international agencies, including the Rapporteurship on Migrant Workers and their Families,[FN206] have expressed concern at the situation of the Nicaraguan migrant population in Costa Rica. Studies carried out by these agencies provide an account of the difficulties that migrants face in Costa Rica, particularly if they lack the necessary papers. Those studies provide an information overview that the Inter-American Commission finds alarming. Thus, they report that requirements are set by the Educational Development Directorates, which prevent the enrollment of children and adolescents if they or their parents do not have a temporary or permanent residence permit; that undocumented migrants work in conditions of

overexploitation; and that staff of the Costa Rican Social Security Fund report to the General Directorate of Immigration persons who go for a medical consultation and are found not to have a legal residence permit. Taken together, each of these allegations could be sufficient to establish the existence of a pattern of discriminatory acts and omissions to the detriment of the Nicaraguan migrant population. For that purpose, it is necessary to provide not only general information on the different circumstances alleged, but also concrete examples in sufficient number to enable the Commission to take the alleged practice as attested. However, the State of Nicaragua has not informed the Commission of any concrete cases from which to corroborate the conclusions of these studies and demonstrate the existence of a systematic practice of discrimination in the State of Costa Rica.

[FN206] It should be noted that the powers of the Commission to prepare the studies and reports that it deems advisable for the performance of its main function of promoting observance and protection of human rights, in accordance with Article 41(c) of the Convention, are different from its powers to process the petitions and communications that it examines in exercise of its authority to determine whether or not there has been a violation of a right or freedom protected in the Convention, under Articles 44 or 45 of that international instrument. This conclusion arises from a simple reading of the provisions contained in the Convention and has been ratified by the Commission in its reports. Thus, the Commission has held that its competence to prepare general reports is independent from its power to process individual petitions and that the processing of a case pursuant to the individual petition procedure is more structured than the preparation of a general report, which serves an informative rather than adjudicatory purpose. Accordingly, the factors and evidence that the IACHR weighs in issuing a report or study on the situation of human rights in the country are different from those that it uses to declare the international responsibility of a state in the framework of a contentious proceeding.

297. Similarly, the State of Nicaragua has mentioned that the Law on Migration and Nationality violates the human rights of a number of victims but it has not presented the Commission with any cases in which the Law has been applied to a specific victim. The Commission concurs with the analysis of the State of Nicaragua and various organizations whose comments were added to the record in the case, that the law on migration and nationality is oriented toward protecting public security rather than human rights, and grants broad, discretionary powers to the administrative authorities in Costa Rica. However, the Commission notes that the Costa Rican State has acted within its powers in adopting the law in order to establish mechanisms of control on the entry and departure of undocumented migrants to its territory and to treat documented migrants differently from undocumented migrants,[FN207] always assuming that this different treatment is reasonable, objective, proportional, and does not violate human rights.

[FN207] These powers of the State were ratified by the Inter-American Court in its Advisory Opinion 18/03. See: I/A Court H. R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, par. 169.

298. Although the Commission decided to admit this general case, in which the State of Nicaragua names as victims of human rights violations the Nicaraguan migrant population in a vulnerable situation in Costa Rica, in so doing it noted that the instant case could not be equated with an abstract case since its purpose is the protection of the rights and freedoms of the Nicaraguan migrant population in Costa Rica. The Commission could present an opinion on the Law on Migration and Nationality in an abstract manner through a general recommendation or a study issued in the framework of its principal function to promote the observance and protection of human rights. However, in the framework of a contentious case such as this one, in order for the Commission to pronounce an opinion on the Law, the State of Nicaragua had to show that said law has been applied to the detriment of the protected rights and freedoms of the Nicaraguan migrant population.

299. As the Inter-American Court has held, in order for the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention to give rise to the international responsibility of the state, it is necessary for the law to affect the guaranteed rights and liberties of specific individuals.[FN208] In that connection we should recall the distinction that the Court made in its analysis between self-executing and non-self-executing laws. In the case of self-executing laws, the violation of human rights occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights, for example, because of nationality, automatically injures all the members of that nationality. Non-self-executing laws do not necessarily affect the rights of specific individuals because they may require subsequent normative measures, compliance with certain conditions, or implementation by state authorities. In the instant case, the law that, according to the State of Nicaragua, violates human rights is not a self-executing law and its promulgation alone does not empower the Commission to make a determination on the international responsibility of the State of Costa Rica in the framework of this interstate communication.

[FN208] I/A Court H.R., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, par. 50.

300. The State of Nicaragua has not drawn the attention of the Commission to any cases in which this law has been applied and, through its application, violated the rights of the Nicaraguan migrant population in Costa Rica. The most specific information that the Commission received in this respect recounts that, in accordance with this law, the Ministry of Labor recommended that no work permits for domestic servants be granted for six months in Costa Rica, which, according to an official letter from the Director General for Immigration and Nationality,[FN209] led to the refusal of a large number of applications presented mostly by Nicaraguans, which exacerbated the problem of undocumented migrants in the Nicaraguan community in Costa Rica. In this connection, the Commission notes that according to the documentation supplied by the State of Nicaragua, the Director General for Immigration and Nationality requested the amendment of that recommendation owing to the aforementioned effect. Therefore, documentary evidence presented shows the concern of the main Costa Rican

immigration authority and its steps to persuade the labor authority to modify a recommendation. This is far from being evidence of a discriminatory government policy.

[FN209] Ministry of the Interior and Police. General Directorate of Immigration and Nationality. San José, Costa Rica. DG-1519-2006 of July 25, 2006. Presented as Annex E of the documents put forward by the State of Nicaragua in the framework of the hearing held by the Commission on October 18, 2006.

301. In view of the fact that the State of Nicaragua has not presented the Commission with information that would allow it to conclude that this law has been applied to the detriment of the rights of the Nicaraguan migrant population in Costa Rica, the Commission cannot consider it an example of the generalized discrimination alleged to exist in Costa Rica.

302. Finally, throughout the procedure of this case, the State of Nicaragua has asserted that the State of Costa Rica has confessed the existence of discrimination and xenophobia in its territory. To this respect, the Inter-American Commission values the reiterated occasions in the course of this proceeding on which the State of Costa Rica has recognized that there are enormous challenges to prevent the rise of xenophobia between the two nations, and that those states should adopt preventive measures to strengthen relations between the two peoples. Under no circumstances could the Commission conclude that the State of Costa Rica bears responsibility on the basis of this recognition, as the State of Nicaragua has requested, since it is far from being an acceptance of the factual and legal arguments put forward in the communication.

303. At the same time, the Commission wishes to thank the State of Costa Rica for its invitation in the framework of this interstate communication for the IACHR or its Rapporteurship on Migrant Workers and their Families to conduct an on-site visit to Costa Rica in order to assess the actual situation of Nicaraguan immigrants in its territory. The situation of the migrant population in Costa Rica has been a matter of constant attention by the Inter-American Commission, and its Rapporteurship noted in the year 2002 that “there is a certain degree of discrimination against persons of Nicaraguan origin,”[FN210] but it observed that the discrimination suffered by migrant workers and their families does not reflect a State policy, but rather has to do with a negative predisposition with respect to migrant workers on the part of the population.[FN211]

[FN210] IACHR Annual Report 2002. Fourth Progress Report of the Rapporteurship on Migrant Workers and their Families in the Hemisphere. Chapter V, par. 146.

[FN211] IACHR Annual Report 2002. Fourth Progress Report of the Rapporteurship on Migrant Workers and their Families in the Hemisphere. Chapter V, pars. 145 and 147.

304. The lack of specific evidence presented in the framework of this interstate communication has prevented the Commission from arriving at the determination that certain

acts have been verified in Costa Rica to allow the Commission to conclude that there is a generalized practice of discrimination against Nicaraguans in Costa Rica.

305. Based on the foregoing, the Commission concludes that the State of Nicaragua has not demonstrated, in the framework of the proceeding on this communication, the existence of a generalized practice of discrimination in Costa Rica toward the Nicaraguan migrant population.

306. Having been unable to corroborate prima facie the existence of a generalized practice of discrimination against the Nicaraguan migrant population in Costa Rica, it would be inappropriate for the Commission to assume that no suitable and effective remedies exist to repair the violations alleged in this interstate communication. Accordingly, the exception to the rule set forth in Article 46 of the Convention does not apply.

4. Time period for submission of the communication

307. In accordance with the provisions of Article 46(1)(b) of the Convention, in order to be admissible, a petition or communication must be lodged within six months of the date when the complaining party has been notified of a final decision handed down at the national level. The six months rule ensures legal certainty and stability once a decision has been made.

308. In the instant case, inasmuch as the exception to the rule of exhaustion of domestic remedies is not applicable, which implies that the instant interstate communication is inadmissible, the Commission abstains, since the matter is rendered moot, from examining the other admissibility requirements provided in the Convention.[FN212]

[FN212] This abstention is consistent with the practice of the Commission in such matters. In this respect, see, inter alia: IACHR Report N° 87/05 of October 24, 2005, Petition 4580/02. Peru; Report N° 73/99 of May 4, 1999, Case 11701. Mexico; Report N° 24/99 of March 9, 1999, Case 11.812. Mexico; and Report 82/98 of September 28, 1998, Case 11.703. Venezuela.

VI. CONCLUSIONS

309. Based on the foregoing, the claims of the Nicaraguan State with regard to violation of the rights recognized in Articles 1(1) (Obligation to respect rights), 8 (Right to a fair trial), 24 (Right to equal protection), and 25 (Right to judicial protection) of the American Convention on Human Rights, are inadmissible under Articles 46 of the Convention and 31 of the Rules of Procedure of the IACHR.

310. The Commission takes this opportunity to condemn all acts of discrimination or xenophobia against migrant persons of any origin, and recalls that the international system for protection of human rights was created and operates on the basic premise that all human beings are equal and, therefore, precludes all discrimination. The Commission reiterates that it is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and identical nature and that states have the duty not to commit discrimination as well as

the obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant petition inadmissible under Article 46(a) of the Convention;
2. To notify the parties of this decision; and
3. To publish the instant report in its Annual Report.

Done and signed in the city of Washington, D.C., on the 8st day of the month of March, 2007.
(Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Clare K. Roberts, Paulo Sérgio Pinheiro, and Freddy Gutiérrez Trejo, Commissioners.