Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Ernesto Rafael Castillo-Paez v. Peru
Doc. Type:	Judgment (Preliminary Objections)
Decided by:	President: Hector Fix-Zamudio; Vice President: Hernan Salgado-Pesantes; Judges: Alejandro Montiel-Arguello; Maximo Pacheco-Gomez; Alirio Abreu-Burelli; Antonio A. Cancado Trindade Judge Oliver Jackman recused himself in this case because he had participated in several stages of the case during its consideration by the Inter-American Commission on Human Rights when he was a member of the Commission.
Dated:	30 January 1996
Citation:	Castillo-Paez v. Peru, Judgment (IACtHR, 30 Jan. 1996)

In the Castillo Páez Case,

the Inter-American Court of Human Rights, pursuant to Article 31(6) of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "the Rules of Procedure"), renders the following judgment on the preliminary objections presented by the Government of the Republic of Peru (hereinafter "the Government" or "Peru").

I.

1. This case was submitted to the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") by the Inter-American Commission on Human Rights (hereinafter "the Commission" or the "Inter-American Commission") by petition of January 12, 1995, which was received the following day at the Secretariat of the Court (hereinafter "the Secretariat"). The case originated in a complaint (No. 10.733) against Peru lodged with the Secretariat of the Commission on November 16, 1990.

2. In referring the case to the Court, the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the Inter-American Convention") and Articles 26 et seq. of the Rules of Procedure. The Commission submitted this case to the Court for a decision as to whether, with the alleged "abduction and subsequent disappearance of Ernesto Rafael Castillo-Páez by the Peruvian National Police in violation of the Convention", the Government had violated the following articles of the Convention: 7 (Right to Personal Liberty), 5 (Right to Humane Treatment), 4 (Right to Life), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), all these in relation to Article 1(1) (Obligation to Respect Rights).

Additionally, the Commission asked the Court:

2. To order the Government of Peru to conduct the necessary investigations to identify, prosecute and punish those responsible for the forced disappearance of Ernesto Rafael Castillo-Páez.
3. To request the Government of Peru to report on the location of the remains of Ernesto Rafael Castillo-Páez to the victim's next of kin and deliver up such remains to them.
4. To order the Peruvian State to provide full material and moral compensation to the family of Ernesto Rafael Castillo-Páez for the grievous suffering they have endured as a result of the numerous violations of rights protected by the Convention. Also, that it declare the State liable to make such material and moral reparations to Dr. Augusto Zúñiga-Paz for the damage he sustained for his defense of the young Castillo-Páez.
5. To order the Government of Peru to pay the costs of these proceedings, including the fees of the professionals who represented the victim both in the petition filed with the Commission and in the case filed with the Court.

3. The Inter-American Commission named as its Delegate, Patrick Robinson, member, and as its Attorneys, Edith Márquez-Rodríguez, Executive Secretary, and Domingo E. Acevedo, Special Advisor to the Secretariat. In addition, the Commission named as Assistants the following persons: Juan Méndez, José Miguel Vivanco, Ronald Gamarra, Kathia Salazar, Viviana Krsticevic, Verónica Gómez and Ariel E. Dulitzky, who represented the plaintiff as petitioners before the Commission.

4. On February 9, 1995, after the President of the Court (hereinafter "the President") had made the preliminary review of the application, the Secretariat notified the Government of the application and informed the State that it had a period of three months in which to answer, two weeks to name an Agent and Alternate Agent and thirty days to present preliminary objections. The Government was also invited to designate a Judge ad hoc and received the notification on February 13, 1995.

5. In a brief of March 23, 1995, the Government appointed Mario Cavagnaro-Basile as Agent and on the following day it reported that it had appointed Julio Mazuelos-Coello as Alternate Agent. On September 23, 1995, the Government appointed Iván Fernández-López as Advisor.

6. By communication of March 15, 1995, received at the Secretariat on March 24, 1995, in accordance with Article 31(1) of the Rules of Procedure, the Government submitted a brief containing its preliminary objections; they included "failure to exhaust domestic remedies" (in capitals in the original) and "inadmissibility of the petition" (in capitals in the original). By note of March 24, 1995, received on April 3, 1995, the Government submitted a brief supporting the preliminary objections.

7. In the same brief the Government, pursuant to Article 31(4) of the Rules of Procedure, asked the Court "to declare the suspension of the proceedings on the merits until such time as the objections presented are resolved." By Order of May 17, 1995, the Court declared "the request

from the Government of Peru to suspend the proceedings on the merits of the case to be inadmissible and that it would continue processing the case in its distinct procedural stages" since the suspension sought did not correspond to an "exceptional situation" and no arguments had been presented in justification.

8. On April 27, 1995, the Commission submitted an application to the Court, in which it asked that the preliminary objections raised by the Government be declared inadmissible; on the following day it submitted its answer to the Government's preliminary objections. For its part, Peru submitted to the Court another brief dated June 13, 1995, concerning the aforementioned objections.

9. On May 8, 1995, the Government submitted its answer to the brief.

10. By Order of May 20, 1995, the President decided to summon the parties to a public hearing to be held at the seat of the Court on September 12, 1995. The Commission orally requested a postponement of the hearing, and the President, by Order of June 30, 1995, changed the original date of the public hearing, setting it for September 23 to hear the parties' comments on the preliminary objections presented by the Government.

11. On June 13, 1995, the Government submitted another brief, received on June 27, concerning "the allegedly extemporaneous filing of the preliminary objections." By note of August 23, 1995, the Commission requested that the Court consider that brief from the Government "not to have been presented and decide to expunge it from the records." By letter of September 18, 1995, the President declared that the Government's brief of June 27 "has been consider[ed] by the Court and it was decided that the Tribunal would evaluate it in due course."

12. The public hearing took place at the seat of the Court on September 23, 1995, at which there appeared

for the Government of Peru:

Mario Cavagnaro-Basile, Agent
Iván Fernández-López, Advisor;

for the Inter-American Commission on Human Rights:

Patrick Robinson, Delegate
Edith Márquez-Rodríguez, Attorney
Domingo E. Acevedo, Attorney
José Miguel Vivanco, Assistant
Viviana Krsticevic, Assistant
Ariel E. Dulitsky, Assistant

II.

13. The following paragraphs summarize the events, circumstances and processing of this case before the Commission as they were set forth in the application and its attachments submitted to the Court.

14. According to the application, on October 21, 1990, Mr. Ernesto Rafael Castillo-Páez, a university student and teacher, aged 22, was detained by officers of the Peruvian National Police near the Central Park of Group 17, Sector Two, Zone Two, of the Villa El Salvador district, Lima, Peru. According to witnesses to the events, when the agents detained him, "they stripped him of his glasses, beat him, handcuffed him and put him in the trunk of a police car, which then headed towards an unknown destination." The arrest took place after members of the subversive group "Sendero Luminoso [Shining Path]" (hereinafter PCP-SL) had detonated explosives near the "Monumento a la Mujer" in the Villa El Salvador district. Mr. Castillo-Páez had apparently left home early that morning to study with a friend when he disappeared.

15. Mr. Castillo-Páez's parents received an anonymous telephone call informing them that their son had been detained by the National Police. They immediately began to search for him and, not finding him at the various police stations, instituted judicial proceedings in order to locate him.

16. On October 25, 1990, a petition of habeas corpus was filed on behalf of the alleged victim with the presiding Examining Magistrate on duty in the Lima District Court, who, on October 31, 1990, upheld the petition. That decision was appealed by the Public Prosecutor for Terrorism before the Court of Appeal. On November 27, 1990, that Court declared the Prosecutor's appeal inadmissible, upheld the Examining Magistrate's ruling and ordered that all the documents needed for bringing "the appropriate criminal charges" be submitted.

17. The Commission also contends that, under Law No. 23.506 -governing habeas corpus and amparo in Peru- such a decision by the appellate court is final and constitutes res judicata. The above notwithstanding, the State Prosecutor filed a petition for nullification with the Court of Appeal, which did not grant the petition, whereupon the Prosecutor filed a complaint directly with the Supreme Court. The Supreme Court upheld the application and "ordered that the Court of Appeals grant the petition for nullification filed, as a result of which the case was brought before the Supreme Court of Justice." On February 7, 1991, the Second Criminal Chamber of the Supreme Court issued a decision to "overturn the ruling and declare the protective remedy inadmissible."

18. Based on evidence in the habeas corpus proceedings, a case was brought before Lima's Fourteenth District Criminal Court against several officials involved in the disappearance of Mr. Castillo-Páez for the crime of abuse of power. On August 19, 1991, that Court found "that the disappearance of student Ernesto Rafael Castillo-Páez occurred after he had been arrested by members of the National Police." However, it also found that there was no evidence that the accused bore any responsibility and therefore declared the case closed. That ruling was appealed before the First Criminal Court, which upheld it and closed the case without punishing anyone.

19. The Commission stated in its petition that it had received the complaint on this case on November 16, 1990, and that on November 19 it had first sought information from the

Government as to Mr. Castillo-Páez's whereabouts. After a number of requests to the Government on the part of the Commission for information on the case, the Government replied on October 3, 1991, stating that there was no evidence that National Police agents had detained Mr. Ernesto Rafael Castillo-Páez. On December 18, 1992, Peru dispatched to the Commission a copy of the ruling of the Second Criminal Chamber of the Supreme Court of February 7, 1991, which stated that "the case concerning the detention and subsequent disappearance of Mr. Castillo-Páez is closed."

20. On September 26, 1994, the Commission approved Report 19/94, submitted to the Government on October 13, 1995, inviting it to report within a period of forty-five days on the measures taken in compliance with the following recommendations contained therein:

1. To declare that the Peruvian State is responsible for the violation of Ernesto Rafael Castillo-Páez's rights to personal liberty, to humane treatment, to life and to judicial protection, as well as the judicial guarantees of due process of law embodied, respectively, in Articles 7, 5, 4, 25 and 8 of the American Convention.
2. To declare, further, that in the instant case the Peruvian State has not fulfilled the obligation to respect the rights and guarantees established in Article 1(1) of the American Convention.
3. To recommend to the Peruvian State that, in consideration of the review made by the Commission in the instant case, within forty-five days it conduct a new investigation of the events denounced, determine the whereabouts of the victim and identify and punish those responsible for the disappearance of Ernesto Castillo-Páez.
4. Likewise, to recommend that the Peruvian State pay fair compensation to the victim's next of kin.
5. To inform the Government of Peru that it is not authorized to publish this Report.
6. To request the Government of Peru that it inform the Inter-American Commission on Human Rights, within a period of sixty days, of the results of the recommendations contained in paragraphs 3 and 4 above.

21. On January 3, 1995, the Government dispatched to the Commission a copy of a report prepared by a task force, which the Commission considered as the answer to Report 19/94. On January 13, 1995, the Commission referred this case to the Court for its consideration.

III.

22. The Court has jurisdiction to hear the instant case. Peru has been a State Party to the Convention since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

IV.

23. Before examining the preliminary objections filed by the Government, it is appropriate to consider a previous matter raised by both parties, both in writing and at the hearing, concerning the admissibility of the filing of those objections.

24. The Government, in its brief dated March 24, 1995, received at this Tribunal on April 3, 1995, claims to have presented the preliminary objections in good time. In support of this claim, it argued that there was a distinction between the deadline established in the Rules of Procedure of this Court for answering to the application [Article 29(1)], set at three months, and the deadline for filing preliminary objections [Article 31(1)], set at thirty days, proving that there was a difference, well supported by procedural doctrine, between dates established in days and those established in months or years; whereas the former include only working days, the latter are reckoned in calendar days.

25. The Government adds that this difference is consistent with Peru's legislation and jurisprudence whereby procedural periods established in days are reckoned excluding non-working days; however, when the reference is to months or years those days are included; in other words, they are calendar days. The Government concluded that in the Rules of Procedure of this Court a clear distinction is drawn between the period for answering the application and the period for filing preliminary objections, with the deliberate intention of following the generally accepted procedure that when a period is indicated in months it includes all the days in the Gregorian calendar, holidays and working days alike, but that when it is established in days - as is the case with preliminary objections- only working days are taken into account. According to that hypothesis, the brief of preliminary objections had been presented on time.

26. The Inter-American Commission, for its part, in its brief received by the Court on April 27, 1995, requested that the brief presented by Peru on March 24 be declared inadmissible, on the grounds that it had not been presented within the deadline established by the Rules of Procedure of this Court. The Commission maintains that the Government received notification of the application on February 13, 1995, so that when the preliminary objection was presented on March 24, 1995, without any request for a deferment or extension of the deadline- the period of thirty days established in Article 31(1) of the Rules of Procedure had long expired, and, consequently, Peru's right to file the objection had been extinguished.

27. The Commission invoked the thesis sustained by the Court in the Cayara case, to the effect that the Court “must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism” (Cayara Case, Preliminary Objections, Judgment of February 3, 1993. Series C, No. 14, para. 63). Hence, should the brief of preliminary objection presented extemporaneously be admitted, those principles would be violated.

28. As far as the above allegations are concerned, the Court considers those made by the Government regarding the presentation of their preliminary objections to be unfounded, on the ground that although the period established in Article 31(1) of the Rules of Procedure is thirty days, whereas the deadline for answering the application is three months, the difference is not one of reckoning as Peru maintains, for the simple reason that time limits set in international and national proceedings are not based on the same criteria.

29. It is true that a distinction is drawn between judicial periods established in days and those established in months or years in some national procedural rules and in the practice of many

domestic tribunals. The former are reckoned excluding non-working days and the latter in calendar days. However, this distinction cannot be applied to international tribunals, there being no standard regulation for determining which days are non-working, unless these are expressly stated in the rules of procedure of the international organizations.

30. This situation is more evident in the case of this Court, since it is a jurisdictional body that does not function on a permanent basis and holds its sessions, without need of authorization, on days that may be non-working by the rules established for national tribunals and those of the host country of the Court itself. For this reason, the criteria used in domestic legislation cannot be applied.

31. As the Government maintains, the Rules of Procedure of this Court make no provision similar to that established in Article 77 of the Regulations of the Inter-American Commission, to the effect that all time periods in days, indicated in those Regulations, "shall be understood to be counted as calendar days." Nonetheless, this provision must be regarded as implicit in the proceedings before this Tribunal since, as stated earlier, the differentiation criterion invoked by Peru cannot be accepted, there being no point of reference -such as that established in domestic procedural legislation- to determine which days are non-working. It is therefore not feasible to use any reckoning other than natural days to establish periods in days, months or years.

32. Two examples corroborate this point: first, the provisions of Article 80(1)(b) of the Rules of Procedure of the Court of Justice of the European Communities, amended on May 15, 1991, which provides that:

[a] period expressed in weeks, months or in years shall end with the expiry of whichever day in the last week, month or year is the same day of the week, or falls on the date, as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months or years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month.

Secondly, mention may be made of Articles 46 and 49 of the Rules of Procedure of the Court of Justice of the Cartagena Agreement (Andean Agreement) of March 15, 1984. Whereas the former clearly establishes the working days and hours of the Tribunal, as well as its holidays, Article 49 establishes in its first paragraph that: "[t]he periods shall be reckoned in continuous days and calculated excluding the day of the date on which it begins.." Let it be said, however, that both those Tribunals function on a permanent basis.

33. Consequently, if the period of thirty days indicated in Article 31(1) of the Rules of Procedure of this Court should be considered in calendar terms, and the notification of the application was made on February 13, 1995, the date on which it was received by the Government, the deadline was March 13, 1995, whereas the preliminary objection brief reached the Secretariat of the Court on March 24, 1995.

34. The Court has declared that:

[i]t is a commonly accepted principle that the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved (Cayara Case, Preliminary Objections, supra 27, para.42; Paniagua Morales et al. Case, Preliminary Objections, Judgment of January 25, 1996. Series C No. 23, para. 38).

35. The Court observes that the brief in which the Government filed its preliminary objections was presented a few days after expiration of the period of thirty days set by Article 31(1) of its Rules of Procedure, but that this delay cannot be considered excessive within the limits of timeliness and reasonableness considered by this Tribunal as necessary for excusing a delay in meeting a deadline (see supra 34, Paniagua Morales et al. Case, paras. 37 and 39). Further, that this very Court has been flexible about the periods established in the Convention and in its Rules of Procedure, including that indicated in Article 31(1) of the Rules of Procedure, and has often granted extensions requested by the parties when they have shown reasonable cause.

36. In the instant case, the Court considers that, even though the Government did not expressly request an extension, this omission was possibly due to its mistaken computation of the period, excluding the non-working days in accordance with its procedural rules. For the reasons adduced, the review of the preliminary objections presented by Peru should proceed.

V.

37. The Government filed preliminary objections on two grounds: the failure to exhaust the remedies of domestic law and the inadmissibility of the application. The Government's position on these two points is summarized in a. and b. below.

a. The former is based essentially on the charge that the complaint before the Inter-American Commission was filed in parallel with the procedures of domestic remedies, thereby contravening the provisions of Articles 46(1)(a) and (b) of the American Convention and Article 37(1) of the Regulations of the Commission. The Government also considers that there has been a contravention of Article 305 of the 1979 Constitution of Peru, in force at the time at which the complaint was lodged with the Commission, in particular the principle whereby only after domestic remedies have been exhausted may persons who consider that their constitutional rights have been violated have recourse to the international courts or organizations established under the treaties to which Peru is a signatory. According to the Government, the foregoing is all the more serious since, as shown in the text of the application, the Peruvian courts had already ruled in the plaintiff's favor at the time the petition was lodged with the Inter-American Commission.

The Government also maintains that there was simultaneity in the presentation of the national and international remedies, recalling that on October 25, 1990 Mr. Cromwell Pierre Castillo-Castillo, father of Mr. Castillo-Páez, filed an appeal of habeas corpus against several officials with the Twenty-fourth Criminal Court of Lima under Judge Minaya Calle; once the appeal had been processed it culminated in the judgment of October 31, 1990 which upheld the appeal in favor of Ernesto Rafael Castillo-Páez for arbitrary arrest and ordered his immediate release.

Although he had obtained this favorable ruling, Mr. Castillo-Castillo had still appealed to the international authority, the complaint in question having been lodged with the Commission on November 16, 1990, before completion of the habeas corpus proceedings. The ruling of the Examining Magistrate was appealed before the Eighth Criminal Chamber, which admitted the appeal on November 27 of that year and ordered that a certified copy of all the events be sent to the presiding Provincial Prosecutor for the purpose of bringing a criminal case against the Director of the National Police Force and the Head of the Anti-Terrorism Bureau and identifying those responsible.

The Government further contends that in connection with that judgment of the appeal, a criminal process was initiated against those officers in the Fourteenth Criminal Court of Lima for abuse of authority, and that the case was expanded to include members of the police force for the use of violence and refusal to obey orders. The writ of habeas corpus was later granted by the Second Criminal Chamber of the Supreme Court of Justice of the Republic for serious irregularities committed in the court of first instance.

In view of the foregoing, the Government declares that the Commission, in admitting the complaint and formulating recommendations on it, infringed the provisions of the Convention and of its own Regulations concerning the exhaustion of domestic remedies, since the action of habeas corpus which was in full process before the First Criminal Chamber of the Lima Court of Appeals, to establish the whereabouts of Mr. Ernesto Rafael Castillo-Páez and identify those responsible for his alleged detention by members of the police force had not ended.

Peru concludes that Mr. Castillo-Castillo should have filed a petition of cassation with the former Tribunal of Constitutional Guarantees which, in accordance with the constitutional provisions in force at that time, had jurisdiction to take up, on appeal, rulings that denied petitions of habeas corpus.

b. The second objection brought by Peru concerns the inadmissibility of the Commission's application to the Court, on the grounds that this Court may not admit an application that originated in a case irregularly processed by the Inter-American Commission. It claims not only that the petitioner turned to the Commission without exhausting the domestic remedies, but that the complaint was lodged even though the subject had been awarded national judgments that protected his right, and a criminal case that originated with the appeal of habeas corpus presented on his behalf was still in process. The Commission did not duly verify, as it is called upon to do under Article 47(1) of its Regulations, whether the motives for the petition still existed, once it had received Peru's answer to Commission Report 19/94 of September 26, 1994, transmitted through a diplomatic note from the office of that country's Permanent Representative to the OAS.

38. In the Commission's comments on the brief of preliminary objections, it requests that those objections be rejected for the following reasons:

a. That Peru did not file the objection alleging non-exhaustion of domestic remedies at the proper time; that is to say that when the Commission instituted its proceedings four years had elapsed between the filing of the complaint and the date on which the Government first

raised that objection in the Task Force Report which was transmitted to the Commission on January 3, 1995, in response to the considerations and recommendations contained in Report 19/94. The Commission invokes the criterion laid down by this Tribunal in the Velásquez Rodríguez Case, judgment of June 26, 1987, whereby the objection of non-exhaustion of internal 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.

b. That the proceeding being conducted in the First Criminal Chamber of the Superior Court against two police officers on charges of abuse of power, violence and resisting arrest is not a criminal proceeding to ascertain who is responsible for the alleged detention and subsequent disappearance of Mr. Ernesto Rafael Castillo-Páez and, consequently, is not a remedy that must be exhausted before international protection may be sought.

c. Nor is it possible to accept the Government's assertion that the petitioner had not exhausted the domestic remedies by failing to file a petition of cassation with the Tribunal of Constitutional Guarantees. On the contrary, the Commission considers that the petitioner had no obligation to resort to that tribunal, inasmuch as the petition of habeas corpus in favor of the alleged victim had been granted in the courts of both first and second instance. Furthermore, the remedy was ineffective owing to the fact that the Supreme Court of Justice of Peru had irregularly admitted the hearing of that petition when it overturned the judgment of the Eighth Court of Appeals upholding the lower court's decision to grant the petition of habeas corpus filed on behalf of Mr. Ernesto Rafael Castillo-Páez. It was not competent to rule on the writ of habeas corpus in view of the specific legal prohibition contained in Article 21 of Law 23.506, "habeas corpus and Amparo Law," whereby that court could only take up, on appeal, lower court rulings that denied petitions of habeas corpus. In this case, the petition had been granted.

d. That the Government's objection of inadmissibility of the Commission's application to the Court is based on non-exhaustion of domestic remedies; it is therefore not an objection filed in a timely manner, but rather a recapitulation of arguments that add nothing to the first objection.

VI.

39. The Court considers that both objections must be examined jointly, inasmuch as they are mutually supporting and are based solely on the failure to exhaust domestic remedies, in the terms of Article 46(1)(a) of the Convention and Article 37 of the Regulations of the Commission.

40. The Court wishes to state that, in connection with this matter, it has established criteria that must be taken into consideration in this case. Indeed, the generally accepted principles of international law to which the rule of exhaustion of domestic remedies refers indicate, firstly, that this is a rule that may be waived, either expressly or by implication, by the party 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]. Secondly, the objection asserting 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. Thirdly, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective (Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 88: Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987. Series C No 2, para. 87; Godínez Cruz Case,

Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 90; Gangaram Panday Case, Preliminary Objections, Judgment of December 4, 1991. Series C No. 12, para. 38 and Neira Alegría et al. Case, Preliminary Objections, Judgment of December 11, 1991. Series C No. 13, para. 30).

41. In accordance with the aforementioned criteria, the Court further considers that the Government had the obligation to invoke explicitly and in a timely manner the rule of non-exhaustion of domestic remedies if it wished to challenge appropriately the admissibility of the complaint before the Inter-American Commission, presented on November 16, 1990, on the disappearance of Mr. Ernesto Rafael Castillo-Páez.

42. The briefs that the Government presented to the Commission during the processing of the case showed inter alia the evolution of the habeas corpus proceedings and the criminal aspect of Mr. Ernesto Rafael Castillo-Páez's disappearance. However, the Government did not clearly state its objection of non-exhaustion of domestic remedies at an early stage of the proceedings before the Commission. It was only expressly invoked in the Task Force Report presented to the Commission by the Government on January 3, 1995, in answer to Report 19/94 approved by the Commission itself on September 26, 1994, which served to support the application before this Court.

43. It may be concluded from the foregoing that, since the Government extemporaneously claimed the non-exhaustion of domestic remedies required by Article 46(1)(a) of the Convention to preclude admission of the complaint on behalf of Mr. Ernesto Rafael Castillo-Páez, it is understood to have tacitly waived the requirement.

44. At the public hearings on preliminary objections held by this Court on September 23, 1995, in reply to a question from Judge Antônio A. Cançado Trindade, the Peruvian Agent clearly stated that only at a later stage in the case before the Commission had the question of exhaustion of domestic remedies been explicitly raised. Indeed, in the previous briefs (including the brief of October 3, 1991) submitted to the Commission, reference had been made solely to the evolution of the aforementioned proceedings, which in the view of this Court is insufficient to consider the objection to have been presented. The reason, as explained, is that the Government may expressly, or by implication, waive the requirement. Since it had done so by implication, the Commission could not later properly take the objection into consideration.

45. For the reasons stated above, the first of the objections brought must be dismissed. The second objection must also be rejected for the same reasons, since they were both founded on the same premise, as stated above (see supra 39).

VII

46. Now, therefore,

THE COURT,

DECIDES:

unanimously,

1. To dismiss the preliminary objections of the Government of the Republic of Peru.
2. To proceed with the consideration of the merits of the case.

Judge Antônio A. Cançado Trindade informed the Court of his Separate Opinion, which is attached hereto.

Done in Spanish and English , the Spanish text being authentic, in San José, Costa Rica, on this thirtieth day of January, 1996.

Héctor Fix-Zamudio
President

Hernán Salgado-Pesantes
Alejandro Montiel-Argüello
Máximo Pacheco-Gómez
Alirio Abreu-Burelli
Antônio A. Cançado Trindade

Manuel E. Ventura-Robles
Secretary

Read at a public session at the seat of the Court in San José, Costa Rica, on February 2, 1996.

So ordered,

Héctor Fix-Zamudio
President

Manuel E. Ventura-Robles
Secretary

SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. I subscribe to the decision of the Court to reject the preliminary objection raised by the respondent Government, and to continue to hear the instant case on its merits. I feel obliged to add this Separate Opinion in order to leave on record the basis of my reasoning and my position on the central point of the preliminary objection presented by the Government of Peru, that is, the objection raised before the Court of non-exhaustion of domestic remedies in the circumstances of the present Castillo Páez Case.

2. May I, first of all, reiterate my understanding, expressed in my Dissenting Opinion in the Resolution of the Court of 18 May 1995 in the case of Genie Lacayo concerning Nicaragua, to the extent that, in the context of the international protection of human rights, the preliminary

objection of non-exhaustion of domestic remedies is one of pure admissibility (and not of competence), and, as such, in the current system of the American Convention on Human Rights, should be resolved in a well-founded and definitive manner by the Inter-American Commission on Human Rights.

3. Contrary to what may be inferred, the extensive interpretation of the Court's own faculties, which it advanced in the cases concerning Honduras,[FN1] so as to comprise also issues related to preliminary objections of admissibility (based on a question of fact), does not always necessarily contribute to a more effective protection of the guaranteed human rights. In reality, such a conception leads to the undesirable reopening and reexamination of an objection of pure admissibility, which obstruct the procedure and thereby perpetuate a procedural imbalance which favors the respondent party. This is not a question of "restricting" the powers of the Court in particular, but rather of strengthening the system of protection as a whole, in its current stage of historical evolution, remedying such imbalance, and thus contributing to the full realization of the object and purpose of the American Convention on Human Rights.

[FN1] Judgments of 1987 on Preliminary Objections, in the cases of Velásquez Rodríguez, paragraph 29; Godínez Cruz, paragraph 32; and Fairén Garbi and Solís Corrales, paragraph 34.

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4. The preliminary objections, if and when interposed, should be, by their very definition, in limine litis, at the stage of admissibility of the petition and before any and all consideration of the merits. This applies even more forcefully when dealing with a preliminary objection of pure admissibility, as is that of non-exhaustion of domestic remedies in the present context of protection. If this objection is not raised in limine litis, it is tacitly waived (as the Court has already admitted, for example, in the Gangaram Panday case, concerning Suriname).[FN2]

[FN2] Judgment of 1991 on Preliminary Objections, Gangaram Panday case, paragraphs 39-40; see also the Judgment on Preliminary Objections, Neira Alegría et al. case concerning Peru, of the same year, paragraphs 30-31; and the judgments cited supra (Note 1) in the three cases concerning Honduras, paragraphs 88-90 (Velásquez Rodríguez), 90-92 (Godínez Cruz), and 87-89 (Fairén Garbi and Solís Corrales); and earlier, Decision of the Court of 1981 in the matter of Viviana Gallardo et al., paragraph 26.

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5. Therefore, the respondent Government cannot subsequently raise that preliminary objection before the Court, as it failed to raise it, in a timely manner, for the decision of the Commission. If, as in the present case, the respondent Government waived that objection by not raising it in limine litis in the prior procedure before the Commission, it is inconceivable that the respondent Government may freely withdraw that waiver in the subsequent procedure before the Court (estoppel/forclusion).

6. The grounds of my position, which I reiterate here with conviction, are expounded in detail in my Separate Opinion in the Judgment of the Court of 4 December 1991, in the

Gangaram Panday case (Preliminary Objections). There is no need to repeat them here ipsis literis, but rather to single out and develop some aspects which I deem especially relevant in relation to the present case of Castillo Páez.

7. Just as the Commission's decisions on the inadmissibility of petitions or communications are considered definitive and non-appealable, its decisions of admissibility should be treated likewise, also considered definitive and unsusceptible to reopening by the respondent Government in the subsequent procedure before the Court. Why is it that the respondent Government is allowed to attempt to reopen a decision on admissibility by the Commission before the Court and an individual complainant does not have the same faculty to question a decision on inadmissibility of the Commission before the Court?

8. Such reopening of review by the Court of a decision on admissibility by the Commission creates an imbalance between the parties, in favor of the respondent governments (all the more so since individuals currently do not even have locus standi before the Court). This being so, the decisions of inadmissibility by the Commission should also be allowed to be reopened by the alleged victims and submitted to the Court. Either all decisions -of admissibility or not- of the Commission are allowed to be reopened before the Court, or they are all kept exclusive to the Commission.

9. This understanding is the one that is best suited to the basic notion of collective guarantee underlying the American Convention on Human Rights, as well as all treaties of international protection of human rights. Instead of reviewing the decisions on admissibility by the Commission, the Court should be able to concentrate more on the examination of questions of substance in order to fulfill with more speed and security its role of interpreting and applying of the American Convention, determining the occurrence or not of violations of the Convention and its juridical consequences. The Court is not, in my view, a tribunal of appeals of decisions of the Commission on admissibility.

10. The alleged reopening of questions of pure admissibility before the Court surrounds the process with uncertainties, prejudicial to both parties. It further generates the possibility of divergent or conflicting decisions on the matter by the Commission and the Court, thus fragmenting the unity inherent in a decision of admissibility. This in no way contributes to the perfecting of the system of guarantees of the American Convention. The principal concern of both the Court and the Commission should lie, not in the zealous internal distribution of attributions and competences in the jurisdictional mechanism of the American Convention, but rather in the adequate coordination between the two organs of international supervision so as to assure the most effective protection possible of the guaranteed human rights.

11. In the instant case of Castillo Páez, the Commission had pointed out the prior exhaustion of domestic remedies and declared the petition or communication admissible (case No. 10.733, Report 19/94, of 26 September 1994, pp. 13 and 24). As the dossier of the case reveals[FN3] and the public hearing before the Court of 23 September 1995 confirms, the question was only brought up by the Government of Peru in an advanced stage of the proceedings before the Commission[FN4], in the period of the consideration of the preparation of the Commission's Report on the case[FN5](above mentioned document), beyond the time limit (and not in limine

litis), and, even so, not as a preliminary objection of admissibility proper but rather as de facto information on proceedings pending in the domestic jurisdiction. [FN6]

[FN3] E.g., writings of the Government of 3 October 1991, 3 January 1995, and 15 March 1995; writings of the Commission of 27 April 1995 and 28 April 1995.
[FN4] Hearing of 16 September 1994, before the Commission.
[FN5] The previous writing of the Government of 3 October 1991, limited itself to transmitting to the Commission information on investigations carried out on the national level on the Castillo Páez case.
[FN6] The Government only raised the preliminary objection as such before the Commission in its writing of 3 January 1995 (Report prepared by a Working Group) when the Commission's Report containing its decision on the case had already been adopted.

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12. The act of pointing out, as a fact and in an extemporaneous manner, the existence of judicial proceedings pending in the domestic courts is not the same as expressly objecting to, on the basis of this fact, the admissibility and examination of the case by the Commission on the international level. Moreover, as the present judgment rightly sets forth, there is no way to prolong indefinitely in time the opportunity granted to the respondent Government to raise a preliminary objection of non-exhaustion of domestic remedies, which exists primarily for its benefit at the stage of admissibility of the petition.

13. The decision of the Commission regarding the admissibility should be considered definitive, impeding the Government to reopen it, and the Court to review it, since, in the present case, the preliminary objection in question was not even raised by the respondent Government in due time (in limine litis) for the decision of the Commission. This basis alone is sufficient to reject the preliminary objection interposed by the respondent Government. Given the circumstances of the present case of Castillo Páez, the objection (of the same content) of the alleged non-exhaustion of domestic remedies should be rejected on the basis of its extemporaneous nature and the tacit waiver before the Commission, and the estoppel (forclusion) before the Court[FN7] .

[FN7] Under the European Convention on Human Rights, according to the jurisprudence constante of the European Court of Human Rights, the respondent Government who failed to raise an objection of non-exhaustion of domestic remedies previously before the Commission, is prevented from raising it before the Court (estoppel). The European Court has ruled to this effect, inter alia, in the cases of Artico (1980), Corigliano (1982), Foti (1982) and Ciulla (1989), concerning Italy; Granger (1990), concerning the United Kingdom; Bozano (1986), concerning France; De Jong, Blajet and Van der Brink (1984), concerning Holland; and Bricmont (1989), concerning Belgium. In its Judgment of 22 May 1984, in the Van der Sluijs, Zuiderveld and Klappe case, concerning Holland, the European Court went even further. In that case, the respondent Government had initially raised an objection of non-exhaustion of domestic remedies before the European Commission, but failed to mention it in its "preliminary" arguments (hearing of November 1983) before the European Court. The delegate of the Commission

deduced, in his reply, that the respondent Government appeared no longer to insist upon that objection. Since the Government did not question the Commission's analysis, the Court took formal notice of the Government's "withdrawal" of the objection of non-exhaustion, thus putting an end to the question (Judgment cit. supra, paragraphs 38-39 and 52).

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14. The rationale of my position, such as I have manifested it in the work of the Court, [FN8]ultimately lays in the aim of assuring the necessary balance or procedural equality of the parties before the Court -that is, between the petitioning plaintiffs and the respondent governments- essential to all jurisdictional systems of international protection of human rights. Without the locus standi in judicio of both parties[FN9]any system of protection finds itself irremediably mitigated, as it is not reasonable to conceive rights without the procedural capacity to vindicate them directly.

[FN8] E.g., in the public hearing of the Court of 17 January 1996, in the El Amparo case, concerning Venezuela.

[FN9] It cannot go unnoticed that the queston of locus standi in judicio of individuals before the Court (in cases already submitted to it by the Commission) is distinct from the right to submit a concrete case for decision by the Court, which Article 61(1) of the American Convention currently reserves only to the Commission and the States Parties to the Convention.

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15. In the universe of the international law of human rights, it is the individual who alleges violations of his human rights, who alleges having suffered damages, who has to comply with the requirement of prior exhaustion of domestic remedies, who actively participates in an eventual friendly settlement, and who is the beneficiary (he or his relatives) of eventual reparations and indemnities. In the examination of the questions of admissibility before the Commission, the individual complainants and the respondent Governments are parties[FN10]. The reopening of such questions before the Court, without the presence of one of the parties (the petitioning plaintiffs), militates against the principle of procedural equality (equality of arms/égalité des armes).

[FN10] Regarding the admissibility stage of a petition or communication before the Commission, the American Convention refers to "the party alleging violation of his rights" (Articles 46(1)(b) and 46(2)(b), to the "petitioner" himself and the State (Article 47(c)), and to the "parties concerned" before the Commission (Article 48(1)(f) having clearly in mind the individual complainants and the respondent Governments. Cf. also, in the same sense, Articles 32(a) and (c); 33; 34(4) and (7); 36; 37(2)(b) and (3); and 43(1) and (2) of the Rules of Procedure of the Commission.

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16. In our regional system of protection, [FN11] the spectre of the persistent denial of the procedural capacity of the individual petitioner before the Inter-American Court, a true capitis diminutio, arose from dogmatic considerations, belonging to another historical era, which tended

to avoid his direct access to the international judicial organ. Such considerations, in my view, in our time lack support or meaning, even more so when referring to an international tribunal of human rights.

[FN11] In the framework of this latter, to the Inter-American Commission, in its turn, is reserved the role of defender of the "public interests" of the system, as guardian of the correct application of the American Convention. If to this role one continues to add the additional function of defender of the interests of the alleged victims, as an "intermediary" between these latter and the Court, an undesirable ambiguity which should be avoided.

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17. In the inter-American system of protection, de lege ferenda one gradually ought to overcome the paternalistic and anachronistic conception of the total intermediation of the Commission between the individual (the true complaining party) and the Court, according to clear and precise criteria and rules, previously and carefully defined. In the present domain of protection, every international jurist, faithful to the historical origins of his discipline, will know to contribute to the rescue of the position of the human being as a subject of international law (droit des gens), endowed with international legal personality and full capacity.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary