In the Fairén Garbi y Solís Corrales case,

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

I.

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

2. In filing the application with the Court, the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention in the case of Francisco Fairén Garbi and Yolanda Solís Corrales. The Commission also asked the Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties."

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

4. On July 23, 1986, Judge Jorge R. Hernández Alcerro informed the President of the Court that, pursuant to Article 19(2) of the Statute of the Court, he had "decided to recuse (him)self from hearing the three cases that. . . were submitted to the Inter-American Court." By a note of

that same date, the President informed the Government of its right to appoint a judge ad hoc under Article 10(3) of the Statute of the Court. The Government named Rigoberto Espinal Irías to that position by note of August 21, 1986.

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

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

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

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

9. In his Order of January 30, 1897, the President made clear that the application which gave rise to the instant proceeding should be deemed to be the Memorial provided for in Article 30(3) of the Rules of Procedure. He also specified that the deadline of March 20, 1987 granted to the Commission was the time limit set forth in Article 27(3) of the Rules for the presentation of its observations and conclusions on the preliminary objections interposed by the Government. Having heard the views of the parties, the President ordered a public hearing on June 16, 1987 for the presentation of oral arguments on the preliminary objections. The time limits for submissions on the merits were left open to allow for the possibility that the Court might decide to join the preliminary objections to the merits or, in the event they should be decided separately, that the decision adopted would result in the continuation of the proceeding.

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

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

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

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

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

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

There appeared before the Court

for the Government of Honduras:

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

for the Inter-American Commission on Human Rights:

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

II.

16. According to the petition filed with the Commission on January 14, 1982, Francisco Fairén Garbi, a 28-year-old student and public employee, and Yolanda Solís Corrales, also 28 and a teacher, both Costa Rican nationals, disappeared in Honduras on December 11, 1981, while in transit through that country on their way to Mexico. It was also claimed that the authorities denied that the Costa Ricans had ever entered Honduras, whereas reports from the

Government of Nicaragua certified their departure for Honduras through the Las Manos border post at 4:00 p.m. on December 11, 1981. The petition asked for an appeal to the Government of Honduras to respect their lives and personal security and that the Government of Costa Rica to be informed of their whereabouts and physical condition.

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

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

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

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

a) that on January 8, 1982, the Consulate of Nicaragua in San José, Costa Rica certified that Francisco Fairén Garbi and Yolanda Solís Corrales had left Nicaragua for Honduras, crossing the border at Las Manos at 4:00 p.m. on December 11, 1981. The Consulate subsequently produced photostatic copies of the immigration cards filled out in the travellers' own handwriting;
b) that the Government of Honduras in a document dated January 24, 1982, and the Honduran Ambassador to Costa Rica, in a paid advertisement in the Costa Rican newspaper "La Nación", both declared, based upon a "thorough investigation" of Honduran immigration officials, that Francisco Fairén Garbi and Yolanda Solís Corrales had "at no time entered the territory of the Republic of Honduras." On February 19, 1982, the Ambassador to Costa Rica repeated this statement based on an investigation conducted by the Ministry of Foreign Affairs of her country. On February 11, 1982, the Secretary General of Immigration of Honduras had already certified, however, that Yolanda entered Honduran territory on December 12, 1981, through the Las Manos Customs Posts, travelling from Nicaragua "in a private vehicle" and that "there is no evidence of Francisco Fairén having entered our country, nor is there any record of the departure of either of the Costa Ricans." On the other hand, on March 10, 1982, the Foreign Minister of Honduras informed his Costa Rican colleague that both Francisco and Yolanda had entered Honduran territory from Nicaragua at Las Manos on December 11, 1981 and had left for Guatemala the following day, December 12, crossing the border at El Florido;
c) that whereas the Consul of Guatemala in San José, Costa Rica certified on January 4, 1982, that Francisco Fairén Garbi and Yolanda Solís Corrales did not enter or leave Guatemala between December 8 and 12, 1981, on February 3, 1982, he certified that both had entered Guatemala from Honduras on December 12, 1981, at the El Florido border post and had departed for El Salvador on December 14, 1981 through the Valle Nuevo border post;
d) that the Department of Motor Vehicles of Costa Rica certified that no driver's license had been issued to Yolanda Solís Corrales;
e) that witnesses had seen Francisco and Yolanda in Tegucigalpa on December 12, 1981.

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

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

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

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

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

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

a) that it order the most thorough investigation of the acts denounced in order to determine the circumstances of the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales;
b) that it punish those responsible, in accordance with Honduran law; and
c) that it inform the Commission within 90 days on the measures taken to carry out these recommendations.

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

26. On October 29, 1984, the Government requested the reconsideration of Resolution 16/84 on the grounds that the persons who had disappeared had left its territory, presumably for Guatemala; that it would consent to the exhumation of the body found in La Montañita, following the procedure established by the laws of Honduras; and that it had given specific orders to the authorities to investigate the allegations contained in the petition. The Government also argued that it had established a high-level Investigatory Commission to shed light on the

facts and to establish the appropriate legal responsibilities and that "with the firm conviction that in this case --as shown in paragraph 10 of the Resolution-- the remedies provided on the national plane have not been exhausted, (it had) decided to forward all the documentation on this deplorable matter to the Investigatory Commission so that it might reopen the investigation and verify the truth of the allegations."

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

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

notwithstanding the efforts of the Investigatory Commission established by Decree 232 of June 14, 1984, no new evidence has been discovered. The information at hand contains no convincing evidence on which to rule on the alleged disappearances with absolute certainty. In view of the impossibility of identifying the persons allegedly responsible, the interested parties were publicly exhorted to make use of the judicial remedies available to them through the appropriate courts, in order to bring charges against the public authorities or the private persons they deem responsible.

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

III.

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

1. It is proven that Francisco Fairén Garbi and Yolanda Solís Corrales departed from Costa Rica and entered the Republic of Nicaragua on December 8, 1981 and that they left Nicaragua on December 11 of that same year.
2. It is also proven that the Costa Rican nationals entered Honduras on December 11, 1981 and left that country on December 12, 1981.
3. It is likewise proven that Francisco Fairén and Yolanda Solís entered the Republic of Guatemala and that the Government of that country asserts that they left Guatemala for El Salvador.
4. It is proven that the petitioner at no time voluntarily exhausted the domestic legal remedies of Honduras.
5. Since the requirements of the Convention and the Regulations have not been met, the petition should have been ruled inadmissible. To admit and process such a petition in violation of the provisions of the Convention nullifies all actions taken in this case.

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

1. Francisco Fairén Garbi and Yolanda Solís Corrales, both Costa Rican nationals, were captured on December 11, 1981, and then disappeared while in transit through Honduras, and

that the Government of Honduras did not adopt the Commission's recommendations to investigate the allegations and punish those found to be responsible;

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

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

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

IV.

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

V.

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

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

assures the States Parties that have accepted the jurisdiction of the Court that the provisions of the Convention will be strictly observed.

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

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

VI.

36. The Court will now examine the preliminary objections.

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

a) lack of a formal declaration of admissibility by the Commission;
b) failure to attempt a friendly settlement;
c) failure to carry out an on-site investigation;
d) improper application of Articles 50 and 51 of the Convention, and
e) non-exhaustion of domestic legal remedies.

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

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

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

VII.

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

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

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

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

1. The Commission, acting initially through its Secretariat, shall receive and process petitions lodged with it in accordance with the standards set forth below:

. . .

c. If it accepts, in principle, the admissibility of the petition, it shall request information from the government of the State in question and include the pertinent parts of the petition.

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

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

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

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

VIII.

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

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

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

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

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

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

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

IX.

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

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

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

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

X.

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

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

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

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

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

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

61. Article 50 of the Convention provides:

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.
2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.
3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

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

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

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

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

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

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

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

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

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

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

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

70. The extension of the time limit for submission of an application to the Court does not impair the procedural position of the State when the State itself request an extension. In the instant case, the Commission's delay in reaching a decision on the request for reconsideration

resulted in a substantial (approximately a year and half) extension of the period available to the Government for a last opportunity to resolve the matter without being brought before the Court. Thus, neither the State's procedural rights nor its opportunity to provide a remedy were in any way diminished.

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

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

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

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

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

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

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

XII.

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

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

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

81. Both in its submissions of March 20, 1987 and at the hearing, the Commission argued that the prior exhaustion of domestic remedies was not required because of the total ineffectiveness of the judiciary. The Commission emphasized that in the period when the acts allegedly took place, not a single writ of habeas corpus "resulted in the release of anyone who had been illegally detained by governmental bodies." The Commission also asserted that the exhaustion of domestic legal remedies is not required when the violation of the right protected is the result of repeated state practice. It also argued that at least two of the exceptions to the rule

of prior exhaustion of domestic remedies set out in Article 46 (2) where applicable, because during that period there was no due process of law, nor was the petitioner allowed access to those remedies.

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

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

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

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

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

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

86. The Court need not decide here whether the grounds listed in Article 46 (2) are exhaustive or merely illustrative. It is clear, however, that the reference to "generally recognized

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

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

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

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

90. The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1). Thus, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due

process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case.

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

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

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

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

domestic remedies had been exhausted or did not exist, it would be prejudging the merits in a manner detrimental to the State.

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

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

NOW, THEREFORE, THE COURT:

unanimously,

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

unanimously,

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

unanimously,

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

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

Thomas Buergenthal
President

Rafael Nieto-Navia
Rodolfo E. Piza E.
Pedro Nikken
Héctor Fix-Zamudio
Héctor Gros Espiell
Rigoberto Espinal Irías

Charles Moyer
Secretary

So ordered:

Thomas Buergenthal
President

Charles Moyer
Secretary