INTER-AMERICAN COURT OF HUMAN RIGHTS

GANGARAM PANDAY CASE

PRELIMINARY OBJECTIONS

JUDGMENT OF DECEMBER 4, 1991

In the Gangaram Panday case,

the Inter-American Court of Human Rights, composed of the following judges:

Héctor Fix-Zamudio, President
Thomas Buergenthal, Judge
Rafael Nieto-Navia, Judge
Sonia Picado-Sotela, Judge
Julio A. Barberis, Judge
Antônio A. Cançado Trindade, *ad hoc* Judge;

also present,

Manuel E. Ventura-Robles, Secretary, and
Ana Maria Reina, Deputy Secretary

delivers the following judgment pursuant to Article 27(4) of the Rules of Procedure of the Court in force for matters submitted to it prior to July 31, 1991 (hereinafter "the Rules"), on the preliminary objections interposed by the Republic of Suriname (hereinafter "the Government" or "Suriname").

I

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted the instant case to the Inter-American Court of Human Rights (hereinafter "the Court") on August 27, 1990. It originated in a petition (N° 10.274) against Suriname, which the Secretariat of the Commission received on December 17, 1988.

2. In filing the application with the Court, the Commission invoked Articles 51 and 61 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 50 of its Regulations, and requested that the Court determine whether the State in question had violated Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty) and 25 (Right to Judicial Protection) of the Convention, to the detriment of Mr. Choeramoenipersad Gangaram Panday, also known as Asok Gangaram Panday. The Commission also asked the Court *"to adjudicate this case in accordance with the terms of the Convention, and to fix responsibility for the violation described herein and award just compensation to the victim's next of kin."* It appointed the following Delegates to represent it in this matter: Oliver H. Jackman, Member; Edith Márquez-Rodríguez, Executive Secretary; and David J. Padilla, Assistant Executive Secretary.

3. On September 17, 1990, the Secretariat of the Court transmitted the application and its attachments to the Government.

4. By fax of November 6, 1990, the Government of Suriname appointed Lic. Carlos Vargas-Pizarro, of San Jose, Costa Rica, as its Agent.

5. By Order of November 12, 1990, the President of the Court, in agreement with the Agent of Suriname and the Delegates of the Commission and in consultation with the Permanent Commission of the Court, set March 29, 1991, as the deadline for the Commission's submission of the memorial provided for in Article 29 of the Rules and June 28, 1991, as the deadline for submission by the Government of the counter-memorial provided for in that same article.

6. By note of November 12, 1990, the President asked the Government to appoint an *ad hoc* Judge for this case. In a communication dated December 13, 1990, the Agent informed the Court that the Government had named Professor Antônio A. Cançado Trindade of Brasilia, Brazil, to that position.

7. By note of February 7, 1991, the Commission appointed Professor Claudio Grossman to serve as its legal adviser in this case.

8. In a communication dated June 28, 1991, the Agent filed preliminary objections pursuant to Article 27 of the Rules. The President of the Court set July 31, 1991, as the deadline for the Commission's submission of a written statement on the preliminary objections.

9. By Order of August 3, 1991, the President directed that a public hearing be convened on December 2, 1991, at 15:00 hours, at the seat of the Court, for the presentation of oral arguments on the preliminary objections. At the request of the Government, the order also subpoenaed the following witnesses to testify on the preliminary objections: Ramón de Freitas, Military Auditor of the Government of Suriname, and Dr. A. Vrede, pathologist of the Anatomical Laboratory of the Paramaribo Hospital. The Government subsequently waived the right to have these persons appear as witnesses. In a communication dated November 28, 1991, the Agent informed the Court that Messrs. Ramón de Freitas, Albert Vrede and Fred M. Reid would appear *"as members of the delegation of Suriname"* and identified them as Attorney General of the Republic of Suriname, pathologist and expert, and Third (Embassy) Secretary of the Ministry of Foreign Affairs of Suriname, respectively.

10. The public hearing was held at the seat of the Court on December 2, 1991.

There appeared before the Court

for the Government of Suriname:

Carlos Vargas Pizarro, Agent

Ramón de Freitas

Albert Vrede

Fred M. Reid;

for the Inter-American Commission on Human Rights:

Oliver H. Jackman, Delegate

David J. Padilla, Delegate.

II

11. The petition filed with the Commission on December 17, 1988, refers to the detention and subsequent death of Mr. Asok Gangaram Panday in Suriname. The petition was filed by the victim's brother, Mr. Leo Gangaram Panday.

12. According to the petitioner, Mr. Asok Gangaram Panday was detained by the Military Police when he arrived at Zanderij Airport in Paramaribo. The Military Police at Fort Zeeland, where he was detained, subsequently reported that he had hanged himself.

13. On December 21, 1988, the Commission requested the Government to provide information regarding the circumstances surrounding the death of the alleged victim. On May 2, 1989, the Government reported on the steps taken to investigate the manner of his detention and added that, according to the autopsy, Asok Gangaram Panday had indeed committed suicide.

14. Pursuant to Article 50 of the Convention, on May 15, 1990, the Commission drew up Report N° 04/90 in which it resolved:

> 1. To admit the present case.
>
> 2. To declare that the parties have been unable to achieve a friendly settlement.

3. To the declare that the Government of Suriname has failed to fulfill its obligations to respect the rights and freedoms contained in the American Convention on Human Rights and to assure their enjoyment as provided for in Articles 1 and 2 of the same instrument.

4. To declare that the Government of Suriname violated the human rights of the subjects of this case as provided for by Articles 1, 2, 4(1), 5(1), 5(2), 7(1), 7(2), 7(3), 25(1), and 25(2) of the American Convention on Human Rights.

5. To recommend to the Government of Suriname that it take the following measures:

a. Give effect to Articles 1 and 2 of the Convention by assuring respect for and enjoyment of the rights contained therein;

b. Investigate the violations that occurred in this case and try and punish those responsible for their occurrence;

c. Take the necessary measures to avoid their reoccurrence;

d. Pay a just compensation to the victim's next of kin.

6. To transmit this report to the Government of Suriname and to provide the Government with 90 days to implement the recommendations contained herein. The 90 day period shall begin as of the date this report is sent. During the 90 days in question the Government may not publish this report, in keeping with Article 47(6) of the Commission's Regulations.

7. To submit this case to the Inter-American Court of Human Rights in the event that the Government of Suriname should fail to implement all of the recommendations contained in numeral 5 above.

15. On August 27, 1990, the Commission referred the instant case to the Court.

III

16. The Court has jurisdiction to hear the instant case. Suriname has been a State Party to the Convention since November 12, 1987, when it also recognized the contentious jurisdiction of the Court, pursuant to Article 62 of the Convention.

IV

17. In its communication of June 28, 1991, the Government refers to some questions of form without, however, characterizing them as preliminary objections. At the hearing, the Agent expressly stated that they did not qualify as such. Nevertheless, since these "questions of form" could in one way or another affect the admissibility of the instant case and since the communication expressly requests that the Court deal with them, it will address these questions below. The issues raised concern the lack of a signature on the memorial submitted to the Court, the representation of the Commission in this contentious case, and the presence of the victim's representative on the Commission's delegation.

18. The Court has stated earlier that

> failure to observe certain formalities is not necessarily relevant when dealing on the international plane. What is essential is that the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced and that the objectives of the different procedures be met. **(*Velásquez Rodríguez Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 1, para. 33; *Fairén Garbi and Solís Corrales, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 2, para. 38; *Godínez Cruz Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 3, para. 36.)**

19. The Government argued, first, that *"Memorials initiating international proceedings in the area of human rights* [. . .] *must comply with*

the formal requirement of being duly signed by the party filing the application." This requirement was not met by the Commission.

20. The Commission maintained that the fact that the memorial had been sent by fax, under a cover sheet indicating that to be the form of transmittal, did not leave the Court or any third parties in doubt as to the authenticity of the document in question.

21. Article 25(2) of the Rules provides that: *"If the Commission intends to bring a case before the Court in accordance with the provisions of Article 61 of the Convention, it shall file with the Secretary, together with its report, in twenty copies, its duly signed application which shall indicate the object of the application, the human rights involved, and the names of its delegates."*

22. Article 30(3) of the Rules states that: *"A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions."*

23. The instant case was referred to the Court by means of an application filed by the Commission on August 27, 1990. It was duly signed by the Executive Secretary of the Commission. According to the Rules, the memorial is not the document that brings the case before the Court but is, rather, the first procedural act that initiates the written part of the proceedings before the Court.

24. The relevant procedural norms applicable to this case do not establish, either as a formality or as a requirement for presentation, that the memorial must be signed. It goes without saying that all documents presented to the Court should bear a signature and that the Commission should have made sure that this was so in the instant case; however, the omission does not constitute non-compliance of a requirement, since the Rules do not require it. Here, moreover, it has been established that the memorial was sent by the Commission, leaving no doubt as to its authenticity.

25. The Government's second contention, based on Articles 2(1) and 3(1) of the Statute of the Commission, Article 71(4) of the Regulations of the Commission and Article 21 of the Rules of the Court, was that the Commission had failed to comply with the aforementioned provisions by naming as Delegates the Executive Secretary and Assistant Executive

Secretary who, while members of the staff of the Commission, are not members of the Commission as such.

26. The Commission responded that *"[t]he delegates of the Commission were duly elected by the Commission itself at the appropriate time, and this fact was communicated to the Government."* The Commission argued that, in order to enjoy a degree of flexibility in its actions, it had appointed a team comprising various Delegates, including one of its members, the Executive Secretary and the Assistant Executive Secretary, and that a similar procedure had been followed in other cases decided by the Court.

27. Article 21 of the Rules provides that: *"The Commission shall be represented by the delegates whom it designates. These delegates may, if they so wish, have the assistance of any person of their choice."* Therefore, the Court holds that the Commission fulfilled the requirements spelled out therein.

The same argument is applicable to the appointment of the victim's lawyer as a member of the Commission's delegation.

V

28. The Government presented the following preliminary objections:

a. "Abuse of the Rights conferred by the Convention" on the Commission,

b. non-exhaustion of domestic remedies, and,

c. non-compliance of the provisions contained in Articles 47 to 51 of the Convention.

29. In the first preliminary objection, the Government is of the opinion that the Commission incurred an *"abuse of the rights"* by: (1) appropiating for itself the right to find a State responsible for violations of human rights; (2) breaking the *"confidentiality rule;"* (3) the manner it determined the evidence before the Court; and (4) *"a result of*

the abuses committed and lack of proof" because the Commission incurred an *"abuse of right of petition"* in filing the case with the Court.

30. Without deciding whether or not there exists a preliminary objection such as the one that the Government describes as an "abuse of right," the Court will now examine the Government's contentions.

31. With regard to the first point raised, the Court considers that Article 50 of the Convention is clear when it provides that *"[i]f a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions* [. . .]*"* When the Commission does what this provision provides, as it did in drawing up its Report N° 04/90 of May 15, 1990, it is fulfilling its obligations under the Convention.

32. Secondly, the Government deemed that the Commission had broken the confidentiality rule established in Articles 46(3) of the Rules of Procedures of the Court and 74 of the Regulations of the Commission by having *"made public certain facts relating to the case and, furthermore, by having issued prior value judgments in a case still under consideration* [. . .] *seeking, Mala Fide, a double sanction not contemplated by the Convention."* The Government appears to be referring to the information on this case that was included in the Commission's Annual Report for 1990-1991. The Commission denied having applied a double sanction, arguing that in the relevant part of its Annual Report to the General Assembly, it merely made a reference to the case and that the reports described in Articles 50 and 51 of the Convention were not published.

33. The Court notes that the aforementioned Annual Report of the Commission refers to the case but does not reproduce the report drawn up under Article 50 and that the case had already been filed with the Court when the Annual Report was published. Consequently, it cannot be contended that there existed a violation by the Commission of Article 74 of its Regulations, let alone a violation of Article 46(3) of the Rules of the Court, which refers to a very different situation.

34. The Government alleged *"abuse of rights by the manner it determined the evidence before the Court,"* and averred that *"although the Commission did not expressly say so, in the instant case it resorted to an*

irregular presumption of certain facts under Article 42 of its Regulations, despite the fact that a different conclusion would be reached on the basis of the evidence provided by Suriname to the Commission." The Commission, on its part, asserted that its conclusions are based on the investigation carried out and on the evidence obtained, and that the presumption provided for in Article 42 of its Regulations, according to which *"[t]he facts reported in the petition* [. . .] *shall be presumed to be true* [. . .] *if* [. . .] *the government has not provided the pertinent information,"* was not applied.

35. The Court found no evidence in the record showing that the Commission had resorted to the presumption referred to in Article 42 of its Regulations.

36. Both in the written proceedings and at the hearing, the Government failed to substantiate its claim that the Commission committed an *"abuse of the right of petition"* by filing an application with the Court. Consequently, basing itself on the provisions of Article 27(2) of its Rules, under which *"[t]he preliminary objection shall set out the facts and the law on which the objection is based,"* the Court will not deal with this objection.

37. The Court will now examine the objection of non-exhaustion of domestic remedies to which Article 46(1)(a) of the Convention refers. That article provides that:

Article 46

> 1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
>
> a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
>
> [. . .]

38. This requirement

> allows the State to resolve the problem under its internal law

> before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction (American Convention, Preamble). **(*Velásquez Rodríguez Case*, Judgment of July 29, 1988. Series C No. 4, para. 61; *Godínez Cruz Case*, Judgment of January 20, 1989. Series C No. 5, para. 64; *Fairén Garbi and Solís Corrales Case*, Judgment of March 15, 1989. Series C No. 6, para. 85.)**

The Court has stated that:

> Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (see **Viviana Gallardo *et al.***, Judgment of November 13, 1981, No. G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective. **(*Velásquez Rodríguez Case, Preliminary Objections, supra* 18, para. 88; *Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra* 18, para. 87; *Godínez Cruz Case, Preliminary Objections, supra* 18, para. 90.** See also ***In the Matter of Viviana Gallardo et al.*, No. G 101/81. Series A.)**

> [T]he rule of prior exhaustion is a prerequisite established in favor of the State, which may waive its right, even tacitly, and this occurs, **inter alia,** when it is not timely invoked. **(*Fairén Garbi and Solís Corrales Case, ibid.*, para. 109.)**

39. The Court notes that the Government did not interpose the objection of non-exhaustion of domestic remedies before the Commission, a fact that was expressly confirmed by the Agent during the public hearing of December 2, 1991. This constitutes a tacit waiver of the objection. The Government also failed to indicate in a timely fashion the domestic remedies that, in its opinion, should have been exhausted or how they would be effective.

40. Consequently, the Court considers that the Government is untimely when it now seeks to invoke the objection of non-exhaustion of domestic remedies that it should have interposed before the Commission but did not.

41. Finally, the Government's third preliminary objection, which asserts that the Commission did not fully comply with the provisions of Article 47 to 51 of the Convention, was not substantiated by the Government either in its communication or at the public hearing. Based on Article 27(2) of its Rules **(*supra* 36)**, the Court will not deal with this objection.

VI

42. The Court will address the written and oral requests of the parties regarding costs relating to this stage of the proceedings when it deals with the merits of the instant case.

Now, therefore,

THE COURT,

unanimously,

1. Rejects the preliminary objections interposed by the Government of Suriname.

unanimously,

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

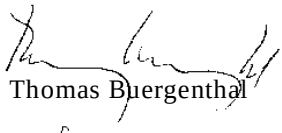
unanimously,

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

Judge Cançado Trindade informed the Court of the contents of his concurring opinion, which will be attached to this judgment.

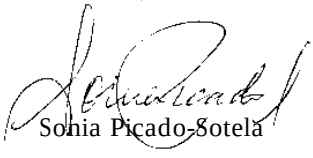
Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San Jose, Costa Rica, this fourth day of December, 1991.

Héctor Fix-Zamudio
President



Thomas Buergenthal

Rafael Nieto-Navia



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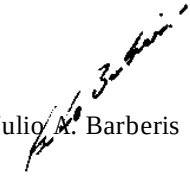

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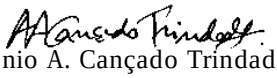
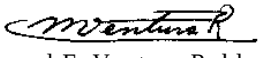


Antônio A. Cançado Trindade

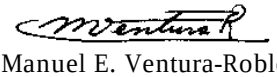


Manuel E. Ventura-Robles
Secretary

Read at the public hearing held at the seat of the Court in San Jose, Costa Rica, on December 6, 1991.

So ordered,

Héctor Fix-Zamudio
President



Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. I concur with the Court's decision to reject the preliminary objections raised by the respondent Government, to proceed with the consideration of the present case, and to postpone its decision on the costs until such time as it renders judgement on the merits. Yet I am bound to append this Concurring Opinion in order to explain, and to expand on, the reasons why I fully agree with the Court's dismissal of one of the preliminary objections in particular, namely, that of non-exhaustion of local remedies, and the approach I take on the question on non-exhaustion in relation to the issue of the internal structure of the international jurisdictional body (that is, of the attribution of competences to the Inter-American Commission and Court of Human Rights).

2. I wish to consider the particular issue of the objection of non-exhaustion of local remedies raised before the Court, in two circumstances: when, as in the present case, it has not been raised first before the Commission, and when it has duly been raised earlier before the Commission. In the first instance, it can hardly be doubted that the respondent Government is estopped from relying on the objection of non-exhaustion before the Court as it had not been raised first before the Commission**(1)**. The Court, it may be recalled, has deemed the objection of non-exhaustion waivable, even tacitly, and the question of compliance or not with the admissibility requirements before the Commission (Articles 46-47) one which related to the interpretation or application of the American Convention and as such falling *ratione materiæ* within the scope of the Court's jurisdiction. However, as it was a requirement of admissibility of an application before the Commission, it held, "**In the Matter of Viviana Gallardo *et al.***" **(1981, §§ 26-27)**, that it was for the Commission in the first place to pass on the matter, and only thereafter could the Court accept or reject the Commission's views; as in that case the issue had not been dealt with by the Commission, the Court found that it could not at that stage pronounce

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(1) Cf. to this effect the established case-law of the European Court of Human Rights (Judgments, *inter alia*, in the cases: **Artico**, 1980; **Corigliano**, 1982; **De Jong, Baljet and Van der Brink**, 1984; **Bozano**, 1986; **Bricmont**, 1989; **Ciulla**, 1989; **Granger**, 1990).

on the waiver by the Government of the requirement of prior exhaustion of local remedies.

3. It is, in fact, a requirement of common sense, of the proper administration of justice and of juridical stability, and one which ensues from the general economy itself of the American Convention, that an objection to admissibility on the ground of non-exhaustion of local remedies is to be raised only *in limine litis*, to the extent that the circumstances of the case so permit. If that objection, which benefits primarily the respondent State, is not raised by this latter at the appropriate time, that is, in the proceedings on admissibility before the Commission, there comes into operation a presumption of waiver -albeit tacit- of that objection by the respondent Government. There is nothing to prevent a respondent Government from waiving -expressly or tacitly- the benefit of the local remedies rule, which purports to privilege its own national legal order. It follows that if such a waiver had taken place, as in the present case, in the course of proceedings before the Commission, it could hardly be conceived that the respondent Government would be entitled to withdraw the waiver at will, in subsequent proceedings before the Court. Such an unwarranted and "extended" opportunity claimed by the respondent Government -in fact, a double opportunity- to avail itself of an objection which exists primarily in its favour seems to militate against the foundations of the system of international protection of human rights; there seems to be here room, on the contrary, for at a time tipping the balance equitably in favour of the alleged victims and strengthening the proper administration of justice and the Convention's mechanism of protection.

4. The second instance, that is, the reconsideration by the Court of the exhaustion rule previously raised before the Commission, requires further reflection. The point was dwelt upon by the Court in the three Honduran cases (Preliminary Objections, 1987), where the Court did not uphold the Commission's argument that the Court was prevented from reviewing all aspects pertaining to procedural rules of admissibility of applications. The Court regarded the matter at issue as falling within its (contentious) jurisdiction as it related to the interpretation or application of the Convention; it then decided on its own evaluation to join the question of non-exhaustion to the merits, given the close interplay between the issue of local remedies and the very violation of human rights **(**cases: **"Velásquez Rodríguez", §§ 28, 84 and 94-96;**

"Godínez Cruz", §§ 31, 86 and 96-98; "Fairén Garbi and Solís Corrales", §§ 33, 83 and 93-95). In those cases, the way seems to have been paved for the Court so to decide by the fact that the Commission itself somehow argued that the issue of exhaustion of local remedies was inseparably linked to the merits and to be decided jointly with the latter **(**cases: **"Velásquez Rodríguez", § 83; "Godínez Cruz", § 85; "Fairén Garbi and Solís Corrales", § 82)**.[(2)]

5. The Court justified that, in the exercise of its contentious jurisdiction, it was competent to decide on all matters relating to the interpretation or application of the American Convention, and those matters comprised the determination of whether there had been a violation of guaranteed rights and the adoption of appropriate measures as well as the interpretation of procedural rules and the verification of compliance with them. In exercising those powers, the Court regarded itself as not bound or restricted by previous decisions of the Commission; the Court added that it did not act as a court of review or appeal of the Commission's admissibility decisions, but those powers derived from its character as the sole judicial organ in matters concerning the Convention and they further assured States Parties which accepted the Court's jurisdiction that the Convention provisions would be strictly observed **(**cases: "**Velásquez Rodríguez", § 29; "Godínez Cruz", § 32; "Fairén Garbi and Solís Corrales", § 34)**. Such zealous assertion by the Court of its powers also in relation to aspects pertaining to the preliminary objection to admissibility on the basis of non-exhaustion of local remedies, unlike what it would seem to assume, may not always necessarily ensure or lead to a greater protection of guaranteed human rights.

6. In fact, some cogent reasons appear to militate in favour of taking, on this particular point, a distinct position, more consonant with,

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(2) This outlook is reminiscent of the jurisprudence of the European Court of Human Rights (inaugurated in the **De Wilde, Ooms and Versyp** Judgement, 1971) to the effect that the Court had jurisdiction to take cognizance of all questions of fact and of law pertaining to the matter of non-exhaustion of local remedies insofar as that objection had first been raised before the Commission. This thesis, however, has not passed without some dissent within the European Court itself, not only in that leading case, but also in the more recent cases in which it has been upheld by the Court (**Brozicek**, 1989; **Cardot**, 1991; **Oberschlick**, 1991).

and conducive to, the fulfillment of the ultimate object and purpose of the American Convention, insofar as the handling of this procedural issue is concerned. First, under the American Convention, the two supervisory organs, the Commission and the Court, have defined powers, the former being entrusted with competence to decide on the admissibility of applications (Articles 46-47), the latter with jurisdiction (in contentious cases) to determine whether there had been a violation of the Convention (Article 62(1) and (3)). The preliminary (procedural) question of admissibility is one and indivisible: just as decisions of inadmissibility of applications by the Commission are regarded as final and without appeal, the dismissal by the Commission of an objection of non-exhaustion of local remedies should likewise be regarded as final and not susceptible of being retaken by the respondent Government in subsequent proceedings before the Court. (This naturally presupposes that admissibility decisions are based upon a thorough examination of the facts of the cases by the Commission.) This position would assist in diminishing the factual inequality of status between the alleged victims and the respondent Governments in proceedings before the Court, and would seem to satisfy the requirements of pure logic (given the unity and indivisibility of jurisdiction) and of the general plan of the Convention (whereby a case could only be referred to the Court after first having been examined by the Commission). The local remedies rule, as a preliminary objection to the admissibility of applications, was never meant to be resorted to twice in a case, that is, to be raised or pursued to the advantage of the respondent Government twice, in proceedings before the Commission and later before the Court.

7. Secondly, to proceed otherwise would amount to shifting the emphasis from the overriding concern to secure an effective protection to victims of alleged human rights violations to the more circumscribed concern with the proper internal structure of the international jurisdictional body. It should not pass unnoticed that the local remedies rule is not concerned with the internal structure of an international jurisdictional body, but its purpose is of a different nature: as a preliminary objection, to be raised *in limine litis*, it is meant to afford the State an opportunity at that stage to remedy the alleged wrong before the complaint can be dealt with in its merits by the international organ concerned. Thus, it is not, after all, a matter of "restricting" the powers of the Court on the point at issue, but rather of strengthening the system of protection as a whole, in a way which is beneficial to the alleged victims, in

pursuance of the accomplishment of the object and purpose of human rights treaties.

8. Thirdly, in further support of this view, to assume a review jurisdiction of the Court in such questions of admissibility as the local remedies rule would appear to attempt against the equality of arms and to create a disparity between the parties. Even if the applicant had won his case before the Commission, he would be surrounded by uncertainties as to the outcome of the case, and could after a prolonged litigation be denied a judgement on the merits by the Court. Why was a respondent Government allowed to challenge before the Court the dismissal by the Commission of an objection of non-exhaustion if the alleged victim was not allowed to challenge before the Court the upholding by the Commision of an objection of non-exhaustion? This appears to amount to a considerable unfairness, to the detriment of the alleged victim.

9. Fourthly, there would further be a case for avoiding a repetitious and time-consuming work by the Court, not only in the procedure on the merits, but also in the handling of the evidence: it would indeed be very unwise to extend such repetition regularly also to questions of admissibility, without any tangible or real effect on the protection of human rights. Rules which are procedural in nature, such as the local remedies rule in the particular context of human rights protection, enshrined in the human rights treaty at issue for the purpose of sifting complaints, could hardly be placed on the same footing as the norms on the very rights guaranteed, the ensurance of the observance of which is properly to attract the attention of the Court. If the Court was taken to be empowered to review the Commission's decisions on admissibility, if both organs were to pronounce on the objection of non-exhaustion, this might regrettably pave the way for possibly diverging or conflicting decisions by the two organs on the point at issue;**(3)** such an outcome would seem hardly conducive to strengthening the international mechanism of human rights protection concerned.

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(3) This is more than a theoretical possibility, it has already happened: in a recent case (**Cardot**, 1991) under the European Convention on Human Rights, the respondent Government's objection of non-exhaustion had earlier been rejected by the Commission, but was later retaken by the Court, which retained and upheld it and found itself unable to take cognizance of the merits of the case due to the applicant's alleged failure to exhaust local remedies.

10. In the present case, the Court rightly holds that the respondent Government is clearly estopped from relying at this stage upon the objection of non-exhaustion in view of its tacit waiver of that objection, as it failed to raise it in the proceedings on the admissibility of the application before the Commission. Taking the point further, it may be argued that even if a respondent Government had raised that objection at the preliminary stage of admissibility and the Commission had rejected it, the objection could no longer be pursued or relied upon by the Government before the Court; that decision by the Commission is to be regarded as final, insofar as the local remedies rule is concerned. This would prevent the Court from even hearing that objection, once it had not been raised before the Commission, as in the present case, or, having been raised, had been rejected by the Commission: the plea simply could not be relied upon before the Court. Such ground alone would suffice therefore to reject that objection, in the two circumstances contemplated herein. This approach, properly applied, would furthermore strongly discourage the Court to consider joining to the merits the issue of exhaustion, which would invariably prejudice the alleged victims, or have no concrete effect on the protection of their rights, for the reasons above referred to. The dismissal by the Commission of a preliminary objection of non-exhaustion is as such an indivisible one, covering the conditions of application of the local remedies rule under the Convention, that is, the incidence of the rule as well as the exceptions to it. This seems in keeping with the *rationale* of the rule in the context of the international protection of human rights.

11. The specificity or special character of human rights treaties and instruments, the nature and gravity of certain human rights violations and the imperatives of protection of the human person stress the need to avoid unfair consequences and to secure to this end a necessarily distinct (more flexible and equitable) application of the local remedies rule in the particular context of the international protection of human rights. This has accounted for, in the present domain of protection, the application of the principles of good faith and estoppel in the safeguard of due process and of the rights of the alleged victims, the distribution of the burden of proof as to exhaustion of local remedies between the alleged victim and the respondent Government with a heavier burden upon the latter,**(4)** the clarifications and greater precision as to the wide scope of exceptions to the local remedies rule.**(5)** This comes to acknowledge that generally recognized principles of international law,

referred to in the formulation of the local remedies rule in human rights treaties and instruments, necessarily undergo some degree of adaptation or adjustment when enshrined in those treaties and instruments, given the specificity of these latter and the special character of their ultimate object and purpose.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

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(4) Three Honduran cases, IACHR: **Preliminary Objections**, 1987 **("Velásquez Rodríguez", § 88; "Godínez Cruz", § 90; "Fairén Garbi and Solís Corrales", § 87)**; and merits **("Velásquez Rodríguez", 1988, §§ 56-60 and 73; "Godínez Cruz", 1989, §§ 62-63 and 76; "Fairén Garbi and Solís Corrales", 1989, §§ 83-84)**. **Advisory Opinion OC-11/90, Exceptions to the Exhaustion of Domestic Remedies**, 1990, §§ 40-41.

(5) IACHR, **Advisory Opinion OC-11/90, Exceptions to the Exhaustion of Domestic Remedies**, 1990, §§ 14-40.