Inter-American Court of Human Rights

Case of Velásquez-Rodríguez *v.* Honduras

Judgment of June 26, 1987
(Preliminary Objections)

In the Velásquez Rodríguez case,

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

Thomas Buergenthal, President
Rafael Nieto-Navia, Vice President
Rodolfo E. Piza E., Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge
Héctor Gros Espiell, Judge
Rigoberto Espinal Irías, Judge ad hoc

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

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

I

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted the instant case to the Court on April 24, 1986. It originated in a petition against Honduras (No. 7920) which the Secretariat of the Commission received on October 7, 1981.

2. In filing the application with the Court, the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention in the case of Angel Manfredo Velásquez Rodríguez. The Commission also asked the

Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties."

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

4. On July 23, 1986, Judge Jorge R. Hernández Alcerro informed the President of the Court that, pursuant to Article 19(2) of the Statute of the Court, he had "decided to recuse (him)self from hearing the three cases that. . . were submitted to the Inter-American Court." By a note of that same date, the President informed the Government of its right to appoint a judge ad hoc under Article 10(3) of the Statute of the Court. The Government named Rigoberto Espinal Irías to that position by note of August 21, 1986.

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

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

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

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

9. In his Order of January 30, 1987, the President made clear that the application which gave rise to the instant proceeding should be deemed to be the Memorial provided for in Article 30(3) of the Court's Rules of Procedure. He also specified that the deadline of March 20, 1987 granted to the Commission was the time limit set forth in Article 27(3) of the Rules for the presentation of its observations and conclusions on the preliminary objections interposed by the Government. Having heard the views of the parties, the President ordered a public hearing on June 15, 1987 for the presentation of oral arguments on the preliminary objections. The time limits for submissions on the merits were left open to allow for the possibility that the Court might decide to join the preliminary objections to the merits or, in the event they should be decided separately, that the decision adopted would result in the continuation of the proceeding.

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

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

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

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

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

There appeared before the Court

for the Government of Honduras:

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

for the Inter-American Commission on Human Rights:

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

II

15. According to the petition filed with the Commission on October 7, 1981, and the supplementary information received subsequently, Angel Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras, "was violently detained without a warrant for his arrest by members of the Dirección Nacional de Investigación (DNI) and G-2 of the Armed Forces of Honduras" on the afternoon of September 12, 1981, in Tegucigalpa. According to the petitioners, several eyewitnesses reported that he and others were detained and taken to the cells of Public Security Forces Station No. 2 located in the Barrio El Manchén of Tegucigalpa, where he was "accused of alleged political crimes and subjected to harsh interrogation and cruel torture." The petition added that on September 17, 1981, Velásquez Rodríguez was moved to the First Infantry Battalion, where the interrogation continued, but that the police and security forces, nevertheless, denied that he had been detained.

16. On October 14 and November 24, 1981, the Commission transmitted the relevant parts of the petition to the Government and requested information on the matter.

17. When the Commission received no reply, it again asked the Government for information on May 14, 1982, warning that if it did not receive the information within a reasonable time, it would

consider applying Article 42 (formerly 39) of its Regulations and presume the allegations to the true.

18. Although it reiterated its request for information on October 6, 1982, March 23 and August 9, 1983, the Commission received no reply.

19. At its 61st Session, the Commission adopted Resolution 30/83 of October 4, 1983, whose operative parts read as follows:

> 1. By application of Article 39 of the Regulations, to presume as true the allegations contained in the communication of October 7, 1981, concerning the detention and disappearance of Angel Manfredo Velásquez Rodríguez in the Republic of Honduras.
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> 2. To point out to the Government of Honduras that such acts are most serious violations of the right to life (Art. 4) and the right to personal liberty (Art. 7) of the American Convention on Human Rights.
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> 3. To recommend to the Government of Honduras: (a) that it order a thorough and impartial investigation to determine who is responsible for the acts denounced; (b) that it punish those responsible in accordance with Honduran law; and (c) that it inform the Commission within 60 days, especially about the measures taken to carry out these recommendations.
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> 4. If the Government of Honduras does not submit its observations within the time limit set out in paragraph 3 **supra**, the Commission shall include this Resolution in its Annual Report to the General Assembly pursuant to Article 59(g) of its Regulations.

20. On November 18, 1983, the Government requested the reconsideration of Resolution 30/83 on the grounds that domestic remedies had not been exhausted, that the Dirección Nacional de Investigación had no knowledge of the whereabouts of Velásquez Rodríguez, that the Government was making every effort to find him, and that there were rumors that Velásquez Rodríguez was "with Salvadoran guerrilla groups."

21. On May, 30, 1984, the Commission informed the Government that it had decided at its 62nd Session (May 1984), "in light of the information submitted by the Honorable Government, to reconsider Resolution 30/83 and to continue its study of the case." The Commission also asked the Government to provide information on the exhaustion of domestic legal remedies and other matters relevant to the case.

22. On January 29, 1985, the Commission repeated its request of May 30, 1984 and notified the Government that it would render a final decision on this case at its meeting in March 1985. On March 1 of that year, the Government asked for a postponement of the final decision and reported that it had set up an Investigatory Commission to study the matter. The Commission agreed to the Government's request on March 11, granting it thirty days in which to present the information requested.

23. On April 7, 1986, the Government provided information about the outcome of the proceeding that had been brought before the First Criminal Court of behalf of Velásquez Rodríguez and other persons who had disappeared. According to that information, the tribunal had dismissed the complaints "except as they applied to General Gustavo Alvarez Martínez, because he had left the country and has not given testimony." This decision was later affirmed by the First Court of Appeals.

24. In Resolution 22/86 of April 18, 1986, adopted at its 67th Session, the Commission deemed the new information presented by the Government insufficient to warrant reconsideration of Resolution 30/83 and found, to the contrary, that "all evidence shows that Angel Manfredo Velásquez Rodríguez is still missing and that the Government of Honduras . . . has not offered convincing proof that would allow the Commission to determine that the allegations are not true." In that same Resolution, the Commission confirmed Resolution 30/83, denied the request for reconsideration and referred the matter to the Court.

III

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

> 1. The Commission did not follow the procedure established for the admissibility of a petition or communication.
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> 2. The Commission did not take into account the information provided by the Government regarding the failure to exhaust the domestic legal remedies.
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> 3. Domestic legal remedies were neither pursued nor exhausted.
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> 4. The Commission did not follow the procedure established for preparation of reports.
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> 5. The Commission ignored the Convention's provision regarding friendly settlement.
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> 6. The procedures established in Articles 48 - 50 of the Convention for referral of a case to the Court pursuant to Article 61 of the Convention were not complied with.
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> 7. Observations by the Government on the merits are not appropriate at this stage of the proceedings.

26. In its observations of March 20, 1987, on the submissions of the Government, the Commission concluded that:

> 1. Officials or agents of the Government of Honduras detained Angel Manfredo Velásquez Rodríguez on September 12, 1981, and he has been missing since that date. This constitutes a most serious violation of the rights to life, to humane treatment and to personal liberty, which are guaranteed by Articles 4, 5 and 7 of the American Convention on Human Rights, to which Honduras is a State Party;
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> 2. The substantive or procedural objections raised by the Government of Honduras in its Memorial have no legal basis under the provisions of the relevant articles of the American Convention on Human Rights and the standards of international law; and
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> 3. Since Honduras has recognized the compulsory jurisdiction of the Inter-American Court of Human Rights, the Commission again petitions the Honorable Court, pursuant to Article 63 (1) of the American Convention on Human Rights, to

find a violation of the rights to life (Article 4), to humane treatment (Article 5) and to personal liberty (Article 7) guaranteed by the Convention. It also asks the Court to rule that the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties.

IV

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

V

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

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

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

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

VI

31. The Court will now examine the preliminary objections.

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

a. lack of a formal declaration of admissibility by the Commission;

b. failure to attempt a friendly settlement;

c. failure to carry out an on-site investigation;

d. lack of a prior hearing;

e. improper application of Articles 50 and 51 of the Convention, and

f. non-exhaustion of domestic legal remedies.

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

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

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

VII

35. At the hearing, the Government argued that the Commission, by not formally recognizing the admissibility of the case, had failed to comply with a requirement demanded by the Convention as a prerequisite to taking up a case.

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

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

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

> 1. The Commission, acting initially through its Secretariat, shall receive and process petitions lodged with it in accordance with the standards set forth below:
>
> . . .
>
> c. if it accepts, in principle, the admissibility of the petition, it shall request information from the government of the State in question and include the pertinent parts of the petition.

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

40. Although the admission of a petition does not require an express and formal act, such an act is necessary if it is found to be inadmissible. The language of both the Convention and the Regulations of the Commission clearly differentiates between these two options (Art. 48 (1) (a) and (c) of the Convention and Arts. 34 (1) (c) and 3, 35 (b) and 41 of its Regulations). An express declaration by the Commission is required if a petition is to be deemed inadmissible. No such requirement is demanded for admissibility. The foregoing holds provided that a State does not raise the issue of admissibility, whereupon the Commission must make a formal statement one way or the other. That issue did not arise in the instant case.

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

VIII

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

43. The Commission argued that the friendly settlement procedure is not mandatory and that the special circumstances of this case made it impossible to pursue such a settlement, for the

facts have not been clearly established because of the Government's lack of cooperation, and the Government has not accepted any responsibility in the matter. Moreover, the Commission contends that the rights to life (Art. 4), to humane treatment (Art. 5) and to personal liberty (Art. 7) violated in the instant case cannot be effectively restored by conciliation.

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

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

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

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

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

IX

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

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

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

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

X

51. At the hearing, the Government pursued a similar line of reasoning, arguing that, pursuant to Article 48 (1) (e) of the Convention and before adopting Resolution 30/83, the Commission was obligated to hold a preliminary hearing to clarify the allegations. In that Resolution, the Commission accepted the allegations as true, based on the presumption set forth in Article 42 (formerly 39) of its Regulations.

52. The Commission contended that neither Article 48 (1) (e) of the Convention nor Article 43 of its Regulations require a preliminary hearing to obtain additional information before the issuance of the report and that, moreover, the Government did not request such a hearing.

53. The Court holds that a preliminary hearing is a procedural requirement only when the Commission considers it necessary to complete the information or when the parties expressly request a hearing. At the hearing, the Commission may ask the representative of the respondent State for any relevant information and, upon request, may also receive oral or written submissions from the interested parties.

54. Neither the petitioners nor the Government asked for a hearing in the instant case, and the Commission did not consider one necessary.

55. Consequently, the Court rejects the preliminary objection raised by the Government.

XI

56. In its motion concerning admissibility, the Government asked the Court to rule that the case should not have been referred to the Court, under Article 61 (2) of the Convention, because the Commission had not exhausted the procedures established in Articles 48 to 50 of the Convention. The Government also referred to the absence of any attempt to bring about a friendly settlement under the terms of Article 48 (1) (f), an issue which has already been dealt with by the Court (**supra** 42-46), and to other aspects of the handling of this case which, in the Government's opinion, did not meet the requirements of Articles 50 and 51 of the Convention. The Court will analyze the grounds for the latter contentions after making some general observations on the procedure set forth in Articles 48 to 50 of the Convention and the relationship of these provisions to Article 51. This analysis is necessary in order to place the Government's objections within the legal context in which they must be decided.

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

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

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

59. The procedures of Articles 48 to 50 have a broader objective as regards the international protection of human rights: compliance by the States with their obligations and, more specifically, with their legal obligation to cooperate in the investigation and resolution of the violations of which they may be accused. Within this general goal, Article 48 (1) (f) provides for the possibility of a friendly settlement through the good offices of the Commission, while Article

50 stipulates that, if the matter has not been resolved, the Commission shall prepare a report which may, if the Commission so elects, include its recommendations and proposals for the satisfactory resolution of the case. If these procedures do not lead to a satisfactory result, the case is ripe for submission to the Court pursuant to the terms of Article 51 of the Convention, provided that all other requirements for the Court to exercise its contentious jurisdiction have been met.

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

61. Article 50 of the Convention provides:

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

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

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

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

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

63. Article 51 (1) also considers the possibility of the Commission preparing a new report containing its opinion, conclusions and recommendations, which may be published as stipulated in Article 51 (3). This provision poses many problems of interpretation, such as, for example, defining the significance of this report and how it resembles or differs from the Article 50 report.

Nevertheless, these matters are not crucial to the resolution of the procedural issues now before the Court. In this case, however, it should be borne in mind that the preparation of the Article 51 report is conditional upon the matter not having been submitted to the Court within the three-month period set by Article 51 (1). Thus, if the application has been filed with the Court, the Commission has no authority to draw up the report referred to in Article 51.

64. The Government maintains that the above procedures were not fully complied with and that the Commission applied Articles 50 and 51 simultaneously. The Court will now examine this objection, keeping in mind the special features of the procedure followed before the Commission, which gave rise to some unique problems due largely to initiatives taken both by the Commission and the Government.

65. The Commission adopted two Resolutions (30/83 and 22/86) approximately two and a half years apart, neither of which was formally called a "report" for purposes of Article 50. This raises two problems. The first concerns the prerequisites for reports prepared pursuant to Article 50 and the question whether the resolutions adopted by the Commission fulfill those requirements. The other problem concerns the existence of two resolutions, the second of which both confirms the earlier one and contains the decision to submit the case to the Court.

66. In addressing the first issue, it should be noted that the Convention sets out, in very general terms, the requirements that must be met by reports prepared pursuant to Article 50. Under this article, such reports must set forth the facts and conclusions of the Commission, to which may be added such proposals and recommendations as the Commission sees fit. In that sense, Resolution 30/83 meets the requirements of Article 50.

67. The Commission did not call Resolution 30/83 a "report," however, and the terms employed by the Commission do not conform to the wording of the Convention. That is, nonetheless, irrelevant if the content of the resolution approved by the Commission is substantially in keeping with the terms of Article 50, as in the instant case, and so long as it does not affect the procedural rights of the parties (particularly those of the States) to have one last opportunity to resolve the matter before it can be filed with the Court. Whether this last condition was complied with in the instant case is related to the other problem: the Commission's adoption of two Resolutions -- Nos. 30/83 and 22/86.

68. The Commission adopted Resolution 30/83 at its 61st Session (October 1983) and transmitted it to the Government by note of October 11, 1983. On November 18 of the same year, that is, fewer than three months after the adoption of Resolution 30/83 and, thus, within the deadline for filing the application with the Court, the Government asked the Commission to reconsider the Resolution on the grounds that various domestic remedies were underway and still pending which could lead to the settlement of the matter in the terms suggested by the Commission. The Commission approved the request for reconsideration and decided at its 62nd Session (May 1984) "to continue the study of the case." Pursuant to that Resolution, the Commission asked the Government to provide additional information. Because the Commission deemed the evidence presented since the adoption of Resolution 32/83 insufficient to warrant a new study of the matter, it adopted Resolution 22/86 on April 18, 1986, which confirmed Resolution 30/83 and contained its decision to submit the case to the Court.

69. The Convention does not foresee a situation where the State might request the reconsideration of a report approved pursuant to Article 50. Article 54 of the Commission's Regulations does contemplate the possibility of a request for reconsideration of a resolution. However, that provision only applies to petitions involving States that are not parties to the Convention, which is not the instant case. Quite apart from strictly formal considerations, the procedure followed by States Parties to the Convention in requesting reconsideration has repercussions on procedural deadlines and can, as in the instant case, have negative effects on the petitioner's right to obtain the international protection offered by the Convention within the

legally established time frames. Nevertheless, within certain timely and reasonable limits, a request for reconsideration that is based on the will to resolve a case through the domestic channels available to the State may be said to meet the general aim of the procedures followed by the Commission, since it would achieve a satisfactory solution of the alleged violation through the State's cooperation.

70. The extension of the time limit for submission of an application to the Court does not impair the procedural position of the State when the State itself request an extension. In the instant case, the Commission's decision to "continue the study of the case" resulted in a substantial (approximately two and a half years) extension of the period available to the Government for a last opportunity to resolve the matter without being brought before the Court. Thus, neither the State's procedural rights nor its opportunity to provide a remedy were in any way diminished.

71. The Commission never revoked Resolution 30/83; rather, it suspended the procedural effects in expectation of new evidence that might lead to a different settlement. By confirming the previous resolution, the Commission reopened the periods for the succeeding procedural stages.

72. The Government argues that the ratification of Resolution 30/83 should have reinstated the 60-day period granted therein for the Government to adopt the Commission's recommendations. Given the circumstances of this case, the Court considers that argument to be ill-founded because the Government was afforded a much longer period, to the detriment of the petitioner's interest in obtaining a satisfactory result within the established time limits.

73. The investigation conducted by the Government between 1983 and 1986 concluded that it was impossible "to reach an unequivocal determination regarding disappearances resulting from actions attributed to governmental authorities." In this regard, the Government had informed the Commission, by note of April 7, 1986, that the First Criminal Court had dismissed proceedings relating to the disappearance of Manfredo Velásquez, a decision that was affirmed by the First Court of Appeals "except as they applied to General Gustavo Alvarez Martínez, because he had left the country and had not given testimony." Under the circumstances, it made no sense to grant new extensions, which would have resulted in even longer periods than those provided for by the Convention before the matter could be submitted to the Court.

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

75. Nor is the Government correct in asserting that Resolution 22/86 has allowed the Court and the Commission to consider the matter simultaneously. The Government argues that, in confirming Resolution 30/83, the Commission reiterated the recommendations contained therein, the compliance with which was to be evaluated by the Commission itself, and that it also submitted the case to the jurisdiction of the Court. In this connection, the Court finds that the Commission's application to the Court unequivocally shows that the Commission had concluded its proceedings and submitted the matter for judicial settlement. The presentation of the case to the Court implies, **ipso jure**, the conclusion of proceedings before the Commission. Nevertheless, a friendly settlement between the parties under the terms of Article 42 (2) of the Rules of Procedure could still, if approved by the Court, lead to the striking of the case from the Court's docket and the end of the judicial proceedings.

76. Once an application has been filed with the Court, the provisions of Article 51 regarding the Commission's drafting of a new report containing its opinion and recommendations cease to apply. Under the Convention, such a report is in order only after three months have elapsed since transmittal of the communication referred to in Article 50. According to Article 51 of the

Convention, it is the drafting of the report that is conditional on the failure to file a case with the Court and not the filing of a case that is conditional on the report not having been prepared or published. If, therefore, the Commission were to draft or publish the report mentioned in Article 51 after having filed the application with the Court, it could be said that the Commission was misapplying the provisions of the Convention. Such action could affect the juridical value of the report but would not affect the admissibility of the application because the wording of the Convention in no way conditions such filing on failure to publish the report required under Article 51.

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

78. Likewise, the reasoning developed from paragraph 31 onwards leads to the conclusion that the case should not be dismissed for failure to comply with the procedures set out in Articles 48 to 50 of the Convention.

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

80. Although proceedings before the Commission began on October 7, 1981, the Government did not raise this issue until November 18, 1983 when, in requesting reconsideration of Resolution 30/83, it asserted that "the domestic jurisdiction of my country has not been exhausted" because "a Writ of "Exhibición Personal" (Habeas Corpus) . . . is still pending." By note of May 30, 1984, in response to the Government's request for reconsideration, the Commission, in turn, asked "whether the domestic legal remedies had been exhausted." Finally, Resolution 22/86 pointed out that "there has been, moreover, an unjustified delay in the administration of justice in this case."

81. In its submissions to the Court, the Government declared that "the petitioner has not proved to the Commission that domestic remedies have been previously exhausted or pursued." The Government reiterated this position at the hearing, where it added that, under Honduran law, the writ of exhibición personal does not exhaust domestic remedies.

82. Both in its submissions of March 20, 1987, and at the hearing, the Commission argued that domestic remedies had been exhausted, because those pursued had been unsuccessful. Even if this argument were not accepted, the Commission asserted that the exhaustion of domestic remedies was not required because there were no effective judicial remedies to forced disappearances in Honduras in the period in which the events occurred. The Commission believes that the exceptions to the rule of prior exhaustion of domestic remedies contained in Article 46 (2) of the Convention were applicable because during that period there was no due process of law, the petitioner was denied access to such remedies, and there was an unwarranted delay in rendering a judgment.

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

for filing applications with the Court and that, therefore, the Government's objection should not be ruled upon as a preliminary objection.

84. The Court must first reiterate that, although the exhaustion of domestic remedies is a requirement for admissibility before the Commission, the determination of whether such remedies have been pursued and exhausted or whether one is dealing with one of the exceptions to such requirement is a matter involving the interpretation or application of the Convention. As such, it falls within the contentious jurisdiction of the Court pursuant to the provisions of Article 62 (1) of the Convention (**supra** 29). The proper moment for the Court to rule on an objection concerning the failure to exhaust domestic remedies will depend on the special circumstances of each case. There is no reason why the Court should not rule upon a preliminary objection regarding exhaustion of domestic remedies, particularly when the Court rejects the objection, or, on the contrary, why it should not join it with the merits. Thus, in deciding whether to join the Government's objection to the merits in the instant case, the Court must examine the issue in its specific context.

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

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

> The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:
>
> a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
>
> b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
>
> c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

87. The Court need not decide here whether the grounds listed in Article 46 (2) are exhaustive or merely illustrative. It is clear, however, that the reference to "generally recognized principles of international law" suggests, among other things, that these principles are relevant not only in determining what grounds justify non-exhaustion but also as guidelines for the Court when it is called upon to interpret and apply the rule of Article 46 (1) (a) in dealing with issues relating to the proof of the exhaustion of domestic remedies, who has the burden of proof, or, even, what is meant by "domestic remedies." Except for the reference to these principles, the Convention does not establish rules for the resolution of these and analogous questions.

88. 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.

89. The records shows: (a) that the Government failed to make a timely objection when the petition was before the Commission and (b) that when the Government eventually raised the objection, it did so in a contradictory way. For example, in its note of November 18, 1983, the Government stated that domestic remedies had not been exhausted because a writ of exhibición personal was still pending, whereas at the hearing the Government argued that such a writ does not exhaust domestic remedies. On other occasions, the Government referred generally to

domestic remedies, without specifying what remedies were available under its domestic law to deal with complaints of the type under consideration. There is also considerable evidence that the Government replied to the Commission's requests for information, including that concerning domestic remedies, only after lengthy delays, and that the information was not always responsive.

90. Under normal circumstances, the conduct of the Government would justify the conclusion that the time had long passed for it to seek the dismissal of this case on the grounds of non-exhaustion of domestic remedies. The Court, however, must not rule without taking into account certain procedural actions by both parties. For example, the Government did not object to the admissibility of the petition on the grounds of non-exhaustion of domestic remedies when it was formally notified of the petition, nor did it respond to the Commission's request for information. On the other hand, when the Commission first became aware of the objection (subsequent to its adoption of Resolution 30/83), not only did it fail to inform the Government that such an objection was untimely but, by note of May 30, 1984, it asked the Government whether "the domestic legal remedies have been exhausted . . . ." Under those circumstances and with no more evidence than that contained in the record, the Court deems that it would be improper to reject the Government's objection **in limine** without giving both parties the opportunity to substantiate their contentions.

91. The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1). Thus, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case.

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

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

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

95. The Commission has asserted, moreover, that the pursuit of domestic remedies was unsuccessful and that, during the period in which the events occurred, the three exceptions to the rule of prior exhaustion set forth in the Convention were applicable. The Government contends, on the other hand, that the domestic judicial system offers better alternatives. That difference inevitably leads to the issue of the effectiveness of the domestic remedies and judicial system taken as a whole, as mechanisms to guarantee the respect of human rights. If the Court, then, were to sustain the Government's objection and declare that effective judicial remedies are available, it would be prejudging the merits without having heard the evidence and arguments of the Commission or those of the Government. If, on the other hand, the Court were to declare that all effective domestic remedies had been exhausted or did not exist, it would be prejudging the merits in a manner detrimental to the State.

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

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

NOW, THEREFORE, THE COURT:

unanimously,

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

unanimously,

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

unanimously,

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

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

Thomas Buergenthal
President

Rafael Nieto-Navia

Rodolfo E. Piza E.

Pedro Nikken

Héctor Fix-Zamudio

Héctor Gros Espiell

Rigoberto Espinal Irías

Charles Moyer
Secretary

So ordered:

Thomas Buergenthal
President

Charles Moyer
Secretary