

(Translation)

ORDER OF THE PRESIDENT OF JULY 15, 1981

WHEREAS:

1. The Government of Costa Rica, represented by its Minister of Justice, Elizabeth Odio Benito, designated as Agent for this case by Executive Decree No. 389 D.M. of July 13, 1981, has submitted to the Court on this day a formal request that it investigate an alleged violation, on the part of the national authorities of that country, of human rights guaranteed by the American Convention on Human Rights in the cases of the death in prison of Viviana Gallardo and the wounding of Alejandra María Bonilla Leiva and Magaly Salazar Nassar, on July 1 of this year; renouncing for that purpose the prior exhaustion of the domestic legal remedies and of the prior procedures before the Inter-American Commission on Human Rights set forth in Articles 48 to 50 of the Convention;
2. The Court also received a telegram dated July 2, 1981, from Fernando and Rose Mary de Salazar, parents of one of the injured women, which referred substantially to the same acts, and
3. Costa Rica is a State Party to the American Convention on Human Rights and has expressly and unconditionally accepted the jurisdiction of the Court to hear any case relating to the interpretation and application of the provisions of the Convention, pursuant to its Article 62, and

CONSIDERING THAT:

1. In view of the fact that this is a case presented to the Court by a State Party to the Convention that has recognized its jurisdiction and, in addition, this State Party waives the prior exhaustion of the domestic legal remedies and of the prior procedures before the Inter-American Commission on Human Rights set forth in Articles 48 and 50 of the Convention, and because of the imminent session of the full Court convoked for July 16 of this year, the full Court must consider this request to determine, in the first place, its admissibility and the competence of the Court to receive and to hear it (Arts. 25 and 44 (2) of the Rules of Procedure);
2. The below-signed President being a national of the Republic of Costa Rica, it is necessary, under Article 5(3) of the same Rules, to yield the presidency for hearing this matter to the Vice President,

NOW, THEREFORE, THE PRESIDENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS RESOLVES:

1. To turn over the hearing of the request presented by the Government of the Republic of Costa Rica in the matter of Viviana Gallardo **et al.**, together with the petition presented by the parents of one of the victims, to the full Court so that it decide, in the first place, on its admissibility and the competence of the Court in this matter.
2. To yield the presidency for the purposes of the hearing of this matter and call on the Vice President, Judge Máximo Cisneros, to exercise that office.

San José, Costa Rica, July 15, 1981

RODOLFO E. PIZA E.
President

CHARLES MOYER
Secretary

DECISION OF JULY 22, 1981

WHEREAS:

1. The Government of Costa Rica, represented by Elizabeth Odio Benito, the Agent duly accredited for this case by that Government, and invoking Article 62(3) of the American Convention on Human Rights, submitted to this Court on July 15, 1981 an application requesting the Court to decide whether, in the case involving the death of Viviana Gallardo and the wounding of Alejandra María Bonilla Leiva and Magaly Salazar Nassar, the national authorities of Costa Rica committed a violation of human rights guaranteed by the Pact of San José;
2. The Government of Costa Rica has stated that, for the purposes of this case, 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";
3. The Government of Costa Rica further requested that "this application be referred to the Inter-American Commission on Human Rights pursuant to the terms of its jurisdiction, if the Court resolves that it lacks the power to deal with the application before the procedures set forth in Articles 48 to 50 of the Convention have been completed,"

CONSIDERING THAT:

1. Costa Rica, as a State Party to the American Convention on Human Rights that, in addition, has accepted the general jurisdiction of this Court pursuant to Article 62 of the Convention, has standing to submit cases to the Court under Article 61(1) of the Convention;
2. Article 46 of the Convention contains the requirement for the prior exhaustion of domestic legal remedies and prescribes that its meaning be ascertained in accordance with generally recognized principles of international law;
3. Article 61(2) of the Convention provides that "in order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed";
4. The circumstances of this application require the Court to decide first on the effect to be given to the waiver by Costa Rica of the aforementioned procedures and, in general, to determine its jurisdiction to deal with the matter at this stage;
5. Article 57 of the Convention provides that "the Commission shall appear in all cases before the Court,"

NOW, THEREFORE, THE INTER-AMERICAN COURT OF HUMAN RIGHTS

1. Decides that, before determining whether it has jurisdiction and before considering any other aspect of the matter, it is appropriate for this Court to give the Government of Costa Rica and the Inter-American Commission on Human Rights the opportunity to present their views concerning the jurisdiction of the Court to deal with the case at this stage.
2. Requests that the Government of Costa Rica present its arguments concerning the jurisdiction of the Court to deal with the instant case at this stage.
3. Requests that the Inter-American Commission on Human Rights, taking into account Article 57 of the Convention, provide this Court with its views concerning the jurisdiction of the Court to deal with the instant case at this stage.

4. Instructs the President, after conferring with the Government of Costa Rica and the Inter-American Commission on Human Rights, to set an appropriate period within which the pertinent submissions are to be presented and, following consultation with the Court's Permanent Commission, to convene the Court to render a decision.

5. Instructs the Secretary to transmit the present resolution to the Government of Costa Rica and to the Inter-American Commission on Human Rights and to bring its adoption to the attention of the States Parties to the Convention and the Secretary General of the Organization of American States.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this 22nd day of July, 1981.

CARLOS ROBERTO REINA
President

PEDRO NIKKEN

HUNTLEY EUGENE MUNROE

CESAR ORDOÑEZ

MAXIMO CISNEROS

RODOLFO E. PIZA E.

THOMAS BUERGENTHAL

CHARLES MOYER
Secretary

DECISION OF NOVEMBER 13, 1981

The Inter-American Court of Human Rights, sitting in accordance with Article 62(3) of the American Convention on Human Rights (hereinafter "the Convention") and the relevant provisions of its Statute and Rules of Procedure, with the following judges in attendance:

Carlos Roberto Reina, President
Pedro Nikken, Vice President
César Ordoñez
Máximo Cisneros
Rodolfo E. Piza E.
Thomas Buergenthal

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

Having deliberated in private from November 9 through 13, 1981, the Court delivers the following decision:

BACKGROUND:

1. By telegram dated July 6, 1981, the Government of Costa Rica (hereinafter "the Government") announced the institution of a proceeding requesting the Court to hear the matter of Viviana Gallardo **et al.** A formal application was presented on July 15. In its application the Government advised the Court of its decision to submit to it the matter of Viviana Gallardo, a Costa Rican citizen who was killed in prison, as well as that relating to the injuries suffered by her cell mates, all of which were inflicted on July 1, 1981 by a member of the Civil Guard, who was guarding them at that time in the First Commissariat of that institution. The Government's application, citing Article 62(3) of the Convention, requested that the Court decide whether these acts constituted a violation by the national authorities of Costa Rica of the human rights guaranteed in Articles 4 and 5 of the Convention or of any other right guaranteed therein.

2. In its application, the Government declared that for purposes of this case 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," that is, the procedures before the Inter-American Commission on Human Rights (hereinafter "the Commission"). The Government also declared that the waiver was designed to enable the Court to "consider the instant case immediately and without any procedural obstacle."

3. The Government requested subsidiarily that "this application be referred to the Inter-American Commission on Human Rights pursuant to the terms of its jurisdiction, if the Court resolves that it lacks the power to deal with the application before the procedures set forth in Articles 48 to 50 of the Convention have been completed."

4. The Government in its application designated: Elizabeth Odio Benito, Procurator General, Minister of Justice, as Agent; Manuel Freer Jiménez and Farid Beirute Brenes, as advisers; and Roberto Steiner Acuña, Martín Trejos Benavides and María I. Arias Méndez, as advocates.

5. By resolution of July 15, 1981, the President of the Court, Judge Rodolfo E. Piza, decided to submit the Costa Rican application directly to the full Court for its consideration. He also decided, according to Article 5(3) of the Rules of Procedure, to yield the presidency for the

purposes of the hearing of this application to the Vice President, Judge Máximo Cisneros. Judge Carlos Roberto Reina was elected President of the Court on July 17, 1981 and as of that date he assumed the function of presiding over the matter.

6. In its decision dated July 22, 1981, the Court determined that "the circumstances of this application require the Court to decide first on the effect to be given to the waiver of Costa Rica of the aforementioned procedures and, in general, to determine its jurisdiction to deal with the matter at this stage." The Court next decided that "before determining whether it has jurisdiction and before considering any other aspect of the matter, it is appropriate for this Court to give the Government of Costa Rica and the Inter-American Commission on Human Rights the opportunity to present their views concerning the jurisdiction of the Court to deal with the case at this stage." The Court consequently requested the Government to present its arguments concerning the jurisdiction of the Court. Likewise, taking into account Article 57 of the Convention, the Court requested the Commission to provide its views on the same subject.

7. The aforesaid decision instructed the President to set an appropriate period within which the pertinent submissions were to be presented and to convene the Court to render a decision. Having consulted the Government and the Commission, the President convened the Court for November 9, 1981.

8. On October 6, 1981 the Government submitted a brief to the Secretariat containing its arguments confirming its principal and subsidiary pleas. In its brief, the Government asserted that the rule for the prior exhaustion of domestic remedies is a procedural requirement and being a rule established for the benefit of the State can be waived by it. With regard to the waiver of the procedures before the Commission, the Government declared that, according to Article 48(1)(f), the Commission is to seek a friendly settlement of the matter submitted to it and that therefore there is no juridical interest in complying with the provisions of this article as the Government only requested that the Court decide whether the facts set forth constitute a violation of the Convention.

9. On October 20, 1981 the Secretariat received the Commission's reply dated October 13, stating that it had not received any communication or petition regarding the case. The Commission asserted, furthermore, "that the procedures established in Articles 48 and 50 of the American Convention on Human Rights cannot be dispensed with in any case that might be brought before the Inter-American Court of Human Rights." Thus, the Commission is of the opinion that these procedures must be exhausted "before the Court can begin to hear the case."

10. On October 23, 1981 the Court requested the Government to provide it with information relating to the status of the case in the courts of Costa Rica and on the applicable domestic law. The Government complied with this request on October 30.

11. On November 3, 1981 the Government was requested to provide information on civil actions that might be brought in connection with this case under Costa Rican law. The Government complied with this request on November 9.

LEGAL CONSIDERATIONS:

12. From a legal point of view, this case is unique in that the Government, consistent with its country's well-known commitment to and traditional support for human rights and international cooperation and wishing to avoid lengthy delays in seeing justice done, has submitted the instant case directly to the Court before it had been examined by the Commission and before judicial proceedings that might be available in Costa Rican courts had been pursued and exhausted. Cognizant of the legal obstacles it faced in order to obtain direct access to the Court, the Government expressly declared that it waived:

a) The requirement, set out in Article 61(2) of the Convention, that "in order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed," and

b) The provision, contained in Article 46(1)(a) of the Convention, which conditions the admissibility of petitions or communications lodged with the Commission whether by individuals or by States on the requirement "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

13. This matter then has its origin in the action of a State Party which presents to the Court a case of a possible violation of human rights guaranteed in the Convention that might be imputed to that State, which State, moreover, has recognized as binding, **ipso facto**, and not requiring a special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of the Convention. The unusual character of this case requires the Court to seek the best way to reconcile, under the applicable rules of international law, the interests involved in this matter. These are, first, the interest of the victims that the full enjoyment of the rights they have under the Convention be assured and protected; second, the need to safeguard the institutional integrity of the system that the Convention establishes and, finally, the concern reflected in the application of the Government that the case be decided by a speedy judicial process.

14. Article 61(2) of the Convention is sufficiently clear in indicating that the Court may not deal with any matter unless the procedures before the Commission have been exhausted. However, as soon as the Government expressed its willingness to waive this requirement in order to facilitate the speedy consideration of this matter by this tribunal, the Court deemed it appropriate to assess the waiver and determine its scope in order to decide how to reconcile the interest of the victims and the integrity of the system guaranteed by the Convention. The Court, therefore, decided to consider the arguments that aided the Government in justifying the waiver of the aforementioned procedures as well as the views of the Commission, which, under Article 57 of the Convention, has the obligation to appear in all cases before the Court.

15. The object of international human rights protection is to guarantee the individual's basic human dignity by means of the system established in the Convention. Therefore, the Court as well as the Commission have an obligation to preserve all of the remedies that the Convention affords victims of violations of human rights so that they are accorded the protection to which they are entitled under the Convention. In this respect, it should be mentioned that neither the family of Viviana Gallardo, nor the other victims in this case, nor any person entitled, under Article 44, to present complaints to the Commission can submit them directly to the Court because individuals do not have standing, under the Convention, to present cases to it, which is another problem inherent to this case.

16. The Convention has a purpose -the international protection of the basic rights of human beings- and to achieve this end it establishes a system that sets out the limits and conditions by which the States Parties have consented to respond on the international plane to charges of violations of human rights. This Court, consequently, has the responsibility to guarantee the international protection established by the Convention within the integrity of the system agreed upon by the States. This conclusion, in turn, requires that the Convention be interpreted in favor of the individual, who is the object of international protection, as long as such an interpretation does not result in a modification of the system.

17. The application presented to the Court by the Government raises, **prima facie**, two issues bearing on the system established by the Convention. The first has to do with the fact that Article 61(2) requires that the procedures before the Commission be exhausted before the Court can hear a case. The second concerns Article 46(1)(a), which conditions the admissibility of a petition or complaint before the Commission on the requirement that the remedies under domestic law be

pursued and exhausted in accordance with generally recognized principles of international law. Neither of these requirements has been complied with in this case.

18. Before considering these issues, the Court holds that, with regard to the question that is common to both issues, there can be no doubt that under the applicable norms of general international law, the Government, through its duly authorized agent, is competent to make the aforesaid waiver. This conclusion of the Court, for which there is ample support in international law, bears exclusively on the issue of the Government's competence to make the aforesaid declarations before the Convention organs and does not address the question relating to their domestic legal effect in Costa Rica, which are matters governed by domestic law.

19. Having decided that the Government has the necessary competence, the Court must determine what legal consequences attach to the waivers. For if the requirements of Articles 61(2) and 46(1)(a) of the Convention are waivable by a State Party, the instant case is admissible. The opposite would be true if one or the other requirement is not waivable.

a) Waiver of the procedures before the Commission

20. The Court notes the very clear language of Article 61(2), which provides that "in order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed." Naturally, under international law relating to the interpretation of treaties, the aforementioned provision must be read in accordance with "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (Vienna Convention on the Law of Treaties, Art. 31(1)).

21. It is clear that in this matter no procedures at all have been initiated before the Commission. It is, therefore, not a question of deciding whether these procedures have been exhausted or when they might be considered to have been exhausted, but strictly one of determining whether the procedures can be avoided by the mere unilateral waiver of the State concerned. In order to make this determination, it is necessary to define the role that the Convention assigns to the Commission as a body having preparatory or preliminary tasks relating to the adjudicatory functions of the Court and, more particularly, whether the role assigned to the Commission has been created for the sole benefit of States, in which case it is waivable by them.

22. The Convention, in effect, in addition to giving the Commission formal standing to submit cases to the Court and to request advisory opinions and to giving it in proceedings before the Court a quasi-judicial role, like that assigned to the "Ministerio Público" of the inter-American system, obligated to appear in all cases before the Court (Article 57 of the Convention), gives it other attributes connected with functions that pertain to the Court and that by their nature are completed before it begins to hear a particular matter. Thus, the Commission has, **inter alia**, the function of investigating allegations of violations of human rights guaranteed by the Convention that must be carried out in all cases that do not concern disputes relating to mere questions of law. It follows therefrom that, although the Court, as any other judicial organ, does not lack the power to carry out its own investigations, particularly if these are necessary to provide the Court with the information it needs to discharge its functions, the Convention entrusts to the Commission the initial phase of the investigation into the allegations. The Commission also has a conciliatory function empowering it to propose friendly settlements as well as to make the appropriate recommendations to remedy the violation it has found to exist. It is also the body to which the States concerned initially provide all the pertinent information and submissions. But the Commission is also, and this is a fundamental aspect of its role in the system, the body that is authorized to receive individual complaints, that is, the entity to which victims of violations of human rights and other persons referred to in Article 44 of the Convention can resort directly in order to present their complaints and allegations. 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.

23. The Commission, thus, is the channel through which the Convention gives the individual **qua** individual the possibility to activate the international system for the protection of human rights. As a strictly procedural matter, it should be remembered that just as individuals cannot submit cases to the Court, States can submit them to the Commission only if the conditions of Article 45 have been met. This is yet another factor that bears on the institutional interest in fully preserving the ability of the individual by means of his own complaint to initiate proceedings before the Commission.

24. The Court notes, in addition, that it lacks the power to discharge the important function of promoting friendly settlements, within a broad conciliatory framework, that the Convention assigns to the Commission precisely because it is not a judicial body. To the individual claimant this process has the advantage of ensuring that the agreement requires his consent to be effective. Any solution that denies access to these procedures before the Commission deprives individuals, especially victims, of the important right to negotiate and accept freely a friendly settlement arrived at with the help of the Commission and "on the basis of the human rights recognized in (the) Convention." (Art. 48(1)(f)).

25. These considerations suffice to demonstrate that the aforementioned procedures before the Commission have not been created for the sole benefit of the States, but also in order to allow for the exercise of important individual rights, especially those of the victims. Without questioning the good intentions of the Government in submitting this matter to the Court, it follows from the above 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. These 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. In the instant case, the existence of such an exceptional situation is far from having been shown. The Government's waiver of the rule contained in Article 61(2) consequently lacks the force necessary to dispense with the procedures before the Commission. This conclusion, in and of itself, suffices not to admit the instant application.

b) Waiver of the prior exhaustion of domestic remedies

26. Notwithstanding the above conclusion, the fact that the Government has informed the Court of its waiver of the requirement of Article 46(1)(a) of the Convention leads the Court to consider the general issues involved in that waiver. In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly. A waiver, once effected, is irrevocable. (Eur. Court H. R., *De Wilde, Ooms and Versyp Cases* ("Vagrancy" Cases), judgment of 18th June 1971).

27. The application of this general principle may differ from case to case. As the prior exhaustion of domestic remedies is a requirement for the admissibility of a complaint before the Commission, the first question that arises is whether the Court can decide, at this time, on the applicability of that principle to this case, that is, on the scope of the waiver of the Government of this defense. Following the precedent established by international tribunals (see "Vagrancy" cases, **supra**), the Court notes that the question of whether the requirements of admissibility of a complaint before the Commission have been complied with is a matter that concerns the interpretation or application of the Convention, specifically its Articles 46 and 47, and is therefore, **ratione materiae**, within the scope of the Court's jurisdiction. However, because we are dealing

with the admissibility requirements of a complaint or application before the Commission, it is in principle for the Commission in the first place to pass on the matter. If, thereafter, in the course of the judicial proceedings there is a dispute relating to the question of whether the admissibility requirements before the Commission have been complied with, it will be for the Court to decide, which for that purpose it has the power to accept or reject the views of the Commission in the manner analogous to its power to accept or reject the Commission's final report. Therefore, having before it a complaint that has not as yet been dealt with by the Commission, and because it is a case that cannot be examined directly by this Court, the Court does not give an opinion, at this state of the proceedings, on the scope and effect of the waiver by the Government of the requirements concerning the prior exhaustion of domestic legal remedies.

c) Consequences of the prior conclusions

28. One of the unusual characteristics of this case and of the aforementioned conclusions is that the Court cannot hear this case in its present state although, as an abstract proposition, it fulfills the requirements for the exercise of its jurisdiction. In effect, this is a case that involves the application and interpretation of the Convention, especially its Articles 4 and 5, and is therefore, **ratione materiae**, within the scope of the Court's jurisdiction. The case, moreover, has been submitted by a State Party and thus fulfills the requirement of Article 61(1) of the Convention. Finally, this case presents the question of whether or not there was a violation of the human rights guaranteed in the Convention, attributable to a State that has recognized as binding, **ipso facto**, and not requiring special agreement, the jurisdiction of the Court. The inadmissibility of the application that the Government instituted does not, therefore, turn strictly on the lack of jurisdiction of the Court to hear the case but rather on its failure to fulfill the procedural requirements that must be met so that the Court may begin to hear a case. Thus, consistent with the spirit of Article 42(3) of its Rules of Procedure, the Court holds that it is empowered to retain the case on its docket until the conditions that have made it inadmissible in its present state have been complied with.

d) Subsidiary plea of the Government

29. Anticipating the difficulties that this case might present, the Government, in the form of a subsidiary plea, requested that in the event that the Court determined that the procedures provided for in Articles 48 to 50 of the Convention were not waivable, it refer the matter to the Commission, to the extent that the latter has jurisdiction. Despite the fact that such power is not expressly granted to the Court in the Convention, its Statute or its Rules of Procedure, the Court has no objection in complying with the request, it being understood that this action implies no decision by it concerning the Commission's jurisdiction in the instant case.

NOW, THEREFORE, THE COURT:

1. Decides, unanimously, not to admit the application of the Government of Costa Rica, requesting the Court to examine the case of Viviana Gallardo **et al.**
2. Decides, unanimously, to grant the subsidiary plea of the Government of Costa Rica and to refer the matter to the Inter-American Commission on Human Rights.
3. Decides, unanimously, to retain the application of the Government of Costa Rica on its docket pending the proceedings of the Commission.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this 13th day of November, 1981.

CARLOS ROBERTO REINA
President

PEDRO NIKKEN

CESAR ORDOÑEZ

MAXIMO CISNEROS

RODOLFO E. PIZA E.

THOMAS BUERGENTHAL

CHARLES MOYER
Secretary

(Translation)

**EXPLANATION OF THE VOTE OF JUDGE
RODOLFO E. PIZA E.**

In accordance with Article 66(2) of the American Convention on Human Rights I express my views by means of the following explanation of vote:

1. I have concurred in the unanimous decision of the Court because I share in its general conclusion that, within the protective system established by the American Convention on Human Rights, it does not appear possible to dispense with all of the procedures before the Inter-American Commission on Human Rights, set forth in Articles 48 to 50 of the Convention, the exhaustion of which Article 61(2) imposes as a condition precedent to the contentious jurisdiction of the Court. Therefore, it is not possible to admit the waiver of the procedures expressly made by the Government of Costa Rica, which in doing so demonstrate an exalted interest in overcoming the limitations, shortcomings and delays that ordinarily afflict international justice, especially in matters such as the present which should be characterized by effectiveness and promptness.

2. However, I dissent from some of the juridical reasoning found in the majority opinion, as well as from the form in which other points, which I share, are expressed in the decision. My concurring opinion therefore should be understood only to the extent that it is compatible with the majority opinion.

3. First, the action of the Government of Costa Rica presents to the Court a complex problem, without precedent of "competence" in the very generic and imprecise sense of the language of the Convention, which involves three different kinds of matters: of JURISDICTION, the sense of the specific "jurisdictional function" that the case requires of this Court; of COMPETENCE, in the sense of the measure of the general powers of the Court to hear it; and of STANDING, in the sense of the Court's specific power to admit this case in its present state.

4. I believe, in general, that the decision should have expressly explained the conclusion implicit in the majority opinion that the action brought clearly requires the Court to exercise its CONTENTIOUS JURISDICTION; a jurisdiction that, in my opinion, the Convention organizes and regulates as ordinary, giving it an obvious condemnatory nature, as in penal jurisdiction, whose specific object is not that of defining the right in question but rather that of reestablishing the violated right, specifically deciding whether there has been a violation of the rights guaranteed by the Convention that can be imputed to a State Party which in every case is the "passive party," the accused, in detriment to the individual who is the true "active party," the one who has been offended, the holder of the rights whose protection is being sought, and imposing on the States the appropriate consequences, in favor of the individual. This framework is important in order to understand the structure of the jurisdiction and why the procedural equation is always the same even though the case might have been presented by the State Party accused of this violation, which State Party does not, therefore, become converted into an "actor" just as it is not the delinquent in penal jurisdiction, even though the State itself has invoked the jurisdiction by submitting itself to be judged; or even though the jurisdiction has been invoked by the Inter-American Commission, which never has the role of a substantial party, accuser or accused but rather a **sui generis** role, purely procedural, as an auxiliary of the judiciary, like that of a "Ministerio Público" of the inter-American system for the protection of human rights. This latter reason also makes it regrettable that the Court has not been able to have available in this case the reasons that were the bases of the conclusion, succinct and without explanation, of the response of the Commission to the request contained in the Decision of July 22, 1981.

5. I believe, moreover, that the majority opinion is incomplete in setting out in paragraph 27 of the decision the COMPETENCE, **ratione materiae**, of the Court with respect to the case presented by the Government of Costa Rica; it appears to me to be necessary to explain that the general competence does not come about only from the fact that a specific problem has been presented of a possible violation of human rights guaranteed by the Convention, in the case of Viviana Gallardo and her cellmates, but rather that the possible violation could be **prima facie** imputed to the Costa Rican state in that it is attributed to an agent under its authority who apparently was on duty, using the juridical and material means of his post (weapon, access to the cell of the victim, etc.). This is important to point out because the doubt has been raised in this case whether, because we are dealing with a subordinate authority, the responsibility of the State could not be derived directly from the very act of that subordinate but rather only indirectly, in the event that it is determined that there was a culpable omission on its part in protecting the victims, or in granting reparation and indemnification for the consequences of the act. There also exists the doubt whether, in view of these circumstances, the prior exhaustion of domestic legal remedies is indispensable and, therefore, not capable of being waived. It is my strong belief that violations of human rights attributable to public authorities, in exercise or as a result of their duties, or utilizing the juridical or material means thereof, are **per se** attributable to the State, aside from the responsibility that it subjectively has due to the bad faith or the fault of the high authorities.

6. With respect to the problem of the STANDING of this Court to hear the case in its present state, I share the opinion of the majority in that, given its general competence, the State of Costa Rica, as a State Party to the Convention, that has furthermore accepted the jurisdiction of the Court in the manner provided for by Article 62, has the procedural standing, in accordance with Article 61(2) of the Convention, to submit the case to the Court, even though it is the State to which the alleged violations are imputed or can be imputed. I also think it important to link this conclusion to the structure that I have already mentioned of the contentious jurisdiction of the Court as one of a condemnatory nature. I also reiterate that the State concerned always plays the role, in the procedure before the Court, of the passive party, the accused, even though the State itself might have lodged the complaint.

7. In addition, regarding the fulfillment of the procedural requirements that determine the admissibility of the action of the Government of Costa Rica and, therefore, of the standing of the Court to hear it in its present state, I agree with the majority opinion in the sense that the exhaustion of domestic remedies is a procedural condition, in principle capable of being waived. I also agree with the decision not to decide on the question of the admissibility of the waiver of Costa Rica in the present case because of the decision of inadmissibility of this case by the Court, so that the Commission might decide it in the first place.

8. But I do not share the reasoning of the majority when it gives as a basis for rejecting the waiver of the Government of Costa Rica of the procedures before the Commission the fact that these procedures are indispensable to guarantee individuals, especially the victims of alleged violations, the full exercise of their interests, in view of the fact that the Convention expressly prohibits them direct access to the Court, and even in the supposition, still not resolved by the Court, that the Court might eventually give them an independent procedural standing once the proceedings have begun. In my case, my dissenting opinion obliges me to express once and for all that, in my judgment, the Convention only bars the individual from submitting a case to the Court. (Art. 61(1)). This limitation, as such, is, in the light of the principles, a "repugnant matter" (*materia odiosa*) and should thus be interpreted restrictively. Therefore, one cannot draw from that limitation the conclusion that the individual is also barred from his autonomous condition of "party" in the procedures once they have begun. On the other hand, it is possible, even imperative, to grant to the individual that role and the independent rights of a party that would permit him to exercise before the Court all of the possibilities that the Convention gives him in the procedures before the Commission. However, in my opinion, the lack of procedural standing

of the individual to initiate the process is not important because the foregoing presupposes that it already has begun through the action of the Commission or the State that makes the waiver.

9. It could be argued that there is one exception to the possibilities favoring the individual in the procedures before the Commission: that the victim might benefit from a friendly settlement proposed by the Commission that certainly, according to the majority opinion, would not be possible before the Court. But apart from the value, to my mind relative and doubtful, of the procedures of conciliation, which to my way of thinking are rather tilted toward the interests of the States, it cannot be disputed that there always exists the possibility, even with the intervention of the Commission, if not as part of, at least parallel to the procedures before the Court, that it also may result in a withdrawal, a friendly settlement or an extra-judicial agreement, with the advantage that it would have to be approved by the jurisdictional organ. (Art. 42 of the Rules of Procedures of the Court and the doctrine of Arts. 41(b), 50(3) and 51 of the Convention).

10. On the other hand, except for the procedure of conciliation, I believe that nothing that the Commission may be able to do, within the procedures set forth in the Convention, in the interest of an effective protection of human rights, the Court itself may not also be able to do during the proceedings; and do it even better, as its intervention would add certainty and authority to the proceedings and, at the same time, would reduce considerably the length of the proceedings, contributing to the fulfillment of the ideal of prompt and full justice, the absence of which is one of the most serious and frequent violations of human rights, and source and guardian of almost all of the rest.

11. In conclusion, if I share the reasoning of the decision that, in the instant case, the waiver of the Government of the procedures before the Commission is not admissible, I do not do so because I consider it essential in order to have the best protection of human rights but rather I have come to the conclusion that unfortunately the system of the Convention appears to make it impossible because the American States in drafting it did not wish to accept the establishment of a swift and effective jurisdictional system but rather they hobbled it by interposing the impediment of the Commission, by establishing a veritable obstacle course that is almost insurmountable, on the long and arduous road that the basic rights of the individual are forced to travel.

12. For the foregoing reasons, my concurrence in the unanimous decision should be understood in the following terms:

a) The action submitted by the Government of Costa Rica to this Court in the case of Viviana Gallardo **et al.** is not admissible because the waiver of the Government of the prior procedures before the Inter-American Commission on Human Rights is not admissible, because unfortunately it does not appear possible to dispense with them in their totality, within the limitations set out by the system of the Pact of San José.

b) In view of the inadmissibility of the principal plea that the Court now hear the matter, the Court should accept the subsidiary plea and send the case to the Inter-American Commission on Human Rights so that it might consider it in accordance with its powers under the Convention.

c) This Court should also, because of its general competence in the case, retain the application of the Government of Costa Rica on its docket awaiting the procedures before the Commission.

RODOLFO E. PIZA E.

CHARLES MOYER
Secretary

DECISION OF SEPTEMBER 8, 1983

WHEREAS:

1. On November 13, 1981 this Court adopted a Decision, which reads as follows:
 1. Decides, unanimously, not to admit the application of the Government of Costa Rica, requesting the Court to examine the matter of Viviana Gallardo **et al.**
 2. Decides, unanimously, to grant the subsidiary plea of the Government of Costa Rica and to refer the matter to the Inter-American Commission on Human Rights.
 3. Decides, unanimously, to retain the application of the Government of Costa Rica on its docket pending the proceedings of the Commission.
2. On June 30, 1983 the Inter-American Commission on Human Rights adopted a resolution, the relevant parts of which are set out below:

WHEREAS:

1. Article 48, paragraph 1, clause c) of the American Convention on Human Rights relating to the procedure established for the processing of individual communications notes that the Commission may declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received;
2. Article 32, clauses b) and c) of the Regulations of the Commission state that it is necessary in advance to decide on other questions related to the admissibility of the petition or its manifest inadmissibility based on the record or submission of the parties and whether grounds for the petition exist or subsist and, if not, to order the file closed;
3. From the evidence subsequently received by the Commission, in particular, the replies submitted to it for consideration by the Government of Costa Rica; the study of letter No. 034-81 from the Office of the Procurator General of the Nation; the formal inquiry request presented by the fiscal agent of San José; the sentences handed down in the case against José Manuel Bolaños for the crimes of qualified homicide, aggravated assault and simple assault of Viviana Gallardo, Alejandra Bonilla Leiva and Magaly Salazar Nassar; and the investigation conducted by the Director of Judicial Investigations, it is clear that the Government of Costa Rica has acted in conformity with current legal provisions and punished with full force of law the person responsible for the acts charged;
4. In view of the foregoing, the petition advanced is manifestly out of order since the grounds that led to its introduction no longer subsist, as required by Article 48, paragraph 1, clause c) of the Pact of San José and Article 32 b) and c) of the Regulations of the Inter-American Commission on Human Rights;
5. The institutional system for the protection of human rights established in the Convention for the processing of petitions or communications, within the limits set for it, and to which the State Parties have voluntarily agreed to abide, operates, except

in cases specifically provided for in the Convention itself, in lieu of the domestic legal system, in accordance with generally recognized principles of international law,

RESOLVES:

1. To declare inadmissible the petition made in the present matter, under the terms of Article 48, paragraph 1, clause c) of the American Convention on Human Rights.
2. To communicate this Resolution to the Government of Costa Rica and to the Inter-American Court of Human Rights.
3. To close the file on this matter, as provided for in Article 32(c) of the Regulations of the Inter-American Commission on Human Rights.
4. To include this Resolution in its Annual Report to the General Assembly in accordance with the terms of Article 59(g) of the Regulations of the Commission.

AND WHEREAS:

The reasons given on which the Resolution of the Inter-American Commission on Human Rights is based lead to the conclusion that, the Commission having rendered its decision in the manner set forth, there is no reason, under Articles 61(2) and 48 through 50 of the Convention for the case to remain on the docket of the Court,

NOW, THEREFORE, THE INTER-AMERICAN COURT OF HUMAN RIGHTS RESOLVES BY A DECISION OF SIX VOTES TO ONE:

1. To strike from its docket "In the Matter of Viviana Gallardo **et al.**"
2. To close the file on this matter.
3. To communicate this Resolution to the Government of Costa Rica and to the Inter-American Commission on Human Rights.

Nothing in this order is to be understood as being intended to affect the right of any interested individual from resorting to any and all remedies that the laws of Costa Rica may provide.

Done in English and Spanish, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this eighth day of September, 1983.

PEDRO NIKKEN
President

THOMAS BUERGENTHAL

HUNTLEY EUGENE MUNROE

MAXIMO CISNEROS

CARLOS ROBERTO REINA

RODOLFO E. PIZA E.

RAFAEL NIETO NAVIA

CHARLES MOYER
Secretary