In the Loayza-Tamayo 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 objection interposed 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. The case originated in a complaint (No. 11.154) received at the Secretariat of the Commission on May 6, 1993.

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 "unlawful deprivation of liberty, torture, cruel and inhuman treatment, violation of the judicial guarantees, and double jeopardy to María Elena Loayza-Tamayo for the same cause, in violation of the Convention," and of Article 51(2) of the Convention for failing to "implement the Commission's recommendations," the Government had violated the following articles of the Convention: 7 (Right to Personal Liberty), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), all these in relation to Article 1(1) (Obligation to Respect Rights). It also asked the Court to declare that the Government "must pay full compensation to María Elena Loayza-Tamayo for the grave damage -material and moral- she has suffered and, consequently, to instruct the Peruvian State to

order her immediate release and make her appropriate reparation" and "pay the costs incurred in processing this case."

3. The Inter-American Commission named Oscar Luján-Fappiano as its Delegate and Edith Márquez-Rodríguez, Executive Secretary, and Domingo E. Acevedo as its Attorneys. The Commission named the following persons as their Assistants: Juan Méndez, José Miguel Vivanco, Carolina Loayza, Viviana Krsticevic, Verónica Gómez and Ariel E. Dulitzky, the legal representatives of the plaintiff as petitioners before the Commission.

4. After the President of the Court (hereinafter "the President") had made the preliminary review of the application, the Secretariat of the Court (hereinafter "the Secretariat") notified the State of the application in a note of February 9, 1995 -received on February 13- and informed it that it had a period of three months in which to reply, two weeks to name an Agent and Alternate Agent and thirty days to present preliminary objections, all of those periods to commence on the date of notification of the application. In a communication of the same date, the Government was invited to designate a Judge ad hoc.

5. On March 23, 1995, the Government communicated to the Court that it had appointed Mario Cavagnaro-Basile to act as its Agent and on the following day it reported that it had appointed Iván Paredes-Yataco to act as Alternate Agent.

6. By communication of March 22, 1995, the Delegate of the Commission indicated that the thirty-day deadline for the Government to present preliminary objections had expired on March 13.

7. On March 24, 1995 Peru filed a preliminary objection alleging "non-exhaustion of all domestic remedies" (capitals in original) and on April 3, 1995, it submitted a brief containing arguments to obviate interpretations contrary to its interests regarding the time limits established in the Regulations. In a brief of April 24, 1995, the Commission urged that the brief of preliminary objections submitted by the Government be declared inadmissible, and on April 27, 1995, it submitted another brief contesting the preliminary objection filed by the Government.

8. In the brief of preliminary objections the Government requested, in accordance with Article 31(4) of the Rules of Procedure, suspension of the "proceedings on the merits until such time as the preliminary objection is resolved." The Court, by Order of May 17, 1995, declared the request inadmissible and decided to proceed with the case at its various judicial stages on the grounds that the suspension sought did not meet the requirement of "exceptional situation" and could not be justified on any grounds.

9. On May 5, 1995, the Government submitted its answer to the application.

10. By Order of the President of May 20, 1995, the parties were summoned to a public hearing on preliminary objections to be held at the seat of the Court on September 13 of that year. The Commission orally requested a postponement of the hearing, and the President, by Order of June 30, 1995, acceded to the request and set the hearing for September 23.

11. On May 23, 1995, the Government submitted a brief in which it refuted "the alleged extinguishment of [its] right to file this preliminary objection," and on August 24, 1995, the Commission requested that the Court deem the brief not to have been filed and to expunge it definitively from the records. On September 18, the President declared that the brief would be evaluated in due course.

12. In a brief of December 29, 1995, the Commission, for its part, presented a copy of the judgment of October 6, 1995, rendered by the Supreme Court of Justice upholding the sentence passed on María Elena Loayza-Tamayo et al. for the crime of terrorism, and on January 22, 1996, the Government requested that the Commission's brief be rejected and considered not to have been filed. On January 30, 1996, the President declared that the brief would be evaluated in due course.

13. The public hearing took place at the seat of the Court on September 23, 1995.

There appeared

for the Government of Peru:

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

for the Inter-American Commission on Human Rights:

Oscar Luján-Fappiano, Delegate
Edith Márquez-Rodríguez, Attorney
Domingo E. Acevedo, Attorney
José Miguel Vivanco, Assistant
Ariel E. Dulitzky, Assistant

II.

14. The Commission claims in its application that:

a. On February 6, 1993, María Elena Loayza-Tamayo, a Peruvian citizen and a professor at the Universidad San Martín de Porres, was arrested together with a relative, Ladislao Alberto Huamán-Loayza, by officers of the National Anti-Terrorism Bureau (DINCOTE) of the Peruvian National Police, while visiting the construction site of a property she owned on Mitobamba Street, Block D, Lot 18, Urbanización Los Naranjos, Distrito de los Olivos, Lima, Peru. The police officers did not produce an arrest warrant issued by a court or any order from a competent authority. The arrest was based on a charge made to the police authorities by Angélica Torres García, alias "Mirtha," that María Elena Loayza-Tamayo was a collaborator of the subversive group Shining Path [Sendero Luminoso]. The Supreme Court of Military Justice acquitted Ladislao Alberto Huamán-Loayza of the crime of treason and he was released in November 1993.

b. María Elena Loayza-Tamayo was detained by the DINCOTE from February 6 to 26, 1993. During that period she was held incommunicado for ten days and subjected to torture, inhuman and degrading treatment and unlawful pressure. All this was done for the purpose of forcing her to incriminate herself and confess that she was a member of the Peruvian Communist Party-Shining Path (PCP-SL). Despite this, the victim not only declared her innocence, denying membership of the PCP SL, but "criticized its methods: the violence and the human rights violations committed by that subversive group." On March 3, she was transferred to the Chorrillos Women's Maximum Security Prison and, according to the Commission, was still incarcerated in Peru on the date the application was filed.

c. During those ten days she was allowed no contact with her family or her attorney, nor were they informed of her arrest. María Elena Loayza-Tamayo's family learned of her arrest through an anonymous telephone call on February 8, 1993. No protective remedy could be filed on her behalf because Decree Law No. 25.659 (Counter-Insurgency Law) prohibited the filing of "a petition of habeas corpus when the acts in question concern the crime of terrorism."

d. On February 26, 1993, María Elena Loayza-Tamayo was exhibited to the press, dressed in a striped gown, and accused of the crime of treason against her country. The Police Report specified that the crime was treason and the next day her case was brought before the Special Naval Court for trial. A number of judicial proceedings were instituted before the organs of the Peruvian domestic jurisdiction. She was tried by the Military Court for the crime of treason against her country: the Special Naval Court composed of "faceless military judges" acquitted her; the Special Naval War Council found her guilty on appeal; a petition for nullification was filed and the Supreme Council of Military Justice acquitted her of that crime and ordered that the records be forwarded to the regular courts. In that jurisdiction she was tried for the crime of terrorism: the Forty-third Criminal Court of Lima bound her over for trial; the "faceless Special Tribunal of the regular court system," on the basis of the very same facts and charges, sentenced her to 20 years imprisonment. A petition was filed with the Supreme Court of Justice seeking nullification of the court's ruling, but was rejected.

15. On May 6, 1993, the complaint concerning the detention of María Elena Loayza-Tamayo was received by the Inter-American Commission, which forwarded it to the Government six days later. On August 23, 1993, the Commission received the Government's reply together with the documentation on the case and the information that the Prosecutor's Office had instituted proceedings against María Elena Loayza-Tamayo in the special military court system under Decree Law No. 25.659.

16. On July 13, 1994, in response to a request from the Commission on November 17, 1993, the Government declared the existence of "file No. 41 93 before the Fortieth Criminal Court of Lima against [María Elena Loayza-Tamayo] for the crime of terrorism, and [that] the file had been sent to the President of the Superior Court of Lima ... for the oral proceedings to be initiated."

17. On September 16, 1994, the parties attended a hearing held at the seat of the Commission.

18. On September 26, 1994, the Commission approved Report 20/94, in the resolutory part of which it was decided:

1. To declare that the Peruvian State is responsible for the violation, against María Elena Loayza, of the rights to personal liberty, humane treatment and judicial protection enshrined in Articles 7, 5 and 25 respectively of the American Convention on Human Rights.
2. To recommend to the Peruvian State that, in consideration of the analysis of the events and of the right invoked by the Commission, it immediately release María Elena Loayza-Tamayo once it receives notification of this Report.
3. To recommend to the Peruvian State that it pay compensation to the plaintiff in the instant case, for the damage caused as a result of her unlawful deprivation of liberty from February 6, 1993 until such time as it orders her release.
4. To inform the Government of Peru that it is not at liberty to publish this Report.
5. To request that the Government of Peru inform the Inter-American Commission on Human Rights, within thirty days, of any measures it has taken in the instant case, in accordance with the recommendations contained in paragraphs 2 and 3 above.

19. On October 13, 1994, Report 20/94 was transmitted to Peru by the Commission. In response, the Government deemed that it could accept neither the analysis nor the conclusions and recommendations and attached a brief prepared by a Task Force composed of government officials, stating that:

[d]omestic remedies have not been exhausted inasmuch as María Elena Loayza-Tamayo's legal situation should be defined at the end of the judicial proceeding for the CRIME OF TERRORISM in the common court system [and that] the recommendations made by IACHR [Inter-American Commission on Human Rights] in the instant case would involve deciding on a case still pending in the Peruvian justice administration. This is not possible, since, under Peru's Political Constitution in force, no authority could arrogate that power. It is for the Judicial Branch to rule on Maria Elena Loayza-Tamayo's legal situation through the proper criminal process.

20. On January 12, 1995, the Commission, not having reached agreement with the Government, submitted this case for the consideration and decision of the Court.

III.

21. The Court is competent to hear the instant case. Peru ratified the Convention on July 28, 1978, and accepted the jurisdiction of the Court on January 21, 1981.

IV.

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

23. On March 22, 1995, the Commission requested the Court to rule that the Government's right to file preliminary objections had been extinguished, on the grounds that the period of thirty days for filing them had already expired. In its brief of March 24, 1995, received at this Court on

April 3, the Government alleged that it had presented the preliminary objection on 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.

24. The Government also contends 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.

25. On April 24, 1995, the Inter-American Commission, for its part, reiterated its request of March 22, 1995, and also asked 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.

26. The Commission invoked the thesis sustained by the Court in the Cayara case, to the effect that “there must be 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 certainty and reliability of the international protection mechanism” (Cayara Case, Preliminary Objections, Judgment of February 3, 1993. Series C, No. 14, para. 63). Hence, admission of the brief on preliminary objections presented extemporaneously would violate those principles.

27. As far as the above allegations are concerned, the Court considers those brought by the Government regarding the filing of its preliminary objection to be unfounded, on the ground that although the time limit 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.

28. 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.

29. This situation is more evident in the case of this Court, which 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.

30. 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, whereby all periods indicated in days in those Regulations "shall be understood to be calculated as calendar days." Nonetheless, this provision must be regarded as implicit in the proceedings before this Tribunal since, as stated above, the differentiation criterion invoked by Peru is unacceptable, 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.

31. 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 the Tribunals cited function on a permanent basis.

32. 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.

33. 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 26, para. 42; Paniagua Morales et al Case, Preliminary Objections, Judgment of January 25, 1996. Series C No. 23, para. 38).

34. 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 to be necessary for excusing a delay in meeting a deadline (see supra 33, Paniagua Morales et al Case, paras. 37 and 39). Further, that this very Court has exercised flexibility vis-à-vis 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.

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

V.

36. The Government filed the preliminary objection of non-exhaustion of domestic remedies on the ground that the Inter-American Commission lodged the petition against it without fulfilling the provisions of Article 46(2) of the Convention, inasmuch as the case against María Elena Loayza-Tamayo for the crime of terrorism was still pending in the Supreme Court of Justice with the number 950 94.

37. This objection is based essentially on the charge that:

a. The exceptions to the rule of exhaustion of domestic remedies, governed by Article 46(2) of the Convention, do not apply in the instant case, inasmuch as María Elena Loayza-Tamayo was not denied access to those domestic remedies. While it is true that at the time of the alleged victim's arrest the remedy of habeas corpus which, according to the Commission was in process against the deprivation of liberty, had been suspended under Decree Law No. 25.659 as it pertains to the crimes of treason and terrorism, owing to the State of Emergency, Mrs. Loayza-Tamayo did have access to other effective remedies before the competent authority, including the possibility of appealing to the Ministry of the Interior [“Ministerio Público”] to secure its approval of the remedy to protect the fundamental rights enshrined in the American Convention and the 1979 Political Constitution in force at the time. Under Article 250 of the Constitution, the Ministry of the Interior is an autonomous State organ with official responsibility to promote, in its own right or acting upon a petition of one of the parties, the protective remedy to defend the legitimacy of civic rights and public interests protected by the law.

b. María Elena Loayza-Tamayo's right to due process of law was respected under Article 25 of the Convention, inasmuch as she had the time and appropriate means to prepare her defense, since she made her declaration before the military jurisdiction in the presence of her defense

attorney and the Special Military Prosecutor. Moreover, the representative of the Ministry of the Interior was present at the police action that led to her arrest.

c. Although the Government did not indeed file the objection of non-exhaustion of the domestic remedies until the presentation of its Report of November 23, 1994, it had repeatedly declared before the Commission that the requirement of admissibility had not been fulfilled and that, in any event, there was nothing to prevent Peru from filing that objection with this Court, pursuant to Article 31 of the Rules of Procedure.

d. Furthermore, it had sent to the Commission on three occasions the documentation relating to Mrs. Loayza-Tamayo's arrest, trial on the charge of treason in the military court and acquittal by the Supreme Court of Military Justice of August 11, 1993, and the transfer of the case to the regular courts, which had then tried Mrs. Loayza-Tamayo for the crime of terrorism, a case that had not been concluded. The Government had dispatched this documentation to the Commission with its briefs of August 23 and September 30, 1993, as well as its brief of July 13, 1994.

38. The Inter-American Commission, in its brief of comments on the Government's preliminary objections, maintains that:

a. Peru expressly admits that it did not formally interpose the objection of non-exhaustion of domestic remedies in a timely manner and that this admission constitutes in itself sufficient reason for the Court to declare the objection inadmissible.

b. The Government's assertion that it repeatedly told the Commission that the domestic remedies had not been exhausted is not accurate, since it only did so at the time it presented its report prepared by the Government Task Force. Although at the hearing held by the Commission on September 16, 1994, the Government's representative did refer to the failure to exhaust domestic remedies because the lawsuit against María Elena Loayza-Tamayo was still being tried in the regular courts, he did so in a very general manner and did not supply any proof in support of his statement, having at no time indicated the remedy to be exhausted or given proof of its effectiveness.

c. The Government's argument that, although the remedy of habeas corpus was suspended in regard to the crimes of treason and terrorism under Article 6 of Decree Law 25.659, María Elena Loayza-Tamayo had access to other effective remedies before the competent authority for protection of her rights, including the Ministry of the Interior, is unacceptable. The Commission maintains that no reference is made in any part of the brief to such remedies before the competent authority and that the Ministry of the Interior is merely mentioned as an example. Therefore, in keeping with the obligation of probity and good faith that must prevail in international proceedings, any evasive or ambiguous statement such as that made by the Government in this regard must be disallowed.

d. The effective remedy referred to in Article 25 of the Convention must be exercised before judges and courts; it is jurisdictional in nature, inasmuch as it may not be lodged with the Ministry of the Interior since that would make it a petition before an organ outside the judicial system.

e. Moreover, María Elena Loayza-Tamayo raised the res judicata objection before the court, which had dismissed it after hearing the opinion of the Ministry of the Interior. This means that the latter was aware of the objection and ignored it, so that there would be no point in a further

request to the same Ministry of the Interior if its representative did not take the first one into consideration.

f. Also, if under the State of Emergency, protective remedies were not allowed on behalf of those arrested on charges of treason and terrorism, there would be no point in appealing to the Ministry of the Interior in such circumstances, since any petition on that score would be doomed to failure.

39. The Commission dispatched to this Court, together with its brief of December 29, 1995, a photocopy of the October 6, 1995 judgment delivered by the Supreme Court of Justice confirming the sentence passed on María Elena Loayza-Tamayo for the crime of terrorism. For this reason, the Commission maintains that this ruling shows that "the preliminary objection of non-exhaustion of domestic remedies is unfounded."

VI.

40. The Court wishes to stress that 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, first, that this 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 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 (Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 88; Fairén Garbi and Solís Corrales Case, 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; Neira Alegría et al., Preliminary Objections, Judgment of December 11, 1991. Series C No. 13, para. 30 and Castillo Páez Case, Preliminary Objections, Judgment of January 30, 1996. Series C No. 24, para. 40).

41. The Court further considers, in accordance with the aforementioned criteria, that the Government had the obligation to invoke, expressly 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 May 6, 1993, concerning María Elena Loayza-Tamayo's detention and trial.

42. The briefs that the Government presented to the Commission during the processing of the case did show inter alia the way in which the habeas corpus trials developed in the military and regular court systems. However, the Government did not clearly state its objection of non-exhaustion of domestic remedies during the early stages of the proceedings before the Commission, since it was only expressly invoked in the Task Force report presented to the Commission by the Government on December 7, 1994, in answer to Report 20/94 approved by the Commission 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 alleged the non-exhaustion of domestic remedies required by Article 46(1)(a) of the Convention to preclude admission of the complaint on behalf of María Elena Loayza-Tamayo, it is understood to have tacitly waived that right.

44. At the public hearing 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 and Advisor 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 submitted to the Commission, reference had been made solely to the development of the aforementioned proceedings. In its preliminary objection brief, Peru explicitly stated that it had not formally filed the objection of non-exhaustion of domestic remedies to the Commission. In the view of this Court, this is sufficient to consider the objection not to have been presented. Accordingly, since the Government waived by implication the right to file, the Commission could not later properly take the objection into consideration.

45. The preliminary objection should be dismissed for the reasons stated above.

VII.

46. Now, therefore,

THE COURT,

DECIDES:

unanimously,

1. To dismiss the preliminary objection filed by 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 English and Spanish, the Spanish text being authentic, in San José, Costa Rica, on this thirty-first day of January, 1996.

Héctor Fix-Zamudio
President

Hernán Salgado-Pesantes
Alejandro Montiel-Argüello
Máximo Pacheco-Gómez
Oliver Jackman
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 case of Loayza Tamayo.

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,1 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.

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,)2 and, more recently, in the Castillo Páez case, concerning Peru.3

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 Loayza-Tamayo, just as I did in my Separate Opinion in the Judgment of the Court of 30 January 1996 in the Castillo Páez case (Preliminary Objections).

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 Loayza Tamayo, the Commission had pointed out the prior exhaustion of domestic remedies and declared the petition or communication admissible (case No. 11.154, Report 20/94, of 26 September 1994, pp. 14-16 and 31). As the dossier of the case reveals 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 Commission4 in the period of the consideration of the preparation of the Commission's Report on the case (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.5

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. In its brief of 15 March 1995 on the preliminary objection presented to the Court, the Government of Peru expressly states that it had not formally interposed to the Commission, the objection, as such, of the non-exhaustion of domestic remedies.6 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,7 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 Loayza Tamayo, the objection 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.8

14. The rationale of my position, such as I have manifested it in the work of the Court,9 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 parties10 any system of protection finds itself irremediably mitigated, as it is not reasonable to conceive rights without the procedural capacity to vindicate them directly.

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.11 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).

16. In our regional system of protection,12 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.

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