INTER-AMERICAN COURT OF HUMAN RIGHTS

CABALLERO DELGADO AND SANTANA CASE

PRELIMINARY OBJECTIONS

JUDGMENT OF JANUARY 21, 1994

In the case of Caballero Delgado and Santana,

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

Sonia Picado-Sotela, President
Rafael Nieto-Navia, Judge
Héctor Fix-Zamudio, Judge
Alejandro Montiel-Argüello, Judge
Hernán Salgado-Pesantes, Judge
Asdrúbal Aguiar-Aranguren, Judge;

also present:

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

in application of Article 31(6) of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "the Rules of Procedure"), delivers the following judgment on the preliminary objections interposed by the Government of the Republic of Colombia (hereinafter "the Government" or "Colombia").

I

1. This case was submitted to the Inter-American Court of Human Rights (hereinafter "the Court") by the Inter-American Commission on Human Rights (hereinafter "the Commission") on December 24, 1992. It originated in a "request for urgent action" sent to the Commission on April 4, 1989 and in a petition (Nº 10.319) against Colombia received at the Secretariat of the Commission on April 5, 1989.

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 American Convention") and Article 26 *et seq.* of the Rules of Procedure. The Commission submitted this case in order that the Court decide whether the Government in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) in connection with Article 1(1) of the Convention, to the detriment of Isidro Caballero-Delgado and María del Carmen Santana. In addition, the Commission considered that the Government had also violated Article 2 of the Convention by not adopting the domestic legal measures to give effect to those rights *"based on the maxim of the law pacta sunt servanda,"* as also Article 51(2) of that treaty in conjunction with Article 29(b), by not carrying out the recommendations made by the Commission. The Commission requested the Court to require the Government to *"institute the investigation necessary to identify the responsible parties and impose punishment* [. . .]*, inform the relatives of the victims of the latters' whereabouts* [. . .]*, remedy the acts committed by government agents and pay fair compensation to the victims' next of kin* [. . .] [and] *pay the costs of these proceedings."* The Commission appointed its member Leo Valladares-Lanza to represent it as its Delegate, and Edith Márquez-Rodríguez, Executive Secretary, and Manuel Velasco-Clark, the Secretariat's attorney, to serve as Assistants. It also named the following persons to act as legal counsel in the instant case: Gustavo Gallón-Giraldo, María Consuelo del Río, Jorge Gómez-Lizarazo, Juan E. Méndez, and José Miguel Vivanco.

3. The application and its attachments were transmitted to the Government by the Secretariat of the Court on January 15, 1993, after they had been duly examined by the President of the Court (hereinafter "the President").

4. By letter of January 28, 1993, the Government of Colombia notified the appointment of attorney Jaime Bernal-Cuéllar as its Agent, and attorney Weiner Ariza-Moreno as Alternate Agent.

5. By Order of February 5, 1993, and at the request of the Government, the President granted the latter an extension of 45 days to the time limit set in Article 29(1) of the Rules of Procedure for filing an answer to the application. The answer to the application was delivered on June 2, 1993. Likewise, on February 16, 1993, an extension of 15 days was granted for the presentation of preliminary objections.

6. Pursuant to Article 31 of the Rules of Procedure, the Government filed preliminary objections on March 2, 1993. The Commission responded to the objections on April 6, 1993.

7. By Order of June 3, 1993, the President convened a public hearing at the seat of the Court for Thursday, July 15, 1993, at 15:00 hours, for the presentation of oral arguments on the preliminary objections interposed by the Government.

8. On July 12, 1993, Judge Rafael Nieto-Navia was elected President of the Court. Since the new President is a national of Colombia, by Order of July 13, 1993, he relinquished the Presidency for the instant case to Judge Sonia Picado-Sotela, the Vice-President.

9. The public hearing was held at the seat of the Court on the date and at the time set.

There appeared before the Court

for the Government of Colombia:

Jaime Bernal-Cuéllar, Agent

Weiner Ariza-Moreno, Alternate Agent

Francisco Javier Echeverri, Adviser;

for the Inter-American Commission on Human Rights:

Leo Valladares-Lanza, Delegate

Manuel Velasco-Clark, Assistant

Gustavo Gallón-Giraldo, Adviser

Juan E. Méndez, Adviser

José M. Vivanco, Adviser.

II

10. According to the petition, Isidro Caballero-Delgado and María del Carmen Santana were detained on February 7, 1989, in the locality known as Guaduas, under the jurisdiction of the Municipality of San Alberto, Department of Cesar, Colombia, by a military patrol composed of units of the Colombian Army stationed at the military base of Líbano (jurisdiction of San Alberto), attached to the Fifth Brigade headquartered in Bucaramanga.

11. According to the petition, the detention took place because of Mr. Isidro Caballero's active involvement as a leader of the Santander Teachers' Union for a period of 11 years. Prior to that, and for the same reasons, he had been held in the Model Prison of Bucaramanga, charged with belonging to the Movimiento 19 de Abril, but was released in 1986; since that time, however, he was constantly harassed and threatened. María del Carmen Santana, about whom the Commission had *"very little information, was a member of the Movimiento 19 de Abril (M-19)"* and worked with Isidro Caballero in enlisting community participation for the "Meeting for Coexistence and Normalization" which was to be held on February 16, 1989, in the Municipality of San Alberto. This activity had been planned by the "Regional Dialogue Committee" and involved *"organizing meetings, fora and debates in various regions in an effort to find a political solution to the armed conflict."*

12. The petition states that on February 7, 1989, Elida González, a peasant woman who was passing the spot where the victims were captured, was detained by the same Army patrol and later released. She

saw Isidro Caballero, wearing a camouflage military uniform, and a woman who was with them. Javier Páez, a resident of that region who served as their guide, was detained by the Army, tortured and later set free. From the interrogation he was subjected to and the radio communications of the military patrol that detained him, he learned of the detention of Isidro Caballero-Delgado and María del Carmen Santana. After his release, he notified the unions and political organizations to which they belonged. They, in turn, notified the relatives of the detained individuals.

13. The petition reports that Isidro Caballero's family and various union and human rights organizations began to search for the detainees at the military facilities. They were told that Isidro Caballero and María del Carmen Santana had not been detained. Legal and administrative actions were taken in an attempt to establish the whereabouts of the couple who had disappeared and to punish those directly responsible, all to no avail. No reparations were obtained for the damages caused.

14. Among the judicial actions taken, the petition mentions a writ of habeas corpus filed with the First Superior Court of Bucaramanga, an investigation in the ordinary criminal courts before the Second Criminal Examining Magistrate and a military criminal investigation before Military Criminal Examining Magistrate 26, attached to the Santander Battalion based in Ocaña. The following administrative measures were also taken: action by the Office of the Presidential Adviser for the Defense, Protection and Promotion of Human Rights; action by the Bucaramanga Regional Prosecutor's Office; proceedings and negotiations by the Second Assistant Prosecutor for the Judicial Human Rights Police and by the Assistant Prosecutor for the Military Forces; and, also negotiations with the Office of the Deputy Attorney General of the Nation and the Office of the Assistant Prosecutor for the Military Force. Extrajudicial measures included the remedy of public complaint and protest.

15. The Commission states that on April 4, 1989, *"acting on a request for urgent action from a reliable source,* [. . .] *before receiving a formal communication from the petitioners, the Commission, motu proprio, forwarded to the Government the complaint* [. . .] [and] *request*[ed] *that extraordinary measures be taken to protect the life and personal safety"* of the victims. On April 5 of that same year, the Commission received

the formal petition from the petitioners, which it processed under Nº 10.319. On September 26, 1991, the Commission issued Report Nº 31/91, the operative paragraphs of which read as follows:

> 1. That the Government of Colombia has failed to honor its obligation to respect and guarantee Article 4 (right to life), Article 5 (right to humane treatment), Article 7 (right to personal liberty), and Article 25 (on judicial protection), in relation to Article 1(1), upheld in the American Convention on Human Rights, to which Colombia is a State Party, in respect of the kidnapping and subsequent disappearance of Isidro Caballero-Delgado and María del Carmen Santana.
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> 2. That Colombia must pay compensatory damages to the victims' next of kin.
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> 3. To recommend to the Government of Colombia that it continue the investigations until those responsible have been identified and punished, thereby avoiding the consummation of acts of serious impunity that transgress the very bases of the legal system.
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> 4. To request the Government of Colombia to guarantee the safety of the eyewitnesses to the events and give them the necessary protection, as they have risked their lives to provide their valuable and courageous cooperation in the efforts to ascertain the facts.
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> 5. To include this report in the forthcoming Annual Report to the General Assembly of the Organization of American States should no reply be received within 90 days of this report.
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> 6. To transmit this report to the Government of Colombia and to the petitioner, neither of which is authorized to publish it.

16. In a note from the Government to the Commission dated January 16, 1992, the latter was asked to *"reconsider these reports, pursuant to Article 54 of the Regulations of the Commission"* on the ground that *"activities had been carried out by the various government agencies in charge of criminal and disciplinary matters with a view to broadening*

their investigations and thus complying with the recommendations of that Honorable Commission." In a communication dated February 18, the Executive Secretary of the Commission informed the Government of the Commission's decision to *"confirm the reports previously approved by the Commission, postponing the decision as to the publication thereof until the next session."* In a communication dated February 24, the Government, in turn, asked for a clarification of the phrase *"'confirm the reports previously approved by the Commission,' to determine whether the reconsideration requested by Colombia in cases 10.319, 10.454, and 10.581 has been decided upon and, if so, to obtain the authentic text of the pertinent decision, if such a decision has been issued."* The President of the Commission replied to the Government's request on February 28, in the following terms:

> [t]he Commission has agreed to postpone its final decision on Reports N^{os}. 31, 32, and 33/91, which had been approved during its 80th Session, taking into account the arguments presented by the Government of Colombia and the assurances of its willingness to cooperate with the Inter-American Commission.
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> In no way, however, does that decision imply that the reports already approved by the Commission during the month of September, 1991, are no longer in effect. Rather, the decision regarding their adoption as final reports has been suspended, precisely in order to provide the Government of Colombia with a new opportunity to effectively comply with the concrete recommendations contained therein.
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> Consequently, the IACHR will be making a final decision as to the publication of the reports during its 82nd Session. It shall base its decision both on the effective adoption of the recommendations contained therein and on the implementation of those presented to the Government during the on-site visit to be made by the Commission next May.

17. During its 82nd Session in September 1992, the Commission heard a report on the steps taken by the Special Commission during its on-site visit and received the representatives of the Government and the petitioners at a hearing. On September 25, 1992, the Commission approved Report Nº 31/92 of September 25, 1992, the operative part of which reads as follows:

1. To reject the request for reconsideration presented by the Government of Colombia, ratify Report 31/91 of September 29, 1991, and refer this case to the Inter-American Court of Human Rights.

2. To transmit the instant report to the Government of the Republic of Colombia and to the petitioner, with the admonition that it may not be published and that the period stipulated in Article 51(1) of the American Convention on Human Rights starts to run on September 25, 1992, the date of final adoption of the report in question.

III

18. The Court has jurisdiction to hear the instant case. Colombia has been a State Party to the Convention since July 31, 1973, and accepted the contentious jurisdiction of the Court, as set out in Article 62 of the Convention, on June 21, 1985.

IV

19. The Government interposed the following preliminary objections:

a. failure of the Commission to initiate a friendly settlement procedure;

b. incorrect application of Articles 50 and 51 of the Convention; and,

c. non-exhaustion of domestic remedies.

V

20. The Court will now examine the first of these preliminary objections.

In support of this objection, the Government alleged both in its pleadings and at the relevant hearing that the Commission had infringed the provisions of Article 48(1)(f) of the Convention by not placing itself at the disposal of the parties to reach a friendly settlement of this matter, despite the fact that the Government had at no time denied the facts of the case. Consequently, it is arbitrary to assert, as the Commission's Report Nº 31/91 of September 26, 1991 does, that the facts of the case are "by their very nature" not subject to resolution through the friendly settlement procedure and that the parties themselves failed to request such a recourse in accordance with Article 45 of the Regulations of the Commission.

21. The Government argues that the above provision of the Convention does not empower the Commission to transfer to the parties its obligation -which belongs exclusively to the Commission- to place itself at their disposal with a view to reaching a friendly settlement, in order to later contend that by not requesting such a settlement the parties have forfeited the right to charge the Commission with violating the Convention. Furthermore, it is the Government's opinion that Article 45(1) of the Commission's Regulations does not accurately reflect the scope and content of Article 48(1)(f), for the simple reason that the States Parties should not be placed in the uncomfortable situation of having to request a friendly settlement, something that could be interpreted as a prior confession of their responsibility, with all the political and procedural risks that would entail.

22. The Government alleges that the Commission improperly attempts to apply to the instant case the opinion expressed by the Court in its judgment of June 26, 1987, on the preliminary objections in the Velásquez Rodríguez Case, pointing out that the circumstances that led to that decision are substantially different from those of the instant case; in the former, the Government of Honduras repeatedly denied that government or military authorities had ever participated in the forced disappearance of the victim and went so far as to deny that the disappearance had ever taken place. In the instant case, the Government has declared that

> at no time did it deny the actual material fact of the forced disappearance of a person. In addition, the various judicial proceedings brought with a view to finding the victim and identifying the

> authors of that act indicate an acknowledgment of the fact that Colombian military authorities could have taken part in the violations of individual rights. The focus of the dispute between the Government of Colombia and the Commission has to do with the identity of the persons responsible for the violations and whether the national judicial authorities duly fulfilled their obligations to detain those persons or to impose the corresponding sanctions.

23. In both its written response to the preliminary objections and in the hearing on that subject, the Commission, in turn, basically affirmed that ever since the Court's judgment of June 26, 1987, on the preliminary objections filed by the Government of Honduras in the Velásquez Rodríguez Case, it has been firmly established that the friendly settlement procedure contemplated by the Convention must not be deemed to be a compulsory step for the Commission, but, rather, must be seen as an option that is open to the parties and to the Commission itself, depending on the conditions and characteristics of each individual case. In addition, the Commission claims that the abovementioned judgment confirmed the soundness of Article 45 of its Regulations in the sense that it does not contradict the Convention but, on the contrary, correctly implements Article 48(1)(f) thereof.

24. The Commission also points out that, in the Velásquez Rodríguez Case, the Court abstained from evaluating the conduct of the Government of Honduras in its dealings with the Commission and whether the claims of the parties had been presented with sufficient clarity and precision, because the fundamental issue was that the Commission was not under the obligation to always initiate the friendly settlement procedure.

25. The Court notes that the Commission and the Government each have a different interpretation of Articles 48(1)(f) of the Convention and 45 of the Commission's Regulations, as also of the scope of the criterion established by the Court in ruling on the preliminary objections interposed by the Government of Honduras in the Velásquez Rodríguez, Godínez Cruz, and Fairén Garbi and Solís Corrales Cases, as contained in its judgments of June 26, 1987, which are all similar in that respect.

26. In the three cases mentioned, the Court determined that:

> Taken literally, the wording of Article 48(1)(f) of the Convention stating that 'the Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement' would seem to establish a compulsory procedure. Nevertheless, the Court believes that, if the phrase is interpreted within the context of the Convention, it is clear that the Commission should attempt such friendly settlement only when the circumstances of the controversy make that option suitable or necessary, at the Commission's sole discretion. **(*Velásquez Rodríguez Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 1, para. 44; *Fairén Garbi and Solís Corrales Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 2, para. 49;** and**, *Godínez Cruz Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 3, para. 47.)**

After transcribing Article 45(2) of the Regulations of the Commission, the Court stated:

> The foregoing means that the Commission enjoys discretionary, but by no means arbitrary, powers to decide in each case whether the friendly settlement procedure would be a suitable or appropriate way of resolving the dispute while promoting respect for human rights. **(*Velásquez Rodríguez Case, Preliminary Objections*, para. 45; *Fairén Garbi and Solís Corrales Case, Preliminary Objections*, para. 50;** and, ***Godínez Cruz Case, Preliminary Objections*, para. 48.)**

27. The Court has held that the Commission has no arbitrary powers in this regard. The intention of the Convention is very clear as regards the conciliatory role that the Commission must perform before a case is either referred to the Court or published.

Only in exceptional cases and, of course, for substantive reasons may the Commission omit the friendly settlement procedure because the protection of the rights of the victims or of their next of kin is at stake. To state, as the Commission does, that this procedure was not attempted simply because of the "nature" of the case does not appear to be sufficiently well-founded.

28. The Court believes that the Commission should have carefully documented its rejection of the friendly settlement option, based on the behavior of the State accused of the violation.

29. Nevertheless, the Commission's omission did not cause irreparable harm to Colombia because, if it did not agree with the Commission's position, that State had the power to request the friendly settlement procedure pursuant to paragraph 1 of Article 45 of the Commission's Regulations, which provides that:

> At the request of any of the parties, or on its own initiative, the Commission shall place itself at the disposal of the parties concerned, at any stage of the examination of a petition, with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention on Human Rights.

30. An essential part of any friendly settlement procedure is the participation and will of the parties involved. Even if one were to interpret the provisions of the Convention literally and to ignore the Regulations of the Commission, the latter can do no more than suggest to the parties that they enter into conversations aimed at reaching a friendly settlement. The Commission cannot decide the matter, however, since it lacks the power to do so. The Commission must promote the rapprochement but is not responsible for the results. If agreement is reached, the Commission must make sure that human rights have been properly defended.

If one of the parties is interested in a friendly settlement, it is free to propose it. In the case of the Government and keeping in mind the object and purpose of the treaty -that is, the defense of the human rights protected therein- such a proposal could not be interpreted as an admission of responsibility but, rather, as good faith compliance with the Convention's purposes.

The Court finds it unacceptable for the Government to argue as a preliminary objection that the Commission did not implement the peaceful settlement procedure, considering that it enjoyed that very same power under the provisions of the Commission's Regulations. One cannot demand of another an action that one could have taken under the very same conditions but chose not to.

31. For the above reasons, the Court rejects this preliminary objection.

VI

32. The second preliminary objection interposed by the Government is based on the violation by the Commission, to the detriment of the Government, of the procedure established by Articles 50 and 51 of the Convention. Consequently, the Government seeks the Court's dismissal of the application on the ground that it was improperly submitted.

33. The Government alleges that the procedure spelled out in the abovementioned articles of the Convention consists of a series of steps, the first of which falls exclusively to the Commission and would be exhausted once the report has been processed. The second step pertains to the period of three months in which the matter is either settled or submitted to the Court. The third comprises the exclusive jurisdiction of the Court once the case has been referred to it in timely fashion within the abovementioned period; otherwise, it would be up to the Commission to take the measures provided in Article 51 of the Convention. These three, successive steps, allow for no interference; nor could they be omitted without damaging the right of defense of the States Parties.

34. The Government believes that the Commission joined together and confused the various measures and functions that it is charged with under Articles 50 and 51 of the Convention and, in so doing, prevented the parties from discovering with any precision whether a given procedural phase had been exhausted and which of the applicable deadlines were of an obligatory character. According to the Government, it matters little whether such confusion arose from an erroneous interpretation or from negligence on the part of the Commission; the fact is that it has had a negative effect on the rights granted to Colombia under the Convention.

35. In this regard, the Government notes that on September 26, 1991, the Commission adopted its Report Nº 31/91, in which it set forth various recommendations to the Government, and decided to include it in

its Annual Report to the General Assembly of the Organization of American States if it did not receive a response from Colombia within 90 days. The Government adds that by note of January 16, 1992, which in its opinion was presented after the aforementioned 90-day period had expired, it requested reconsideration of the case pursuant to Article 54 of the Commission's Regulations, a provision that only applies to States that are not Parties to the Convention. By letter dated February 28, 1992, the President of the Commission informed the Government that he had agreed to postpone the final decision on Report Nº 31/91 on the basis of the arguments presented by Colombia and its expressed willingness to cooperate, adding that his decision in no way implied that the report in question, approved in September 1991, had become ineffective. Rather, he had merely suspended the decision regarding its adoption as a final report, in order to give the Government a new opportunity to fully comply with the specific recommendations contained therein.

36. In the Government's opinion, the decision taken in February 1992, occasioned the rejection of the request for reconsideration of the report governed by Article 50 of the Convention, while the decision as to the report under Article 51 was postponed. It was not until September 25, 1992, that the Commission decided to reject the request for reconsideration and ratify its Report Nº 31/91, as also to refer the case to the Court. In addition, the Commission set September 25, 1992, as the final date of the report.

37. Given the above, the Government is of the opinion that the matter could no longer be submitted to the Court, by virtue of the fact that the three-month period under Article 51 of the Convention expired on three different occasions, depending on whether one bases one's calculations on September 26, 1991, January 16, 1992, or February 28, 1992. Since the application was brought to the Court by the Commission on December 24, 1992, the submission took place long after any of the abovementioned periods (which are obligatory in character) had expired.

38. The Commission, for its part, maintains that the Government's assertion that the three-month period governed by Article 51(1) of the Convention must be considered to be obligatory in character is incorrect because the Court, in its judgment of December 11, 1991, on prelimi-

nary objections in the Neira Alegría *et al.* Case, found that since that period may be extended it cannot be deemed to be obligatory. The Commission adds that the extension occurred because the Government requested the reconsideration of Report Nº 31/91 before the expiration of the period fixed in that report.

On the other hand, this petition cannot be dismissed by arguing that it was not applicable because a request for reconsideration can only be interposed by States that are not Parties to the Convention. In ruling on the preliminary objections in the Velásquez Rodríguez Case, the Court found that although the request for reconsideration is not contemplated in the Convention and Article 54 of the Commission's Regulations reserves that proceeding for States that are not Parties, it does conform to the spirit and aims of the Convention **(*Velásquez Rodríguez Case, Preliminary Objections, supra* 26, para. 69; *Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra* 26, para. 69;** and, ***Godínez Cruz Case, Preliminary Objections, supra* 26, para. 72)**. In addition, according to the Neira Alegría *et al.* Case, the basic principles of good faith that govern the international law of human rights dictate that one may not request something of another and then challenge the grantor's powers once the request has been complied with **(*Neira Alegría et al. Case, Preliminary Objections,* Judgment of December 11, 1991. Series C No. 13, para. 35)**.

39. The Commission argues that the Government's assertion that the request for reconsideration was submitted after the expiration of the 90-day term beginning on the date of approval of Report Nº 31/91, that is, on September 26, 1991, is incorrect. According to the Commission, that calculation is erroneous because the report was transmitted to the Government on October 17 of that year and that is the date from which the period starts to run. Furthermore, since the reconsideration request was presented on January 16, 1992, it was introduced one day prior to the expiration of the period at issue, based on the case law of the Court which has determined that the 90 days shall begin to run on the date of transmittal of the relevant recommendations to the Government in question.

40. In the Commission's judgment, Colombia's argument that the reconsideration was rejected in February 1992, is also not sound, since the decision made on that date resulted in the suspension of the adop-

tion of Report Nº 31/91 as final. Consequently, the stage governed by Article 50 of the Convention had been neither abandoned nor surpassed. The phrase about the report not having become ineffective means that it had not been revoked. In his clarification of February 28, 1992, the President of the Commission advised the Government that the suspension of the report was intended to provide Colombia with a new opportunity to comply with the recommendations contained therein.

41. The Commission also considers unacceptable the Government's argument that the February 1992 decision implied that the proceedings relating to the document contemplated in Article 51 of the Convention had already begun and that, therefore, the opportunity to refer the case to the Court had been lost. According to the Commission, that decision merely granted an extension to decide on the issue; that decision was made by the Commission during its session of September 1992.

42. This objection comprises several issues. First, the Court does not share the Government's position that the period established under Article 51(1) of the Convention is obligatory in character, for this Tribunal has held that it may be extended **(*Neira Alegría et al. Case, Preliminary Objections, supra* 38, paras. 32-34)**.

The Court has determined that

> Article 51(1) provides that the Commission must decide within the three months following the transmittal of its report whether to submit the case to the Court or to subsequently set forth its own opinion and conclusions, in either case when the matter has not been settled. While the period is running, however, a number of circumstances could develop that would interrupt it or even require the drafting of a new report or the resumption of the period from the beginning. In each case it will be necessary to conduct an analysis to determine whether or not the time limit expired and what circumstances, if any, could reasonably have interrupted the period. **(*Cayara Case, Preliminary Objections*, Judgment of February 3, 1993. Series C No. 14, para. 39.)**

43. In this context, the request for reconsideration presented by the Government on January 16, 1992, could interrupt the 90-day period granted by the Commission to Colombia to enable it to comply with the

recommendations of Report Nº 31/91. The controversy over whether that request was submitted before or after expiration of the 90 days can be explained by Article 51(1) of the Convention, which clearly provides that the period in question begins to run on the date of transmittal to the Government, for it is only then that the latter is apprised of the report and of the recommendations contained therein. Under those circumstances, the request for reconsideration was presented one day before the expiration of the term, which ended on January 17, 1992.

44. In accepting the preliminary objections interposed by Peru in the Cayara Case, the Court indicated that despite the fact that

> [i]t is generally accepted that the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities, [k]eeping 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* 42, para. 42.)**

And later added:

> 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 [because, to act otherwise,] would result in a loss of the authority and credibility that are indispensable to organs charged with administering the system for the protection of human rights. **(*ibid.*, para. 63.)**

45. The Government has interposed this second objection on the ground that the Commission accepted an "untimely" request for reconsideration of the report presented by the Government itself pursuant to an article that was inapplicable, because it refers to States that are not Parties to the Convention. Regardless of the fact that, as has already been stated, the request was not out of time under Article 51(1) of the Convention, the Court must here recall what it already held in a previous case with regard to the good faith that should govern these issues **(*Neira Alegría et al. Case, supra* 38, para. 35)** and add that when a party requests something, even if such a request is based on an inap-

plicable provision, that party cannot later challenge the basis for its request once it has been complied with.

46. In interposing the objection under discussion, Colombia refers to other considerations that are deserving of a different response. Referring to the letter dated February 28, 1992, sent by the President of the Commission, the Government affirms that the phrases "to postpone its final decision on [the] Reports," "the decision regarding their adoption as final reports has been suspended," and "the Commission will be making a final decision as to the publication," *"clearly indicate that the Commission has agreed to postpone the adoption of the report drawn up pursuant to Article 51."* The Government adds that it has come to *"the conclusion that the 'final reports' to which* [the letter in question] *refers are reports that have their normative basis in Article 51. This follows from the fact that the latter reports are the only ones that may be published, which is not true of the reports mandated by Article 50."*

The Government adds that *"if any of these reports to which the Articles* [50 and 51] *refer is to be characterized as 'final,' there is not the least doubt that the only 'final' report that the Commission is empowered to adopt is the report mentioned in Article 51."*

47. On this issue, the record contains the following evidence:

a. Report Nº 31/91 of September 26, 1991, which resolves: *"To include this report in the forthcoming Annual Report to the General Assembly of the Organization of American States should no reply be received within 90 days of this report."*

b. The Minutes for February 6, 1992, in which the Commission decided: *"To confirm its reports on cases 10.319, 10.454, and 10.581, making new recommendations to the Government and granting it a period within which to comply with them. If the Commission's recommendations are implemented, the report will not be published."*

c. The letter of February 18, 1992, in which the Executive Secretary of the Commission informed the Government that she had decided to *"confirm the reports previously approved by* [it]*, postponing the decision as to the publication thereof until the next session."*

d. In reply to the letter dated the 24 of that same month, addressed to him by the Ambassador of Colombia to the OAS and requesting a clarification of the term "confirm the reports previously approved by the Commission," the President of the Commission, by letter dated February 28, 1992, declared that *"the IACHR will be making a final decision as to the publication of the reports during its 82nd Session."*

e. Report Nº 31/92 of September 25, 1992, pursuant to which it was decided to refer the case to the Court, makes no reference whatsoever to publication, thus re-establishing the period mentioned in Article 51(1).

f. The Commission's response to the Government's contentions, according to which:

> The Government contends that the phrase ['the Commission will be making a final decision as to the publication (of the report)'] confused it because it led it to believe that the Commission had abandoned the option of referring the case to the Court and would be initiating the procedure to which the report under Article 51 of the Convention refers.
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> The Court also examined this situation in the Velásquez Case, as a result of the objection raised by Honduras bearing on the transmittal to the Court of the Velásquez Rodríguez, Godínez Cruz and Fairén Garbi and Solís Corrales Cases and the simultaneous publication of the reports thereon in the Commission's Annual Report for the year 1985-1986.
>
> On that occasion, the Court decided that due to the fact that 'according to Article 51 of the Convention, it is the drafting of the report that is conditional on the failure to file a case with the Court and not the filing of a case that is conditional on the report not having been prepared or published,' the simultaneous implementation of both procedural actions could affect the juridical value of the published report

> but would not affect the admissibility of the application before the Court. This did not occur in the instant case; nevertheless, it is useful to underscore the Court's decision, for it found that even if the report were published this would not fatally impair the proceedings before the Court. Consequently, the reference to publication that appears in the President's note in no way implies that the Commission had conclusively and inevitably abandoned its right to bring the case to the Court, all the more so since the period had been suspended in response to the request for reconsideration.

g. The Commission's assertion that all the documents referred to three cases and not solely to the instant case.

48. As regards the implementation of Articles 50 and 51 of the Convention, in dealing with a similar issue in the cases against Honduras the Court has pointed out that

> however, it should be borne in mind that the preparation of the Article 51 report is conditional upon the matter not having been submitted to the Court within the three-month period set by Article 51(1). Thus, if the application has been filed with the Court, the Commission has no authority to draw up the report referred to in Article 51 [and that] [. . .] [o]nce an application has been filed with the Court, the provisions of Article 51 regarding the Commission's drafting of a new report containing its opinion and recommendations cease to apply. Under the Convention, such a report is in order only after three months have elapsed since transmittal of the communication referred to in Article 50. According to Article 51 of the Convention, it is the drafting of the report that is conditional on the failure to file a case with the Court and not the filing of a case that is conditional on the report not having been prepared or published. If, therefore, the Commission were to draft or publish the report mentioned in Article 51 after having filed the application with the Court, it could be said that the Commission was misapplying the provisions of the Convention. Such action could affect the juridical value of the report but would not affect the admissibility of the application because the wording of the Convention in no way conditions such filing on failure to publish

the report required under Article 51. **(*Velásquez Rodríguez Case, Preliminary Objections, supra* 26, paras. 63 and 76; *Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra* 26, paras. 63 and 75;** and, ***Godínez Cruz Case, Preliminary Objections, supra* 26, paras. 66 and 78.)**

49. In response to a request for advisory opinion submitted by the Governments of Argentina and Uruguay regarding the correct interpretation of Articles 50 and 51 of the Convention, the Court held that the procedure established in those articles involves three stages, as follows:

> In the first, regulated by Article 50, when a friendly settlement has not been reached, the Commission may state the facts and its conclusions in a preliminary document addressed to the State concerned. This 'report' is transmitted in a confidential manner to the State so it may adopt the proposals and recommendations of the Commission and resolve the problem. The State is not authorized to publish it.
>
> Based upon the presumption of the equality of the parties, a proper interpretation of Article 50 implies that neither may the Commission publish this preliminary report, which is sent, in the terminology of the Convention, only 'to the states concerned.'
>
> [. . .]
>
> A second stage is regulated by Article 51. If within the period of three months, the State to which the preliminary report was sent has not resolved the matter by responding to the proposal formulated therein, the Commission is empowered, within that period, to decide whether to submit the case to the Court by means of the respective application or to continue to examine the matter. This decision is not discretionary, but rather must be based upon the alternative that would be most favorable for the protection of the rights established in the Convention.
>
> [. . .]
>
> There may be a third stage after the final report. In fact, with the lapse of the time period the Commission has given the State to comply with the recommendations contained in the final report,

> and if they have not been accepted, the Commission shall decide whether to publish it, and this decision must also be based upon the alternative most favorable for the protection of human rights. **[*Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, paras. 48, 50 and 54.]**

50. The supporting documents indicate that the Commission, by approving and subsequently processing Report Nº 31/91, did not contemplate filing the case with the Court but merely publishing the report. That decision changed one year later, in Report Nº 31/92. The reasons for that change are not as clear as would be hoped and the Commission's vaguely worded letter of February 28, 1992, does not help. In the time between the request for reconsideration and Report Nº 31/92, the Commission conducted an on-site visit to Colombia, during which it held a hearing at which the Government indicated that it was impossible for it to pay compensation because the Commission's Report *"was not a binding decision, as would be the case of a judgment of the Inter-American Court, but was simply a recommendation,"* pointing to its domestic legal provisions.

51. It can be deduced from the foregoing that, in the Commission's judgment, the only way in which the Government would compensate those who, according to the Commission, were its victims would be through a judgment of the Inter-American Court, which would be enforceable on the domestic plane. Such an interpretation is in keeping with the object and purpose of the Convention, which is the protection of human rights, and the Court must accept it.

52. Nevertheless, the Court must point out that there is no reason why the Commission should not faithfully follow the procedural rules. As it has said before and repeats today, although it is true that the object and purpose of the Convention can never be sacrificed to procedure, the latter is, in the interests of legal certainty, binding on the Commission.

53. The Court is also of the opinion that the Commission's statements regarding the possible publication of the report should not be understood as an anticipated decision by the Commission, for that decision

was always conditioned upon the Government's reaction to the recommendations.

54. Hence, it must be concluded that, as a result of the extension granted at the request and for the benefit of the Government through a petition for reconsideration, the 90-day period to which Article 51(1) of the Convention refers began to run on October 2, 1992, the date on which the decision of September 25, 1992, to adopt the report as final was transmitted to the Government. Since the application was filed by the Commission with the Court on December 24, 1992, it must be deemed to have been submitted in a timely fashion.

55. In view of the foregoing, the Court dismisses the second preliminary objection interposed by the Government.

VII

56. In its third objection, Colombia invokes the non-exhaustion of domestic remedies by the alleged victims, relying principally on the following arguments: that from the moment of its first appearance before the Commission, Colombia has argued that domestic remedies -which are not limited to habeas corpus- have not been exhausted; that in cases involving the disappearance of citizens, the Court and the Commission have determined that the only remedy capable of "redressing the wrong" is habeas corpus and that none of the other domestic remedies is fully capable of redressing the possible damage caused by the State. That although the foregoing statement is accurate, it is based on a much broader interpretation of the meaning of habeas corpus than that provided for under Colombian law. Pursuant to that law, the measures taken are not really aimed at determining the whereabouts of the person who has been detained; rather, the habeas corpus remedy under Colombian law proceeds on the assumption that the place of detention and the authorities involved in the violation of the constitutional and legal rights of the detainee are known. In the absence of that information, there exist other appropriate procedural means of investigating the illegal deprivation of liberty and reestablishing the right violated and, where appropriate, of punishing those responsible and fixing the compensation due.

57. The Government adds that the Colombian legal system provides for concrete, efficacious actions that could resolve the matter, among them: penal action, the purpose of which is to establish whether criminal law was violated by individuals or agents of the State; and, action under administrative law, directed against the State as a legal entity to ensure compliance with the law by means of compensation for damages resulting from actions attributed to its agents.

58. The Commission, for its part, holds that habeas corpus is an internationally recognized right. Consequently, it should not be different in each country, as the Government claims, for that would imply an evident breach of Article 2 of the Convention, which orders the States Parties to adopt legislative or other measures aimed at giving effect to the rights and freedoms proclaimed therein. As a result, despite the fact that habeas corpus is theoretically the ideal remedy to redress the violation, if it offers no assurance of effectiveness, as the Government contends, it would not be necessary to exhaust it, as provided in the exceptions listed in Article 46(2) of the Convention.

59. In addition, the Commission notes that the relatives of Isidro Caballero also had recourse to the ordinary and military criminal jurisdictions and to the Office of the Attorney General in seeking the investigation of the case and the application of penalties and disciplinary sanctions on those responsible for his disappearance. These actions did not produce any effective results. All of these measures carried out by the relatives of Isidro Caballero, as well as others of an extrajudicial nature, must not be seen as remedies that have to be exhausted before turning to the Commission. Nevertheless, they were attempted and illustrate their determination to exhaust all existing possibilities.

60. The Commission argues, furthermore, that according to the European Court of Human Rights

> objections of inadmissibility that have not been specifically invoked in timely fashion by the Government should not be examined by the Court, since the time-limit for presentation by the Government has expired; in addition, the time to raise these objections is at the very start of proceedings before the Commission, that is, at the stage of initial examination of admissibility, unless it proves impossible to interpose them at the appro-

> priate time for reasons that cannot be attributed to the Government. **(*Eur. Court H.R., Artico judgment of 13 May 1980,* Series A No. 37, paras. 23 *et seq.*)**

and that *"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* 26, para. 88; *Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra* 26, para. 87;** and, ***Godínez Cruz Case, Preliminary Objections, supra* 26, para. 90)**.

61. Finally, the Commission affirms that, as Report Nº 31/91 indicates, it is obvious that the petitioners have been unable to secure effective protection from the domestic judicial organs. Consequently, the Government cannot plead non-exhaustion of the remedies under Colombian law because the investigation of the facts denounced has not produced results, which the Government itself has admitted in its request for reconsideration dated January 16, 1992.

62. The Court believes that the fundamental issue that arises with respect to this preliminary objection is the definition of the domestic remedies that must be exhausted prior to lodging the petition with the Commission, pursuant to the provisions of Article 46(1) of the Convention.

63. The Court has already stated that:

> Article 46(1)(a) of the Convention speaks of 'generally recognized principles of international law.' Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2).
>
> Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or

unreasonable. **(*Velásquez Rodríguez Case, Judgment of July 29, 1988*. Series C No. 4, paras. 63-64; *Godínez Cruz Case, Judgment of January 20, 1989.* Series C No. 5, paras. 66-67;** and, ***Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989.* Series C No. 6, paras. 87-88.)**

64. The Court has also held that, in keeping with the object and purpose of the Convention and in accordance with an interpretation of Article 46(1)(a) of the Convention, the proper remedy in the case of the forced disappearance of persons would ordinarily be habeas corpus, since those cases require urgent action by the authorities. Consequently, *"habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty"* **(*Velásquez Rodríguez Case, Judgment of July 29, 1988, supra* 63, para. 65; *Godínez Cruz Case, Judgment of January 20, 1989, supra* 63, para. 68;** and, ***Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989, supra* 63, para. 90)**.

65. In this case it has been proved that María Nodelia Parra-Rodríguez, the common-law wife of Isidro Caballero-Delgado, on February 10, 1989, filed a writ of habeas corpus with the First Superior Judge for the District of Bucaramanga in connection with the disappearance of the victim who, together with a *"young lady named CARMEN,"* had been unlawfully detained by military authorities. As the here relevant record shows, the Judge not only requested information on the matter from the State institutions where a person could be held in detention for various reasons -namely, the Model Prison of that city, the Police Force and the Administrative Security Department (DAS)- but also went personally to the Fifth Brigade, where the petitioner had asserted they were being held. In other words, the Judge, complying with the purposes of the habeas corpus writ, did everything in her power to find the alleged detainees. Since all of these authorities reported that the persons in question were not being held in their facilities and that there were no orders for their arrest or judgments against them, the Judge -on the very same day that the writ had been filed, that is, handling the matter with great speed- declared the proceeding to be unfounded because it had not been proved that Isidro Caballero had been deprived of his liberty.

66. The Court notes that the writ of habeas corpus was filed and decided only on behalf of Isidro Caballero-Delgado and did not cover María del Carmen Santana, despite the fact that in the statement of facts a *"young lady named CARMEN"* is mentioned. Since the Government did not refer to this matter in its preliminary objections, however, this Tribunal will not consider it.

67. Given that the proceedings before the Commission were initiated on April 5, 1989, with the presentation of the complaint regarding the forced disappearance of Isidro Caballero-Delgado and María del Carmen Santana, that is, after the filing of the writ of habeas corpus and the negative decision thereon, this Court considers that the petitioners fulfilled the requirements of Article 46(1)(a) of the Convention, for they exhausted the domestic remedy that is proper and effective in matters concerning the forced disappearance of persons. All of the remaining domestic proceedings go to the merits of the case, for they relate to the conduct followed by Colombia in complying with its obligation to protect the rights proclaimed in the Convention.

68. In view of the foregoing, it must be concluded that the third objection interposed by the Government is without merit.

VIII

Now, therefore,

THE COURT,

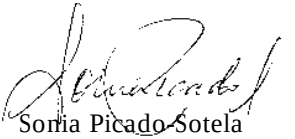
unanimously,

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

unanimously,

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

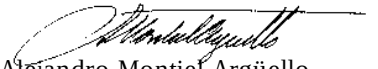
Done in Spanish and English, the Spanish text being authentic. Read at a public hearing at the seat of the Court in San Jose, Costa Rica, this 21st day of January, 1994.



Sonia Picado-Sotela
President

Rafael Nieto-Navia

Héctor Fix-Zamudio



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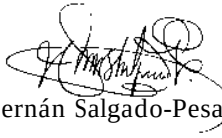

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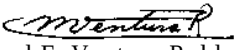
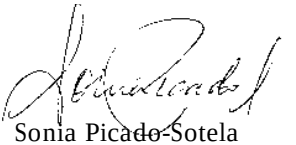
Asdrúbal Aguiar-Aranguren

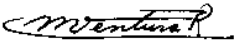


Manuel E. Ventura-Robles
Secretary

So ordered,



Sonia Picado-Sotela
President



Manuel E. Ventura-Robles
Secretary