

Inter-American Court of Human Rights

Case of Castillo-Petruzzi *et al.* v. Peru

Judgment of September 4, 1998 (Preliminary Objections)

In the Castillo-Petruzzi *et al.* Case,

The Inter-American Court of Human Rights (hereinafter "the Court," "the Inter-American Court," or "the Tribunal") composed of the following judges¹:

Hernán Salgado-Pesantes, President
Antônio A. Cançado Trindade, Vice-President
Máximo Pacheco-Gómez, Judge
Oliver Jackman, Judge
Sergio García-Ramírez, Judge
Carlos Vicente de Roux-Rengifo, Judge
Fernando Vidal-Ramírez, Judge *ad hoc*;

also present:

Manuel E. Ventura-Robles, Secretary, and
Víctor M. Rodríguez-Rescia, Interim Deputy Secretary

pursuant to Article 36(6) of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "the Rules of Procedure"), renders the following judgment on the preliminary objections interposed by the State of Peru (hereinafter "the State" or "Peru").

I INTRODUCTION OF THE CASE

1. This case was submitted to the Inter-American Court of Human Rights by the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") on July 22, 1997. It originated with petition No. 11.319 lodged with the Secretariat of the Commission on January 28, 1994.

¹ Judge Alirio Abreu-Burelli informed the Court that for reasons of *force majeure* he could not be present at the final deliberation and signing of this judgment

II FACTS AS SET FORTH IN THE APPLICATION

2. According to the application, Peru violated the right to nationality of Jaime Francisco Castillo-Petruzzi, María Concepción Pincheira-Sáez, Lautaro Enrique Mellado-Saavedra and Alejandro Astorga-Valdéz by trying and convicting them of the crime of "treason against the fatherland," pursuant to Decree-law 25,659, although they are not Peruvians. The Commission also asserted that these persons were not tried by a competent, independent, and impartial judge or court in violation of their right to a fair trial, because they were all tried, convicted, and sentenced to life imprisonment in Peru by a "faceless" tribunal under military jurisdiction. The Commission supports that statement, *inter alia*, with the following facts:

- a. On October 15, 1993, the alleged victims were detained by members of the National Anti-Terrorism Bureau.
- b. On November 20, 1993, the investigative judge decided to open an investigation against the alleged victims.
- c. On January 7, 1994, the Special Military Investigative Judge of the Peruvian Air Force rejected "the jurisdictional objection made by the accused Jaime Francisco Castillo-Petruzzi, María Concepción Pincheira-Sáez, and Lautaro Mellado-Saavedra, and upheld the jurisdictional objection made by the accused Alejandro Astorga-Valdéz." The first three accused were convicted as "perpetrators of the crime of treason against the fatherland, with a sentence of life imprisonment without parole, continuous solitary confinement for the first year of the sentence and then forced labor." In the case of Astorga-Valdéz, the court ruled that "this Court does not have jurisdiction to rule on his criminal conduct."
- d. On March 14, 1994, the military court of the second instance upheld the Judgment of January 7, 1994, rendered by the Special Military Court of the Peruvian Air Force.
- e. On May 3, 1994, the Special Military Supreme Court rejected the motion to annul the Resolution of March 14, 1994, and upheld the January 7, 1994 Judgment, rejecting as without merit the jurisdictional objection made by Mr. Castillo-Petruzzi, Ms. Pincheira-Sáez, and Mr. Mellado-Saavedra. The Court also held that "the part of the judgment that upheld the jurisdictional objection made by Alejandro Luis Astorga-Valdéz was annulled" and refused to hear the case on finding him responsible for

the crime of terrorism [...] for which reason it denied the present motion and modified the judgment of the first instance, rejecting the jurisdictional objection made by Alejandro Luis Astorga-Valdéz and condemning him to life imprisonment as the perpetrator of the crime of treason against the fatherland.

III PROCEEDINGS BEFORE THE COMMISSION

3. On January 28, 1994, Verónica Reyna, Chief of the Legal Department of the Chilean organization Fundación de Ayuda Social de las Iglesias Cristianas (hereinafter "FASIC") submitted the first complaint in this case. On June 29, 1994, the Commission transmitted the pertinent parts of the complaint to the State and requested that it provide information within two months about the events reported in the complaint. The Commission also requested information concerning the exhaustion of domestic remedies.

4. On August 26, 1994, a second group of complainants provided new information on the case, and on November 18, 1994, they added the case of Alejandro Astorga-Valdéz. In their first communication they reported that on January 6, 1994, the defense attorneys of the alleged victims were notified that they had two hours to consult the case file and prepare the defense, and that the judgment would be read the following day. On September 29, 1994, this group of petitioners reiterated their complaint. On November 22, 1994, the Secretariat of the Commission informed that group by telephone that it needed to have a power-of-attorney or an authorization from the initial petitioners in order to be included as co-petitioners in the case.

5. On September 14, 1994, the State provided information, accompanied by a copy of Official Document No. 534-S-CSJM from the Superior Council of Military Justice dated September 1, 1994. In that report it was stated that:

Case No 078-TP-93-L [against Castillo-Petruzzi, Pincheira-Sáez, and Mellado-Saavedra] for the crime of Treason Against the Fatherland was tried before the Military Court of the Air Force of Peru, which convicted them of the commission of the illegal criminal act charged and sentenced them to life in prison.

Moreover, the State added that the Peruvian Courts "exercise jurisdiction over crimes committed within Peruvian national territory as an expression of sovereignty," and that the criminal law of Peru is binding independent of the perpetrator's nationality and domicile. The State also specified that the type of crime denominated as treason against the fatherland in Law 25,659 identifies an aggravated act of terrorism, which "in view of its nature and the way it is carried out, requires courts that have the necessary assurances of security." Finally, the State maintained that in all proceedings that come before the military courts, the courts observe "the rules of due process, the right to appeal to a higher court (three appeals), judicial oversight, rationale for the decisions, inapplicability by analogy of criminal law, and inform the defendant of the charges against him" and provide the defendant with legal assistance. On September 23, 1994, the Commission transmitted a copy of Peru's response to the petitioners.

6. On November 8, 1994, the original petitioners submitted their observations to the State's answer. In their observations they requested that "the January complaint be expanded to include Alejandro Astorga-Valdéz," who had not been listed as a victim in the original complaint. In reference to his case, they provided that

[i]n the ruling of the first instance, the military judge upheld the objection made by the defense regarding lack of jurisdiction.

The Superior Military Prosecutor, issued a report expressing his opinion in favor of confirmation of the judgment including the objection of Astorga-Valdéz.

The ruling of the second instance of the Special Military Court of the Peruvian Air Force, upheld the judgment of the first instance with an order that the documentation on the case of Astorga-Valdéz to be remitted to the regular court. Nevertheless, when the motion for annulment was interposed on behalf of those who were condemned to life imprisonment, his file was also forwarded to the Supreme Council of Military Justice.

This Council modified the judgment of the first instance and condemned Astorga- Valdéz to life imprisonment as the perpetrator of the crime of treason against the Fatherland of the Peruvian State.

The Commission admitted the request pursuant to Article 30 of its Regulations.

7. On December 14, 1994, the second petitioners in the case submitted a notarized power-of-attorney, executed by the family members of the alleged victims, to the president of the Chilean Commission on Human Rights, Jaime Castillo-Velasco and to Carlos Margotta-Trincado.

8. On January 31, 1995, the Commission received from the petitioners a report of the Human Rights Commission of the Chilean Parties of Democratic Reconciliation (hereinafter "the Chilean delegation"), in which it was stated that this commission attempted to make a visit *in loco* to the Chilean citizens imprisoned in Peru. According to this report, "the Peruvian Government prohibited the Chilean delegation from meeting with the Chilean prisoners, even though the delegation was able to visit the Yanamayo Prison [...] where the petitioners are now held." This report was forwarded to the State on March 20, 1995.

9. On March 8, 1995, the Commission received additional information from the Peruvian State with respect to the "legal status" of the case of Jaime Castillo-Petruzzi, María Concepción Pincheira-Sáez, and Lautaro Mellado-Saavedra which established that

[b]y means of official Document No. 09-FG/CSJM, dated February 15, 1995, the General Prosecutor of the Supreme Council of Military Justice, Major General Enrique Quiroga-Carmona of the Peruvian Air Force, stated that [Jaime Castillo-Petruzzi, María Concepción Pincheira-Sáez, and Lautaro Mellado-Saavedra] were sentenced to life in prison. He stated that Jaime Castillo-Petruzzi had filed, through his attorney, Dr. Grimaldo Achau Loayza, a motion for annulment of the final judgment of conviction, which had been rejected on September 14, 1994, by a ruling of the Special Supreme Military Tribunal.

This information was transmitted to the petitioners on March 16, 1995.

10. By note of June 6, 1995, through Official Document No. 316-95 of June 2, 1995, Peru reported on the health and legal status of three of the alleged victims. Peru stated that

the Superior Prosecutor of Puno, had been requested by means of [official document no.] 223-95 MP-FN-FEDPDH-DH-V dated April 18, 1995, to verify the state of health of [Jaime Castillo-Petruzzi and Lautaro Mellado-Saavedra], and to report on their present legal situation. By mean of [official document no.] 09-FG-CSJM, dated February 15,

1995, the General Prosecutor of the Supreme Council of Military Justice communicated that they had been sentenced to life imprisonment [.]

He also added that

[b]y means of [official document no.] 222-95-MP-FN-FEDPDH-DH-V, dated April 18, 1995, the Director of the Maximum Security Criminal Establishment of Women-Chorrillos was asked for information on the legal situation and the state of health of certain prisoners [among whom was María Concepción Pincheira-Sáez.] He stated that this information was not obtained on this occasion.

This information was supplemented on November 7, 1995, to provide that María Concepción Pincheira-Sáez had been sentenced to life imprisonment for the crime of treason against the fatherland and that she had been counseled during the entire proceeding by Dr. Castañeda. It referred to health problems and harassment on the part of the prisoners. Said information was sent to the petitioners on November 30, 1995.

11. On June 14, 1996, the petitioners asked the Commission to adopt precautionary measures on behalf of the alleged victims, as a result of the possibility that they would be transferred to an "uninhabitable" prison. The Commission requested that the Peruvian State provide information on this matter. By means of a note of July 16, 1996, the State reported that there was "no order of any kind to transfer the Chilean prisoners" to another penitentiary, in accordance with the final judgment handed down by the Supreme Special Military Court, which ordered that the sentence of life imprisonment should be served at the Maximum Security Prison at Yanamayo in Puno.

12. On November 19, 1996, the Commission communicated to the State that at its 93rd Regular Session the Commission had determined that Case 11.319 was admissible, and that the Commission was at the disposition of the parties to arrive at a friendly settlement. On February 6, 1997, Peru refused the proposal of a friendly settlement, on the grounds that the alleged victims were tried, convicted, and sentenced pursuant to the provisions of Decree-law 25.659 and Decree-Law 25.708, which regulate the crime and corresponding procedure in cases of treason against the fatherland. Peru also asserted that it had observed the rules of due process and adhered to the principle of territoriality set forth in Article 1 of the Peruvian Criminal Code.

13. On December 17, 1996, the Commission received a report from the Supreme Court of Military Justice of Peru, in which it asserted that the Peruvian courts have jurisdiction in the cases of the alleged victims, since the crimes of which they are accused were committed in the jurisdiction of Peru, and because "the territoriality of criminal law is independent of the nationality of the perpetrator." Moreover, the State maintained that in the aforementioned cases it had observed the principles of due process, the right to appeal, judicial oversight, and rationale for the judgments.

14. On December 18, 1996, the petitioners requested that the Commission adopt precautionary measures to protect the physical integrity of the alleged victims, in consideration of the circumstances resulting from the seizure at the Japanese Embassy in Peru by members of the Revolutionary Movement Tupac Amaru (MRTA), a group with which the alleged victims had been associated.

15. On March 11, 1997, the Commission approved Report 17/97, in the final part of which it stated

[...]

86. That the State of Peru, on trying Jaime Francisco Castillo-Petruzzi, María Concepción Pincheira-Sáez, Lautaro Enrique Mellado-Saavedra and Alejandro Astorga-Váldez, pursuant to Decree-Laws No. 25,475 and 25,659, has violated the judicial guarantees set forth in Article 8(1) of the American Convention on Human Rights [hereinafter "the Convention or the American Convention"] and the rights to a nationality and to the judicial protections recognized respectively by Articles 20 and 25, all in conjunction with Article 1(1) of the Convention.

87. That the crime of treason against the fatherland which is governed by the legal order of Peru violates universally accepted principles of international law, of legality, due process, judicial guarantees, right to a defense, and the right to be heard by impartial and independent courts; and in consequence

The Commission resolved [to recommend] that the State of Peru:

88. Declare the annulment of the proceedings undertaken in the Exclusive Military Jurisdiction for Treason Against the Fatherland against Jaime Francisco Castillo-Petruzzi, María Concepción Pincheira-Sáez, Lautaro Enrique Mellado-Saavedra and Alejandro Astorga-Váldez, and order that the trial of these persons be carried out in a new hearing in the regular courts with full observance of the norms of legal due process, and

89. The Commission, pursuant to Article 50 of the Convention, requests that the Peruvian Government inform the Commission within two months of any measures it has taken in the instant case in accordance with the recommendations contained in the present report, which is confidential in nature and should not be published.

16. On April 24, 1997, Report 17/97 was transmitted to Peru, with the request that the State inform the Commission of the measures adopted with respect to it within a period of two months.

17. After having requested and received an extension until July 8, 1997, the State presented a report, in which it refuted the conclusions of the Commission and affirmed the legitimacy of its proceedings.

18. On June 27, 1997 the Commission made the decision to submit the case to the Court.

IV PROCEEDINGS BEFORE THE COURT

19. In submitting the case to the Court on July 22, 1997, the Commission invoked Article 51(1) of the American Convention and requested that the Court render a judgment as to whether there were violations of Article 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 20 (Right to Nationality), 29 (Restrictions Regarding Interpretation) in conjunction with the Vienna Convention on Consular Relations; 1(1) (Obligation to Respect Rights) and 51(2) of the American Convention.

20. The Inter-American Commission appointed Oscar Luján-Fappiano, Carlos Ayala-Corao, and Claudio Grossman to act as its delegates, Christina M. Cerna as its attorney, and Verónica Reyna, Nelson Caucota, Jaime Castillo-Velasco, and Enrique Correa as its assistants. Pursuant to Article 22(2) of its Regulations, the Commission also informed the Court that the first two assistants would act for the original petitioners and the latter two as representatives of the alleged victims.

21. By note of July 31, 1997, after a preliminary review of the application by the President of the Court (hereinafter "the President") the Secretariat of the Court (hereinafter "the Secretariat"), transmitted the application to the State and informed the State that it had the following deadlines: four months in which to submit its answer, one month to appoint an agent and alternate agent, and two months to interpose preliminary objections. All terms were to begin from the date of notification of the application. By communication of the same date, the State was invited to designate a judge *ad hoc*.

22. By means of communications of August 26 and 28, 1997, the Commission submitted a corrected version of the Spanish text of the application, and stated that it contained "corrections of minor errors, above all in style [and] should replace the earlier version which had been submitted to the Court on July 22, 1997." The corrected version was transmitted to the State on September 2, 1997.

23. On September 3, 1997, Peru informed the Court that it had designated Fernando Vidal-Ramírez as judge *ad hoc*.

24. On September 5, 1997, Peru designated Mario Cavagnaro-Basile as its agent and Walter Palomino-Cabezas as its alternate agent.

25. On September 22, 1997, the State asked the Court to indicate if it should "consider as valid" the new version of the application (*supra* 22) or if, to the contrary, it should maintain that dated July 22 of the same year.

26. On September 24, 1997, the Secretariat, following instructions from the President, informed Peru that in view of the request for clarification of the State and to insure the "transparency of the process," the President had decided to suspend the time limits to answer the application and interpose preliminary objections until the Commission presented clarifications of the corrections made to the original text of the application.

27. On October 1, 1997, Peru submitted its brief in which it raised the following preliminary objections.

First Objection

failure to exhaust the domestic remedies of Peru at the time the Inter-American Commission on Human Rights, pursuant to Article 37 of its Regulations, admitted for processing the complaint on behalf of Jaime Francisco Castillo-Petruzzi, María Concepción Pincheira-Sáez, Lautaro Enrique Mellado-Saavedra and Alejandro Astorga-Valdéz.

Second Objection

lack of competence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, first to consider the petition lodged by the Fundación de Ayuda Social de

las Iglesias Cristianas (FASIC) on behalf of the aforementioned Chilean citizens; and second, to process this application when the original petition was lodged without establishing the exhaustion of the domestic remedies of Peru.

Third Objection

lack of a prior demand and of the exhaustion of the domestic remedies of Peru [with respect to] the alleged violation [of Article 29 of the Convention in relation to] the Vienna Convention on Consular Relations.

Fourth Objection

lack of a prior demand and of the exhaustion of the domestic remedies of Peru with respect to the claim made in point six of the brief supporting the application, under which the Court is to order the Peruvian State to immediately release and compensate Jaime Francisco Castillo-Petruzzi, María Concepción Pincheira-Sáez, Lautaro Enrique Mellado-Saavedra, and Alejandro Astorga-Valdéz.

Fifth Objection

lack of status as a legal entity of the party that, in the name of the Fundación de Ayuda Social de las Iglesias Cristianas (FASIC), filed petition No. 11,319 with the Inter-American Commission on Human Rights against the Peruvian State and lack of standing of the aforementioned foundation.

Sixth Objection

lack of standing of the Fundación de Ayuda Social de las Iglesias Cristianas (FASIC) and of those who the Commission referred in points thirteen and fourteen of the application as "another group of complainants" or "a second group of petitioners" [and sovereignty].

Seventh Objection

premature decision of the Honorable Commission to send the present case to the Inter-American Court of Human Rights.

Eighth Objection

Ambiguity in the manner of submitting the application.

Ninth Objection

Lapse of the application.

Tenth Objection

Disregard of the principles of sovereignty and jurisdiction.

As to the first, second, third, fourth, fifth, sixth, and eighth objections, the State requests that the Court admit them or reserve its decision until the judgment on the merits of the case. As to the seventh, ninth, and tenth objections, it requests that they be admitted and that the application be dismissed.

28. On October 6, 1997, the Commission presented a communication to the Court, to which it added a "list of corrections made [...] to the application" of July

22, 1997 (*supra* 26). The following day the Secretariat, on instructions from the President, requested that Peru present its comments on the clarifications made by the Commission by the latest date of October 13, 1997. These observations were not received.

29. By resolution of October 15, 1997 the President decided

1. To clarify that the original text of the application submitted to the Inter-American Court of Human Rights on July 22, 1997, by the Inter-American Commission on Human Rights, is the document that the parties should consider valid to prepare their defense and arguments in this case.

2. To incorporate into the original text of the application only the corrections submitted by the Inter-American Commission on Human Rights in its correspondence of October 6, 1997.

3. To declare the request of the Commission that the original text of the application to be replaced with the text submitted to the Court on August 26 and August 28, 1997, to be inadmissible.

4. To continue with the processing of the present case and to resume the time period to answer the application, which will expire on December 27, 1997.

5. To resume the time period to interpose preliminary objections, which will expire on October 27, 1997, and to request that the State indicate if it endorses its correspondence of October 1, 1997.

30. On October 17, 1997, the State endorsed its brief on preliminary objections, which had been filed on October 1, 1997 (*supra* 27).

31. On October 22, 1997, the Secretariat received a copy of the original file processed by the Commission.

32. On November 21, 1997, the Commission filed its written response to the preliminary objections interposed by Peru in which it requested that the Court declare the objections to be inadmissible.

33. On December 12, 1997, Peru requested an extension to file its answer to the application until January 5, 1998. On December 15, 1997, the Secretariat, following the instructions of the President, informed the State that

the time period to file the answer to the demand can not be extended. Nevertheless, the Court will be closed as of noon on December 24 of the present year and will reopen on January 5, 1998, for which reason the Illustrious State of Peru may take until that date to file its answer.

34. On January 5, 1998, the State submitted the answer to the application, in which it asked the Court to reject the entire application.

35. On January 19, 1998, the State requested that the document the Commission annexed to its arguments on preliminary objections, which established the legal entity status of FASIC, referred to in that communication as the Fundación de Ayuda Social de las Iglesias Cristianas "be considered challenged as false."

36. On January 22, 1998, the Commission remitted a copy of the documentation sent by FASIC, that related to FASIC's status as a legal entity.

37. On February 17, 1998, in accordance with the Commission's February 11 request, the Secretariat asked the State to send various documents relating to the types of evidence contained in its answer to the application. The State complied with this requirement on March 23, 1998.

38. By Resolution of March 9, 1998, the President summoned the Inter-American Commission and Peru to a public hearing to be celebrated at the seat of the Court on June 8, 1998, to hear their oral arguments on preliminary objections.

39. By means of a March 17, 1998 letter, the State maintained that the documents filed by the Commission on January 22, 1998 (*supra* 36) did no more than confirm its questions about the petitioning foundation's status as a legal entity, and it challenged one of the documents.

40. On March 19, 1998, the Secretariat, following the instructions of the President, informed the State that in response to its demand made in both its brief on preliminary objections and its answer to the application, that the Commission exhibit all of its proceedings in this case, the Commission had opportunely sent the pertinent parts of the file processed before it, and they were in the Court's possession.

41. On March 19, 1998, the Secretariat, following the instructions of the President, asked the State for an authenticated copy of the laws and regulatory provisions applied in the proceedings before the Peruvian courts against the alleged victims in this case, and for the complete judicial files of those proceedings.

42. On April 14, 1998, the State informed the Court that the legal provisions requested had been submitted as part of the evidentiary file in the Loayza-Tamayo Case, and requested that the Court inform it of the items it would be necessary to submit from the judicial files of the alleged victims in this case, since the files "contain a voluminous amount of documents that relate to many persons apart from those referred to in this application."

43. On April 27, 1998, the Commission reiterated its request for the submission of "the laws and other regulatory decrees relevant to the proceedings carried out by the Peruvian Courts against Jaime Castillo-Petruzzi *et. al.*, as well as all the pertinent parts of the judicial files on these cases." Moreover, the Commission opposed the use of the same documents containing the laws and decrees submitted in the Loayza-Tamayo Case, arguing that the files were different. On July 7, 1998, the Secretariat, following the instructions of the Court, requested that the State submit the pertinent parts of the judicial file of the trial which took place in Peru against Jaime Francisco Castillo-Petruzzi *et. al.*, and informed both parties that the legal provisions submitted in the Loayza-Tamayo Case would be integrated into the file.

44. The public hearing took place at the seat of the Court on June 8, 1998.

Appearing

for the State of Peru:

Walter Palomino-Cabezas, alternate agent
 Ana Reátegui-Napurí, counsel, and
 Jennie Vizcarra-Alvizuri, counsel

for the Inter-American Commission on Human Rights:

Oscar Luján-Fappiano, delegate
 Christina Cerna, attorney
 Verónica Reyna, assistant, and
 Nelson Caucota, assistant.

45. On July 14, 1998, the Secretariat, following instructions of the Court, requested that the Commission remit the minutes of the session in which it decided to send the present case to the Court, and any document in which it was recorded that the alleged victims knew of the motions made on their behalf before the Commission, notwithstanding the petitioners were rented with power of representations. On July 29, 1998, the Commission sent the requested documents.

46. On July 14 and August 3, 1998, the Secretariat, following instructions of the Court, requested that the State send official document number 521-DIVICOTE-DINCOTE dated October 19, 1993. The State forwarded the requested document to the Court which was received by the Secretariat of the Court on August 7, 1998.

47. On August 24, 1998, the State objected to the minutes of the Commission (supra 45), because they were drawn up in English, and requested that they be sent in Spanish. On August 25, 1998, the Secretariat, following instructions of the President, sent a translation of the minutes to the State and the Commission, so that they would both be aware of the content of the translation. The time period granted for their comments expired on August 28, 1998, without the Secretariat receiving comments from the parties.

48. On September 1, 1998, the State reported on certain questions related to Chilean consular assistance in Peru. This communication was transmitted to the Commission on September 3, accompanied by a request that the Commission send to the Court within twenty-four hours any comments that it deemed pertinent.

V JURISDICTION

49. Peru has been a State Party to the American Convention since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981. Consequently, the Court is competent, pursuant to Article 62(3) of the Convention, to consider the preliminary objections submitted by the State.

VI PRELIMINARY CONSIDERATIONS

50. The objections raised by Peru basically refer to the following procedural matters: exhaustion of domestic remedies (*cf.* first, second, third, and fourth

objections), legal entity status and standing (*cf.* fifth and sixth objections), "premature decision" to send the case to the Court (*cf.* seventh objection), 'ambiguity in the manner of submitting the application' (*cf.* eighth objection), lapse of the application (*cf.* ninth objection) and "sovereignty and jurisdiction" (*cf.* tenth objection). To avoid unnecessary repetition, these objections will be examined below under general headings that indicate the basic subject matter of the objections, with pertinent cross-references, and an examination in each case of other matters brought up by Peru in its explanation of the respective objections.

VII EXHAUSTION OF DOMESTIC REMEDIES

First Objection

51. The first objection interposed by the State refers to the

failure to exhaust the domestic remedies of Peru at the time the Inter-American Commission on Human Rights, pursuant to Article 37 of its Regulations, admitted for processing the complaint on behalf of Jaime Francisco Castillo-Petruzzi, María Concepción Pincheira-Sáez, Lautaro Enrique Mellado-Saavedra, and Alejandro Astorga-Valdéz.

52. The Court summarizes in the following terms the arguments of the State and the Commission as to this objection:

a. The State asserted that the Inter-American Commission received and initiated the processing of the January 28, 1994 complaint when a proceeding in Peru was pending against the alleged victims. On May 3, 1994, the Special Military Supreme Court of the Supreme Council of Military Justice convicted the alleged victims of "the commission of the above-mentioned criminal act. The complaint filed by Verónica Reyna, Chief of the Legal Department of FASIC, concerned three of the alleged victims; the fourth alleged victim, Alejandro Astorga-Valdéz, was added subsequently. In the public hearing Peru stated that the Commission informed it of the complaint on June 29, 1994. The State maintained that the Commission did not comply with the requirements of Articles 46(1)(a) and 47(a) of the Convention, Article 37 of its Regulations, and Articles 18 and 19 a. of its Statute.

b. The Commission asserted that the complaint was transmitted to Peru on June 29, 1994, after the Supreme Council of Military Justice issued the conviction on May 3, 1994. It added that, in its judgment, it would not have been necessary to exhaust domestic remedies, given that Decree-Laws No. 25,659 and 25,708 the corresponding procedural norms, and their application in a concrete case, do not provide "the fundamental guarantees of due process" for the crime of treason against the fatherland. During the public hearing, the Commission pointed out that its argument was grounded in the exception to the rule of the exhaustion of domestic remedies (Article 46(2) of the Convention) and stated that this issue had not been raised before it in a timely manner.

53. As to this first objection raised by the State, the Court will not consider the assessments of the parties as to the conformity of the nature of the proceedings against the alleged victims with the principles of legal due process set forth in the

Convention. Taking into account the nature of this matter, the Court considers that its analysis should be reserved for the decision on the merits.

54. The Court points out that if the Commission did receive the complaint in this case while the criminal proceeding was pending a final judgment before the military court of the last instance, the mere filing of it did not amount to the Commission's commencement of the processing of the matter. Strictly speaking, the receipt of the complaint, which derives from an act of the complainant, should not be confused with its admission and processing, which are accomplished by specific acts of the Commission itself, such as the decision to admit the complaint and, when appropriate, the notification of the State.

55. It must be noted that in this case the processing began several months after the complaint was lodged, when there was already a final judgment from the organ of final instance in the military jurisdiction. It was only then, by means of a notification on June 29, 1994, that the Commission informed Peru that the complaint had been submitted and required its observations concerning it, so that the State could provide that which it believed to be relevant in its defense.

56. The Court also indicates that the State did not allege the failure to exhaust domestic remedies before the Commission. By not doing so, it waived a means of defense that the Convention established in its favor and made a tacit admission of the non-existence of such remedies or their timely exhaustion, as has been stated in proceedings before organs of international jurisdiction (such as the European Court which has maintained that objections to inadmissibility should be raised at the initial stage of the proceedings before the Commission, unless it proves impossible to interpose them at the appropriate time for reasons that cannot be attributed to the Government), (*cf. Eur. Court H.R., Artico judgment* of 13 May 1980, Series A No 37, paras. 24 et seq; *Eur. Court H.R., judgment of Foti and others* of 10 December 1982, Series A No. 56, paras. 46 et seq; *Eur. Court H.R., Corigliano judgment* of 10 December 1982, Series A No. 57, paras. 31 et seq; *Eur. Court H.R., Bozano judgment* of 18 December 1986, Series A No. 111, para. 44; *Eur. Court H.R., Ciulla case decision* of 23 March 1988, Series A No. 148, paras. 28 et seq., and *Eur. Court H.R., de Jong, Baljet and van den Brick judgment* of 22 May 1984, Series A No 77, paras. 35 et seq). and this Court has stated in earlier judgments. (*In the Matter of Viviana Gallardo et al.* No. G 101/81. Series A, para 26; *Velásquez Rodríguez Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 1, para. 88, 89; *Fairén Garbi and Solís Corrales Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 2, para. 87, 88; *Godínez Cruz Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 3, para. 90, 91; *Fairén Garbi and Solís Corrales Case, Judgment* of March 15, 1989. Series C No. 6, para. 109; *Neira Alegría et al., Preliminary Objections*, Judgment of December 11, 1991. Series C No. 13, para. 30; *Gangaram Panday Case, Judgment* of January 21, 1994. Series C No. 16, para. 38 and 40; *Castillo Páez Case, Preliminary Objections*, Judgment of January 30, 1996. Series C No. 24, para. 40; *Loayza Tamayo Case, Preliminary Objections*, Judgment of January 31, 1996. Serie C No. 25, para 40; in addition to the aforementioned judgments, as to the opportunity to present defenses, the Court has expressed its opinion in *Caballero Delgado and Santana Case, Preliminary Objections*, Judgment of January 21, 1994. Serie C No. 17, para. 60).

57. Consequently, the Court deems this preliminary objection to be inadmissible.

Second Objection

58. The second objection raised by the State concerns the

lack of competence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights first, to consider the petition lodged by the Fundación de Ayuda Social de las Iglesias Cristianas (FASIC) on behalf of the aforementioned Chilean citizens; and second, to process this application when the original petition was lodged without establishing the exhaustion of the domestic remedies of Peru.

59. The Court summarizes as follows the positions of the State and the Commission with respect to this objection:

- a. The State asserted that the Commission received and initiated the processing of the complaint when the criminal proceeding was still ongoing against the alleged victims. It declared that the Commission is authorized to consider a matter when domestic resources have been exhausted and that the non-fulfilment of that norm "results in the incompetence of the Commission and [...] determines that the Court also lacks the competence to exercise jurisdiction and to render a valid decision on the merits of the disputed question." The State emphasized that the alleged victims or their attorneys could have filed writs of habeas corpus or of amparo but did not do so.
- b. The Commission pointed out that the second objection merely repeats the first. It observed that in October of 1993, due to the circumstances of the proceedings and the applicability of Article 6 of Decree-Law No. 25.659 "the alleged victims were not permitted the option of filing a writ of *habeas corpus* or of amparo." Moreover, the Commission asserted that even though the aforementioned Decree-Law was modified on November 25, 1993, by Decree-Law No. 26.248, which allowed for the filing of a writ of *habeas corpus* in cases of treason against the fatherland, this legal modification "came about long after the final, ultimate, and executed judgment rendered in the exclusive military jurisdiction; as a result of which the remedy was ineffective for reasons of untimeliness. It also pointed out that this motion could not be filed, since it concerned the same events for which the prisoners had been tried. Likewise, the Commission stressed that the State had not demonstrated the effectiveness of that remedy for the release of persons tried before" a "faceless" military court.

60. The principal issue raised in the second objection, the failure of the timely exhaustion of domestic remedies, has been examined with regard to the first objection (*supra* 53 to 56), and for that reason the Court does not consider it necessary to repeat the same observations already stated.

61. In its explanation of the second objection, the State referred specifically to the remedies of habeas corpus and amparo. In previous decisions, the Court has maintained that habeas corpus is, in fact, the appropriate remedy to combat violations of the right to personal liberty (*Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paras. 35 and 42).

62. In this matter, it is important to remember that Article 6(4) of Decree-Law No. 26,248 of November 12, 1993, which modified Decree-Law No. 25.659 on this point, as applied to the alleged victims provides that "writs of habeas corpus based

on the same facts or grounds, the subject of a proceeding that is under way, or a proceeding that is already resolved, are not admissible.” As regards amparo, Decree-Law 25.569 excluded access to that guarantee, and it has not been proved that there has been a modification of the aforementioned legislation which would authorize the use of that remedy. It is appropriate to remember that in the Loayza-Tamayo Case this Court determined that persons accused and tried, pursuant to the provisions of the aforementioned Decree-Law No. 25.659, did not have access to the right of petition for any guarantee to safeguard personal liberty. (*Loayza-Tamayo Case*, Judgment of September 17, 1997. Serie C No. 33, para. 52).

63. Moreover, on proposing the objection that is now examined, the State did not explore the applicability of habeas corpus and amparo in this case, nor did it demonstrate the general effectiveness of these remedies in matters such as the present one, by showing that they would be adequate and available. It is evident, and the Court has so decided, that the State must prove the effectiveness of the domestic remedies. (*In the Matter of Viviana Gallardo et. al.*, *supra* 56; *Velásquez Rodríguez Case, Preliminary Objections*, *supra* 56; *Fairén Garbí and Solís Corrales Case, Preliminary Objections*, *supra* 56; *Godínez Cruz Case, Preliminary Objections*, *supra* 56; *Velásquez Rodríguez Case*, Judgment of July 29, 1988. Series C No 4, para. 64; *Godínez Cruz Case*, Judgment of January 20, 1989. Series C No. 5, para 67; *Fairén Garbí and Solís Corrales Case*, *supra* 56; *Neira Alegría et al.*, *Preliminary Objections*, *supra* 56; *Gangaram Panday Case*, *supra* 56; *Caballero Delgado and Santana Case, Preliminary Objections*, *supra* 56; *Castillo Páez Case, Preliminary Objections*, *supra* 56; *Loayza Tamayo Case, Preliminary Objections*, *supra* 56).

64. In light of the above, the Court deems this preliminary objection to be inadmissible.

Third Objection

65. The third objection interposed by the State concerns the lack of a prior demand and of the lack of the exhaustion of the domestic remedies of Peru with respect to the alleged violation of Article 29 of the American Convention in relation to the Vienna Convention on Consular Relations.

66. The Court summarizes the arguments of the State and Commission on this point as follows:

- a. The State asserted that “it offered the Chilean consular officials all of the facilities to visit the persons of their nationality who were detained.” It stated that Report 17/97 did not contain any recommendation about the alleged violation of Article 29 of the American Convention in conjunction with the Vienna Convention on Consular Relations, and that because the domestic jurisdiction of Peru had not been exhausted as to this question, the Court should reject this point of the application. In the public hearing, the State indicated that the report of the Chilean delegation’s visit, “had not been a topic of debate and discussion at the level of the Inter-American Commission [nor] had it been a subject of the confidential report.
- b. The Commission asserted that neither the American Convention nor the Rules of Procedure establish that the application must be an exact replica of the report provided for in Article 50 of the Convention. It added that Report 17/97 stated that the Chilean delegation, which was prohibited from visiting

the alleged victims, sent a report to the State on March 20, 1995, in which it pointed out that Article 20 of Decree-Law No. 25.475 contravened the norms of the Vienna Convention on Consular Relations, because it authorized the total isolation of the prisoners. On June 6, 1995, the State sent its observations on the Commission's report, and did not make reference to the suspension of the visits. During the public hearing before the Court, the Commission indicated that it had not included the subject of the consular visit in its report, given that those detained had already been convicted, and for that reason "there was no possibility of redress because the injury had already been inflicted and was irrevocable."

67. The matter here taken up could be examined in the light of various facts and considerations, such as: the communication of October 19, 1993, that the State maintains was sent to the Chilean consular representative of Chile in Peru concerning the detention of the alleged victims, a copy of which, showing the stamp of receipt of the corresponding consular office dated October 20, 1993, is included as an exhibit; the nature of the commission of the Chilean delegation that attempted to interview the alleged victims in the prison of Yanamayo, which was composed of members of the Chilean Legislature; and the documentary evidence in the file regarding the consular visits to María Concepción Pincheira-Sáez. The Court will not examine these matters which would go to the merits of the case.

68. However, the Court considers it relevant to indicate that the Commission did not raise this issue in its Report 17/97. Although it is true that the application need not necessarily be a simple reiteration of the report issued by the Commission, it is also true that it should not contain types of violations of which the State was not aware during the stage of the proceedings before the Commission itself, and which it could not, therefore, refute at that time. It must be remembered that at that stage the State could admit the facts alleged by the complainants, justifiably reject them, or procure a friendly settlement which would avoid the submission of the case to the Court. If the State is not aware of certain facts or particular statements which are later raised in the application, it can not make use of the rights that assist it at that procedural stage. It must be observed that this instance does not pertain to one of the general obligations set forth in the American Convention (Articles 1(1) and (2)), compliance with which the Court must officially examine (cf. *Cantoral Benavides Case, Preliminary Objections*, Judgment of September 3, 1998. Series C No. 40, para. 46)..

69. For the aforementioned reasons, the Court deems that this preliminary objection is admissible.

Fourth Objection

70. The fourth objection raised by the State concerns the

lack of a prior demand and of the exhaustion of the domestic remedies of Peru with respect to the claim made in point six of the brief supporting the application, under which the Court is to order the Peruvian State to immediately release and compensate Jaime Francisco Castillo-Petruzzi, María Concepción Pincheira-Sáez, Lautaro Enrique Mellad[o]-Saavedra, and Alejandro Astorga-Valdéz.

71. The Court summarizes the arguments of the State and the Commission pertaining to this objection in the following manner:

- a. The State pointed out that in Report 17/97 the Commission's request was limited to the annulment of the proceedings of the exclusive military jurisdiction against the alleged victims, so that they would be tried again before the civilian court. On this basis, the State argued that neither the Commission nor the petitioners exhausted the domestic jurisdiction of Peru, and that the requests included in the application should concern the matters established in the conclusions and recommendations of the Report. During the public hearing, Peru added that the State had found its "right to argue curtailed and had to assert its right by means of an objection which also pertains to the merits of the case."
- b. The Commission stated that neither the Convention nor the Rules of Procedure refer to "the alleged necessity to duplicate the same list of conclusions and recommendations from the Article 50 report in the application to the Court." Moreover, the Commission indicated that by note of July 8, 1997, Peru submitted its observations on Report 17/97, and in them did not mention any measures adopted to comply with the recommendations set forth in the report. In conformance with the principle *non bis in idem*, Peru could not try the alleged victims in the civilian jurisdiction on the same facts as had been considered by the military jurisdiction, for which reason the Commission requested the annulment of the proceedings.

72. The Court refers back to the observations it made with respect to the failure to exhaust domestic remedies, which it examined as to the first objection (*supra* 53 and 56) and to which it also alluded when considering the State's second objection (*supra* 60).

73. It is also important to comment on the State's argument that there is a certain incongruity in the position sustained by the Commission, when the combination of its arguments is considered. The State asserted that on the one hand the Commission requested the annulment of the proceedings that culminated in a final conviction of the alleged victims, and on the other, required their immediate release. Even though the statements in these requests could have been more precisely formulated so as to avoid confusion, the Court deems that the incongruity is more apparent than real. The annulment of a trial that resulted in a final judgment of conviction does not imply the commencement of a new trial against the same person for the same facts, which would be a flagrant violation of the principle of *non bis in idem*, but would lead instead to the immediate and absolute release of the accused. The Court, on examining the statements of the Commission, can establish their possible scope, which has a double objective; the annulment of the trial on the one hand, and the release of the accused as a natural legal effect of that annulment, on the other.

74. For the aforementioned reasons, the Court considers that this preliminary objection is inadmissible.

VIII LEGAL CAPACITY AND STANDING

75. The fifth objection interposed by the State refers to the

lack of status as a legal entity of the party that, in the name of the Fundación de Ayuda Social de las Iglesias Cristianas (FASIC), filed petition No. 11.319 with the Inter-American Commission on Human Rights against the Peruvian State and lack of standing of the aforementioned foundation.

76. In this regard, the Court summarizes the arguments of the State and the Commission as follows:

- a. The State asserted that a party who takes action in the name of or in representation of a legal entity, must be duly authorized under the bylaws of that entity or have its express authorization. Neither Verónica Reyna nor FASIC were accredited respectively as representatives or recognized as a non governmental organization in Chile. During the public hearing, the State added that it was not questioning the existence of this foundation nor the legal capacity of the person who lodged the complaint in its name.
- b. The Commission responded that it did not ask the foundation to “establish its legal capacity when it lodged the complaint in this case, because it is an organization known to the Commission,” which appears in the Guide to Non Governmental Human Rights Organizations, published in 1991 by the Inter-American Institute of Human Rights of San José, Costa Rica. During the public hearing, the Commission indicated that it had always “broadly interpreted Article 44 so as not to require the existence of a power of attorney or specific representation; it is sufficient that the action is taken by a group of persons.”

77. As to this objection, the Court takes note that irrespective of the examination that it could make, if it were necessary, of the existence and authority of FASIC and of the person who took action in its name, it is clear that Article 44 of the Convention permits any group of persons to lodge petitions or complaints of the violation of the rights set forth in the Convention. This broad authority to make a complaint is a characteristic feature of the system for the international protection of human rights. In the present case, the petitioners are a “group of persons,” and therefore, for the purpose of legitimacy, they satisfy one of the possibilities set forth in the aforementioned Article 44. The evident authority in this instance makes it unnecessary to examine the registration of FASIC, and the relationship that said foundation has or is said to have with those who act as its representatives. This consideration is strengthened if it is remembered that, as the Court has stated on other occasions, the formalities that characterize certain branches of domestic law do not apply to international human rights law, whose principal and determining concern is the just and complete protection of those rights. In other words, “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 procedural rights of the parties not be diminished or unbalanced, and that the objectives of the different procedures be met.” (*Vélasquez Rodríguez Case, Preliminary Objections, supra* 56, paras. 33 and 34; *Fairén Garbí and Solís Corrales Case, Preliminary Objections, supra* 56, paras. 38 and 39; *Godínez Cruz Case, Preliminary Objections, supra* 56, paras. 36 and 37; *Paniagua Morales et. al. Case, Preliminary Objections, Judgment of January 25, 1996. Series C No. 23, para. 42, and Caballero Delgado and Santana Case, Preliminary Objections, supra* note 56, para. 44). The International Court of Justice has spoken to this issue in stating 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; *Legal Status of Eastern Greenland*, Judgment, 1933, P.C.I.J., Series A/B, No. 53, p. 71; *Aegean Sea Continental Shelf*, Judgment, I.C.J. Reports 1978, para. 42).

78. The Court has declared that certain formalities may be excluded, provided that there is a suitable balance between justice and legal certainty. (*Cayara Case, Preliminary Objections*, Judgment of February 3, 1993. Series C No. 14, para. 42; *Paniagua Morales et al. Case, Preliminary Objections, supra 77*, para. 38; *Castillo Páez, Preliminary Objections, supra 56*, para. 34, and *Loayza Tamayo, Preliminary Objections, supra 56*, para. 33). In the exercise of its authority to evaluate due process before the Court (*Velásquez Rodríguez Case, Preliminary Objections, supra 56*, para. 34; *Fairén Garbí and Solís Corrales Case, Preliminary Objections, supra 56*, para. 39; *Godínez Cruz Case, Preliminary Objections, supra 56*, para. 37), it deems that in the present case the essential matters implicit in the procedural rules of the Convention have been respected.

79. In view of the foregoing, the Court determines that this preliminary objection is not admissible.

Sixth Objection

80. The sixth objection interposed by the State concerns the

lack of standing of the Fundación de Ayuda Social de las Iglesias Cristianas (FASIC) and of those who the Commission referred in points thirteen and fourteen of the application as “another group of complainants” or “a second group of petitioners” [and sovereignty].

81. The Court summarizes in the following manner the arguments of the State and the Commission concerning this objection:

- a. The State pointed out that the aforementioned persons lack standing under Article 44 of the Convention, “to raise questions about the sovereign actions taken by the Peruvian authorities.” The alleged victims “surreptitiously entered [Peru] and devoted themselves to subverting the established order, associating themselves with a terrorist organization.” The questioning of the sovereign acts of Peru is made by “an alleged legal entity under non Peruvian private law and/or third persons who are unidentified or whose identity is not known to the Peruvian State and who presumably are not of Peruvian nationality.” “This concerns professional international terrorists, as they have been characterized even by the Chilean authorities.” The alleged victims repudiated the conditions of Article 32 of the Convention and those set forth in the Peruvian Constitution then in force. During the public hearing Peru advised that “this objection touches on aspects of the case that should be heard with the merits, for which reason it reserved the right to support it at that time.”
- b. The Commission indicated that “the transition from a question of the domestic forum to the international forum is made by virtue of the existence of a treaty of other norm of international law that imposes an obligation.” It also asserted that, just as it stated in examining the prior objection, FASIC does have legal standing to lodge a complaint against Peru. It pointed out that

both the Commission and the Court are competent to examine the instant case, since Peru ratified the Convention and accepted the jurisdiction of the Court. It asserted that the accused, irrespective of whether they are terrorists, mercenaries, or common criminals, have the rights protected by Article 8 of the Convention. In contrast with the reservation made by the State during the public hearing, the Commission affirmed that "if the objections are raised now, they should be supported now."

82. As to this objection, the Court adheres to the observations that it made on examining the legitimacy of FASIC and of its representatives (*supra* 77). As regards statements concerning the principle of sovereignty and its implications in the present case, reference is made to the examination of the tenth objection (*infra* 101 and 102).

83. As concerns the exclusive subject matter in the sixth objection, the Court emphasizes that it can not nor should not discuss or judge the character of the crimes attributed to the alleged victims, certainly very grave, as that is reserved to the appropriate criminal court. The Court is called upon only to decide on concrete violations of the provisions of the Convention, concerning any persons and independent of the legal situation that applies to them or of the legality or illegality of their conduct from the perspective of the criminal norms that could be applicable under national law.

84. A behavior that risks or harms the legal benefits set forth in Article 32 of the Convention, which was invoked by Peru, would result in the intervention of the regular courts for a judgment as to the liability of those who committed it, but will not override the human rights of the accused nor deprive them of the possibility of access to organs of international jurisdiction. On another occasion, the Court has commented on the seriousness of the real or alleged crimes committed by the victim, holding that the Court is not concerned with the innocence or the guilt of the accused, and that a decision of that nature is in the providence of the domestic criminal court (*cf. Suárez Rosero*, Judgment of November 12, 1997, Series C No. 35, para. 37).

85. Consequently, the Court deems that this preliminary objection is inadmissible.

IX "PREMATURE DECISION" TO SEND THE CASE TO THE COURT

Seventh Objection

86. The seventh objection interposed by the State concerns "the premature decision of the Honorable Commission to send the present case to the Inter-American Court of Human Rights."

87. The Court summarizes the positions of the State and the Commission on this issue as follows.

- a. The State argued that the Commission, in its Ninety-Fifth Regular Session, approved Report 17/97 that was transmitted to the State on April 24, 1997. On June 5 of the same year, the Commission granted Peru an extension to comment on that Report, which ended on July 8, 1997. On June 27, 1997, despite the fact that the additional time period was running, the Commission made the decision to send the case to the Court. According to the State, said decision was premature and constituted a "prejudgment that invalidated the act of the Commission and nullified the submission of the application, because it infringed on an elementary guarantee related to the right to due process."
- b. The Commission stated that pursuant to Article 51 of the Convention, it could send the case to the Court on the latest date of July 24, 1997. On June 27, 1997, it decided to do so, subject to the possible implementation of the recommendations by Peru. Peru, by means of a July 8, 1997 note, received by the Commission on July 10, rejected the recommendations contained in the Report, for which reason, the Commission argued, it was not necessary to reconsider the decision it had adopted. Moreover, it stated that Peru had not indicated in what way it was prejudiced by the disputed decision. Finally, during the public hearing, the Commission added that it found it necessary to make this decision because "it does not meet on a permanent basis."

88. As to this objection, the Court states that the decision adopted by the Commission to submit the case to the Court, a decision that the Commission explained as being a function of its work system and of the schedule that governs its sessions, did not result in the immediate submission of the application to the Court. In explanation of the preceding observation, it is useful to recall the relevant dates in the examination of this objection. The extension of the time period requested by Peru and granted by the Commission was to expire on July 8, 1997. According to the Commission, its decision to send the case to the Court was made on June 27, subject to "the possible implementation of the recommendations" contained in the Report. Peru sent its observations on July 10 and in them rejected the recommendations of the Commission. Finally, the Commission filed the application on July 22, which was almost a month after deciding to do so and two weeks after the expiration of the extension of the initial deadline and after the State refused to heed the recommendations of the Commission. This circumstance shows that Peru was not affected by a *de facto* interruption in the time period it had been granted, and reinforces the statement of the Commission that the performance of the agreement of June 27 was subject to the answer that was to be provided by the State. It is apparent that the mere decision adopted by the Commission on June 27 did not prejudice the State in any way.

89. For the aforementioned reasons, the Court determines that this preliminary objection is inadmissible.

X
AMBIGUITY IN THE MANNER OF SUBMITTING
THE APPLICATION

Eighth Objection

90. The eighth objection interposed by the State concerns “ambiguity in the manner of submitting the application.”

91. The Court summarizes in the following manner the arguments of the State and of the Commission:

- a. The State argued that there is no agreement between the purpose of the application and the petition on which that purpose was based. When referring to the purpose of the application, the Commission asked the Court for the release of the prisoners and reparations for the alleged material and moral injuries they suffered, while in its petition the Commission demanded that the State annul the proceedings which took place in the military court against the aforementioned persons and initiate a new proceeding, respecting due process and granting the consequent reparations for the “violations caused by the military proceedings.”
- b. The Commission observed that this objection “reiterates the arguments presented under the heading of the Fourth Objection;” that its position is that which was expressed in the proceeding before the Court and not that contained in Report 17/97; that

[t]he lack of similarity between the Article 50 or Article 51 Report and the application to the Court, results from ‘the conduct of the State,’ as the Court stated in Advisory Opinion OC\13. [...] If the Peruvian State had taken steps to implement the recommendations of the Article 50 Report, there would not have been a need to make an application to the Court. Nor would it have been necessary for the Court to hear the statements of the petitioners in order to decide on reparations.

During the public hearing, the Commission added that unclarity of the request “if it exists, can mean, at most, that the applicant is told to clarify the terms of its application, but in no way would it result in a rejection *in limine*.”

92. As regards this eighth objection raised by the State, the Court deems that the observations it made in the examination of the fourth objection are applicable (*supra* 73). Of course, there should be congruity between the statements made in the body of the application and those which are made in the pleas of said document, taking into account the natural continuity that exists logically between them. In any case, the Court can and should, in accordance with the principle of *iura novit curia*, examine the document in its entirety and consider its character and the meaning of the requests made by the applicant, so as to duly evaluate and resolve them. (*Velásquez Rodríguez Case, supra* 63, para. 163 and *Godínez Cruz Case, supra* 73, para. 173). The Court will not begin to examine the other observations set forth with regard to this objection interposed by the State and which are not the proper subject matter for a preliminary objection, analysis of which will be reserved for the time of the respective judgment.

93. Consequently, the Court deems this objection to be inadmissible.

XI LAPSE OF THE APPLICATION

Ninth Objection

94. The ninth objection interposed by the State concerns the “lapse of the application.”

95. The Court summarizes the arguments of the State and the Commission as:

- a. The State referred to the submission of a corrected version of the application by the Commission on August 26 and 28, 1997. It asserted that the “submission of the application, its admission for processing and the subsequent notification of the opposing party, precluded all rights of whoever would move to modify or vary in whole or in part its objectives. The submission of the application, its admission, and the notification of the opposing party, “are exclusive and invariable actions that can not be modified much less done so unilaterally.” To accept the second text submitted by the Commission as definitive would amount to an admission that the application was interposed after the expiration of the three months provided by Article 51(1) of the American Convention in accordance with Articles 19(a) and 23 of the Statute of the Commission and Article 47(2) of the Regulations of the Commission.
- b. The Commission stated that on August 26, 1997, it asked the Court to replace the application with a corrected version of the Spanish text submitted that same day. In said text, the Commission stated that “the corrections were merely of spelling, style, and typing mistakes in the redaction of the Spanish version of the application.” It indicated that the matter was resolved by the President of the Court on October 15, 1997, and lastly observed that the State had not indicated what prejudice a modification of this character had caused to its defense.

96. As to this objection, the Court recognizes that there can be no more than one text of an application, considering the characteristics and consequences of this proceeding, but at the same time it observes that in this case the applicant incorporated purely formal corrections and changes, so as to improve the appearance of the document, without modifying any of the objectives or affecting the procedural defense of the State.

97. In any case, it is necessary to indicate that this matter was already considered and resolved by the President of the Court in his Resolution of October 15, 1997 (*supra* 29). In effect, the Resolution determined the text that would serve, to the exclusion of all others, as the valid application in the instant proceeding. The Commission and the State were notified of the President’s decision on October 15 and 17 respectively, and neither of them objected or requested clarifications or changes.

98. For the reasons stated, the Court deems that this preliminary objection is inadmissible.

XII SOVEREIGNTY AND JURISDICTION

99. The State identifies the tenth objection as "sovereignty and jurisdiction."

100. The Court summarizes as indicated below the arguments of the State and the Commission on this issue:

- a. The State asserted that, although it would not begin to inquire into the ambiguity of the application, it considers that "there are inherent aspects that make up the sovereignty of States and of individuals that can not be renounced without affecting public order." On this basis, Peru asserted that it is a sovereign Republic with the full right to pass the necessary laws to repress crimes committed in its territory by nationals or foreigners; that the conviction of the alleged victims took place in accordance with Decree-Laws Nos. 25.659, 25.708, and 25.744, and with the 1993 Constitution in effect at that time, and that "the sovereign decision of the legal organs of Peru cannot be modified much less rendered ineffective by any national, foreign, or international authority." Finally, it asserted that "criminal offenses committed by nationals and foreigners in Peruvian territory, are sanctioned by the competent courts of the country and that their decisions are final."
- b. The Commission stated that the tenth objection is "a combination of the objections presented and considered earlier," and repeated the arguments it made to the sixth objection. It pointed out that both the Commission and the Court are competent to examine and decide this case, since Peru accepted the jurisdiction of the organs of the Inter-American system with respect to acts that violate the human rights set forth in the American Convention.

101. As regards the tenth and final objection raised by the State, the Court must recall that Peru signed and ratified the American Convention on Human Rights. Consequently, it accepted the treaty obligations set forth in the Convention with respect to all persons subject to its jurisdiction without any discrimination. It is not necessary to state that Peru, like the other States Parties to the Convention, accepted the obligations precisely in the exercise of its sovereignty.

102. On becoming a State Party to the Convention, Peru accepted the competence of the organs of the Inter-American system for the protection of human rights, and therefore obligated itself, also in the exercise of its sovereignty, to participate in proceedings before the Commission and the Court and to assume the obligations that derive from them and from the general application of the Convention.

103. If the alleged victims have acted, as Peru asserts, in a manner inconsistent with the provisions of the Convention and with the national law to which they are subject, it can result in criminal consequences in accordance with the infractions committed in the case, but it does not relieve the State of the duty to comply with the obligations that it assumed as a State Party to the aforementioned Convention.

104. Consequently, the Court considers this preliminary objection to be inadmissible.

105. Now, therefore,

XIII

THE COURT,

DECIDES:

by five votes to two

1. To dismiss the first, second, fourth, fifth, sixth, seventh, eighth, ninth, and tenth preliminary objections interposed by the Peruvian State

Judges de Roux-Rengifo and Vidal-Ramírez dissenting

unanimously

2. To admit the third objection raised by the Peruvian State.

unanimously

3. To proceed with the consideration of the merits of the case, except with respect to the third objection.

Judge Cançado Trindade informed the Court of his Concurring Opinion; Judge de Roux-Rengifo of his Partially Dissenting Opinion, and Judge Vidal-Ramírez of his Dissenting Opinion, all of which are attached hereto.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on this fourth day of September, 1998.

Hernán Salgado-Pesantes
President

Antônio A. Cançado Trindade

Máximo Pacheco-Gómez

Oliver Jackman

Sergio García-Ramírez

Carlos Vicente de Roux-Rengifo

Fernando Vidal-Ramírez

Manuel E. Ventura-Robles
Secretary

So ordered,

Hernán Salgado-Pesantes
President

Manuel E. Ventura-Robles
Secretary

**CONCURRING OPINION OF
JUDGE A.A. CANÇADO TRINDADE**

1. I have concurred with the adoption of the present Judgment of the Inter-American Court of Human Rights on preliminary objections in the *Castillo Petruzzi versus Peru* case. The decision taken by the Court, in dismissing the fifth and sixth preliminary objections interposed by the respondent State (pertaining to the legal personality and the *legitimatío ad causam* of the petitioning Chilean non-governmental organization, the *Fundación de Ayuda Social de las Iglesias Cristianas* (FASIC)), brings to the fore the right of individual petition under the American Convention on Human Rights (Article 44), reaching the bases of the mechanism of protection itself under the American Convention.

2. The importance of the right of individual petition does not appear to me to have been sufficiently stressed by international case-law and doctrine to date; the attention which they have devoted to the matter has been, surprisingly, unsatisfactory in my view, not keeping proportion with the great relevance that the right of individual petition has under the American Convention. This is a point which is particularly dear to me. It should be kept in mind that, ultimately, it is by the free and full exercise of the right of individual petition that the direct access of the individual to justice at international level is guaranteed.

3. The question of the *legitimatío ad causam* of the petitioners has occupied a central position in this phase of preliminary objections of the case *Castillo Petruzzi versus Peru*, and the Inter-American Court has decided, in my view correctly, to dismiss the fifth and sixth preliminary objections, which pertained to the matter. In my understanding, Article 44 cannot be analysed as if it were a provision like any other of the Convention, as if it were not related to the obligation of the States Parties of not creating obstacles or difficulties to the free and full exercise of the right of individual petition, or as if it were of equal hierarchy as other procedural provisions. The right of individual petition constitutes, in sum, the cornerstone of the access of the individuals to the whole mechanism of protection of the American Convention.

4. As the judgment of an international tribunal of human rights serves the wide purpose not only of resolving the legal questions raised in a given case, but also of clarifying and developing the meaning of the norms of the human rights treaty at issue, and of thereby contributing to its observance by the States Parties², I feel obliged to add my thoughts on the matter in this Concurring Opinion. I do so bearing in mind the concerns raised in this respect during the public hearing before the Court held on 08 June 1998³, and in support to the decision taken by the Court in the present case *Castillo Petruzzi*, given the necessity which I find of contributing to

1. In this sense, European Court of Human Rights, *Ireland versus United Kingdom* case (Merits), Judgment of 18 January 1978, Series A, n. 25, p. 62, par. 154.

2. Cf. Inter-American Court of Human Rights, *Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte el 08 de Junio de 1998 sobre Excepciones Preliminares en el Caso Castillo Petruzzi*, pp. 9-12 (internal circulation).

clarify - also for future cases - the juridical nature and extent of the right of individual petition under Article 44 of the American Convention.

I. Consolidation, Juridical Nature and Scope of the Right of Individual Petition.

5. The right of individual petition is a definitive conquest of the International Law of Human Rights. It is of the essence itself of the international protection of human rights the contraposition between the individual complainants and the respondent States in cases of alleged violations of the protected rights. It was precisely in this context of protection that the *historical rescue* took place of the position of the human being as subject of the International Law of Human Rights, endowed with full international procedural capacity.

6. Three centuries of an international legal order crystallized, as from the treaties of peace of Westphalia (1648), on the basis of the co-ordination of independent nation-States, of the juxtaposition of absolute sovereignties, led to the exclusion from that legal order of the individuals as subjects of rights (*titulaires de droits*). At international level, the States assumed the monopoly of the condition of subjects of rights; the individuals, for their protection, were left entirely at the mercy of the discretionary intermediation of their nation-States. The international legal order thus erected, - which the excesses of legal positivism attempted in vain to justify, - excluded therefrom precisely the ultimate addressee of the juridical norms: the human being.

7. Three centuries of an international legal order marked by the prevalence of State sovereignties and by the exclusion of the individuals were incapable to avoid the massive violations of human rights, perpetrated in all regions of the world, and the successive atrocities of our century, including the ones that take place nowadays⁴. Such atrocities awoke the universal juridical conscience to the necessity to reconceptualize the foundations themselves of the international legal order, restoring to the human being the central position from where he had been displaced. This reconstruction, on human foundations, took as conceptual basis entirely distinct canons, such as those of the realization of superior common values, of the human being as subject of rights (*titulaire de droits*), of the collective guarantee of the realization of these latter, and of the objective character of the obligations of protection⁵. The international order of sovereignties yielded to that of solidarity.

8. This profound transformation of the international legal order, precipitated as from the Universal and American Declarations of Human Rights of 1948, completing this year half a century of evolution, has not taken place without difficulties, precisely for requiring a new mentality. It underwent, moreover, stages, some of which no longer sufficiently studied nowadays, also with regard to the consolidation of the right of individual petition. Already in the beginnings of the exercise of this right it was stressed that, although motivated by the search for individual redress,

3. Such as the holocaust, the *gulag*, followed by new acts of genocide, e.g., in South-East Asia, in central Europe (ex-Yugoslavia), in Africa (Rwanda).

4. With a direct incidence of those canons in the methods of interpretation of the international norms of protection, without necessarily departing from the general rules of interpretation of treaties set forth in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986).

the right of petition contributed also to secure respect for the obligations of objective character which are incumbent upon the States Parties⁶. In several cases the exercise of the right of petition has gone even further, generating changes in the domestic legal order and in the practice of the public organs of the State⁷. The significance of the right of individual petition can only be appropriately assessed in historical perspective.

9. In fact, the *historia juris* of some countries discloses that the old *right to petition*, at domestic level, to the central authorities, as expression or manifestation of the freedom of expression, gradually developed into a legal remedy to be interposed before the tribunals for the reparation for damages⁸. Only in a more recent epoch the *right of petition* (no longer *right to petition*) was formed within the ambit of international organizations. The first classic distinctions appeared, such as that elaborated by Feinberg⁹ and endorsed by Drost¹⁰, between *pétition plainte*, based upon a violation of an individual private right (e.g., a civil right) and in search of reparation on the part of the authorities, and *pétition voeu*, pertaining to the general interests of a group (e.g., a political right) and in search of public measures on the part of the authorities.

5. For example, under Article 25 of the European Convention on Human Rights; cf. H. Rolin, "Le rôle du requérant dans la procédure prévue par la Commission européenne des droits de l'homme", 9 *Revue hellénique de droit international* (1956) pp. 3-14, esp. p. 9; C.Th. Eustathiades, "Les recours individuels à la Commission européenne des droits de l'homme", in *Grundprobleme des internationalen Rechts - Festschrift für Jean Spiropoulos*, Bonn, Schimmelbusch & Co., 1957, p. 121; F. Durante, *Ricorsi Individuali ad Organi Internazionali*, Milano, Giuffrè, 1958, pp. 125-152, esp. pp. 129-130; K. Vasak, *La Convention européenne des droits de l'homme*, Paris, LGDJ, 1964, pp. 96-98; M. Virally, "L'accès des particuliers à une instance internationale: la protection des droits de l'homme dans le cadre européen", 20 *Mémoires Publiés par la Faculté de Droit de Genève* (1964) pp. 67-89; H. Mosler, "The Protection of Human Rights by International Legal Procedure", 52 *Georgetown Law Journal* (1964) pp. 818-819.

6. It is to be always born in mind that, distinctly from the questions governed by Public International Law, in their majority raised horizontally above all at inter-State level, the questions pertaining to human rights are found vertically at intra-State level, in the contraposition between the States and the human beings under their respective jurisdictions. Accordingly, to pretend that the organs of international protection cannot verify the compatibility of the norms and practices of domestic law, and their omissions, with the international norms of protection, would not make sense. Here as well the specificity of the International Law of Human Rights becomes evident. The fact that this latter goes beyond Public International Law in the matter of protection, so as to comprise the treatment dispensed by the States to the human beings under their jurisdictions, does not mean that a conservative interpretation ought thereby to apply; quite on the contrary, what applies is an interpretation in conformity with the innovative character - in relation to dogmas of the past, such as that of the "exclusive national competence" or reserved domain of the States, as an emanation of State sovereignty, - of the international norms of protection of human rights. With the development of the International Law of Human Rights, it is Public International Law itself which is enriched, in the assertion of canons and principles proper to the present domain of protection, grounded on fundamentally distinct premises from those which have guided its postulates at the level of purely inter-State relations. The International Law of Human Rights thus comes to affirm the aptitude of Public International Law to secure, in the present context, compliance with the international obligations of protection on the part of States vis-à-vis all human beings under their jurisdictions.

7. J. Humphrey, "The Right of Petition in the United Nations", 4 *Revue des droits de l'homme/Human Rights Journal* (1971) p. 463.

8. N. Feinberg, "La pétition en droit international", 40 *Recueil des Cours de l'Académie de Droit International de La Haye* (1932) pp. 576-639.

9. P.N. Drost, *Human Rights as Legal Rights*, Leyden, Sijthoff, 1965, pp. 67-75, and cf. pp. 91-96 and 101.

10. The *pétition voeu* evolved into what it came to be called "communication"; examples, in turn, of *pétitions plaintes* - or "petitions" *stricto sensu* - are found, for example, in the systems of minorities and mandates under the League of Nations and in the trusteeship system under the United Nations¹¹. Those were some of the first international systems to grant procedural capacity directly to individuals and private groups¹². Those antecedents, along the first half of the twentieth century, paved the way to the development, within the ambit of the United Nations and under the human rights treaties at global and regional levels, of the contemporary mechanisms of petitions or communications pertaining to violations of human rights¹³.

11. With the consolidation of those mechanisms, granting direct access to individuals to the international instances, the recognition became evident, also at procedural level, that human rights, inherent to the human person, precede and are above the State and any other form of political organization, and the human being emancipated himself from the domination of the State, whenever it appeared arbitrary. The individual recovered his presence, for the vindication of his rights, at international level, presence which had been denied to him in the historical process of formation of the modern State but which manifested itself in the immediate concern with the human being in the original manuscripts of the so-called founding fathers of international law¹⁴ (the *derecho de gentes*), notably in the perennial lessons - above all the *De Indis - Relectio Prior*, of 1538-1539 - of Francisco de Vitoria¹⁵, the learned lecturer of Salamanca.

12. That transformation, proper of our times, corresponds to the recognition of the necessity that all the States, in order to avoid new violations of human rights, are made responsible for the way they treat all human beings who are under their

10. Cf., e.g., J. Stone, "The Legal Nature of Minorities Petition", 12 *British Year Book of International Law* (1931) pp. 76-94; M. Sibert, "Sur la procédure en matière de pétition dans les pays sous mandat et quelques-unes de ses insuffissances", 40 *Revue générale de Droit international public* (1933) pp. 257-272; Jean Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962, pp. 1-256.

11. To them one ought to add other petitioning systems (such as those of Upper Silesia, of the Aaland Islands, of the Sa1ar and of Danzig), the system of navigation of the river Rhine, the experience of the Central-American Court of Justice (1907-1917), the case-law of the Mixed Arbitral Tribunals and of the Mixed Claims Commissions, besides the International Prize Court proposed at the II Peace Conference of the Hague of 1907. Cf. C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 99-172; y, anteriormente, J.-C. Witenberg, "La recevabilité des réclamations devant les juridictions internationales", 41 *Recueil des Cours de l'Académie de Droit International de La Haye* (1932) pp. 5-135; C.Th. Eustathiades, "Les sujets du Droit international et la responsabilité internationale - nouvelles tendances", 84 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953) pp. 401-614.

12. Cf. M.E. Tardu, *Human Rights - The International Petition System*, binders 1-3, Dobbs Ferry N.Y., Oceana, 1979-1985; Tom Zwart, *The Admissibility of Human Rights Petitions*, Dordrecht, Nijhoff, 1994, pp. 1-237.

13. For a general study, cf. Francisco de Vitoria, *Relecciones del Estado, de los Indios, y del Derecho de la Guerra*, México, Porrúa, 1985, pp. 1-101; P.P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, The Hague, Nijhoff, 1960, pp. 1-245; F.S. Ruddy, *International Law in the Enlightenment*, Dobbs Ferry N.Y., Oceana, 1975, pp. 1-364; Association Internationale Vitoria-Suarez, *Vitoria et Suarez -Contribution des théologiens au Droit international moderne*, Paris, Pédone, 1939, pp. 1-278.

14. Cf. *Obras de Francisco de Vitoria - Relecciones Teológicas* (ed. T. Urdanoz), Madrid, B.A.C., 1960, pp. 1-1386, esp. pp. 491-726.

jurisdiction. This would simply not have been possible without the consolidation of the right of individual petition, amidst the recognition of the objective character of the obligations of protection and the acceptance of the collective guarantee of compliance with these latter. This is the real meaning of the *historical rescue* of the individual as subject of the International Law of Human Rights.

13. Yet, at global level, it was necessary to wait until the first half of the seventies for the right of petition to be crystallized, in the conventional (human rights treaties and conventions) as well as extra-conventional (established by resolutions) mechanisms in the ambit of the United Nations. Parallel to that, at European regional level, the right of individual petition, together with the notion of collective guarantee, came to constitute the most remarkable features of the new system of protection inaugurated by the European Convention on Human Rights of 1950, and, *a fortiori*, of the International Law of Human Rights as a whole.

14. Three decades ago, on the occasion of the twentieth anniversary of the Universal Declaration of Human Rights of 1948, René Cassin, who had participated in the preparatory process of its elaboration¹⁶, pondered that

"(...) S'il subsiste encore sur la terre, de grandes zones où des millions d'hommes ou de femmes résignés à leur destin n'osent pas proférer la moindre plainte ou même ne conçoivent pas qu'un recours quelconque soit possible, ces territoires se rétrécissent de jour en jour. La prise de conscience de ce qu'une émancipation est possible, est devenue de plus en plus générale. (...) La condition première de toute justice, c'est-à-dire la possibilité d'acculer les puissants à subir (...) un contrôle public, est remplie beaucoup plus souvent que jadis. (...) La plupart des Conventions et Pactes [des droits de l'homme], (...) incitent les États Parties à créer chez eux des instances de recours et prévoient certaines mesures de protection ou de contrôle international. (...) Le fait que la résignation sans espoir, que le mur du silence et que l'absence de tout recours soient en voie de réduction ou de disparition, ouvre à l'humanité en marche des perspectives encourageantes. (...)"¹⁷.

15. The assessment of the right of individual petition as a method of international implementation of human rights has necessarily to take into account the basic point of the *legitimatío ad causam* of the petitioners and of the conditions of the use and the admissibility of the petitions (set forth in the distinct instruments of human rights which foresee them). This is, precisely, the central aspect of the legal questions raised in the present case *Castillo Petruzzi versus Peru*, in its phase of preliminary objections. In this respect, the human rights treaties which provide for the right of individual petition¹⁸ in their majority condition the exercise of this right to

15. As *rapporteur* of the Working Group of the United Nations Commission on Human Rights, entrusted with the preparation of the Draft Declaration (May 1947 to June 1948).

16. R. Cassin, "Vingt ans après la Déclaration Universelle", 8 *Revue de la Commission Internationale de Juristes* (1967) n. 2, pp. 9-10. [Translation: "(...) If there still subsist on earth great zones where millions of men and women, resigned to their destiny, do not dare to utter the least complaint nor even to conceive that any remedy whatsoever is made possible, those territories diminish day after day. The awakening of conscience that an emancipation is possible, becomes increasingly more general. (...) The first condition of all justice, namely, the possibility of cornering the powerful so as to subject them to (...) public control, is nowadays fulfilled much more often than in the past. (...) The Conventions and Covenants [of human rights] in their majority, (...) urge the States Parties to create in them the instances of remedies and foresee certain measures of international protection or control. (...) The fact that the resignation without hope, that the wall of silence and that the absence of any remedy are in the process of reduction or disappearance, opens to moving humanity encouraging perspectives (...)"

17. At global level, the right of individual petition is provided for, e.g., in the [first] Optional Protocol to the Covenant on Civil and Political Rights (Articles 1-3 and 5), in the Convention on the Elimination of All Forms of Racial Discrimination (Article XIV), in the United Nations Convention against Torture (Article 22). At regional level, the right of individual petition is set forth both in the European

that the author of the complaint or communication is - or claims to be - *victim* of human rights violation (e.g., European Convention on Human Rights, Article 25; [first] Optional Protocol to the Covenant on Civil and Political Rights, Article 2; Convention on the Elimination of All Forms of Racial Discrimination, Article XIV (1) and (2); United Nations Convention against Torture, Article 22).

16. The notion of victim has, significantly, experienced considerable expansion through the jurisprudential construction of the international supervisory organs, in coming to comprise direct and indirect victims, as well as "potential" victims, that is, those who sustain an admittedly valid potential personal interest in the vindication of their rights¹⁹. The American Convention on Human Rights (Article 44) and the African Charter on Human and Peoples' Rights (Articles 55-56) adopt, however, in this particular point, a more liberal solution, as they do not impose upon the petitioners the requisite of the condition of victim.

17. In any case, the solutions given by human rights treaties and instruments to the *jus standi* of the complainant (with variations, namely, alleged victim and "author of communication", "reasonably presumed" victim, special qualifications of the complainants, right of petition widely conferred), appear to be linked to the nature of the procedures at issue (right of petition or communication or [individual] representation)²⁰. Differences in the legal nature of those procedures, however, significantly have not hindered the development, by the distinct international supervisory organs, of a converging case-law as to a more effective protection of the alleged victims.

18. It has been under the European Convention on Human Rights that a vast case-law on the right of individual petition has evolved. It is certain that Article 25 of the European Convention was originally conceived as an optional clause; nowadays, however, this latter is accepted by all the States Parties to the Convention, and, very soon, as from November 1st of this year, with the entry into force of Protocol XI to the Convention, the right of petition before the new European Court (as the sole jurisdictional organ under the modified Convention) will be mandatory (as it has been under the American Convention on Human Rights since its adoption in 1969). Two brief observations appear to me here necessary.

19. In the first place, almost half a century ago, in conceiving Article 25 originally as an optional clause, the draftsmen of the European Convention were, however, careful enough to determine, in the first paragraph *in fine* of the clause, the obligation on the States Parties which accepted it of not interposing any impediment or obstacle to the exercise of the right of individual petition. In the case *Cruz Varas and Others versus Sweden* (1990-1991), the European Court and, to a larger extent the European Commission, recognized the right of procedural nature which Article 25(1) confers upon the individual complainants, by virtue of which these latter can

Convention on Human Rights (Article 25) as well as in the American Convention on Human Rights (Article 44) and in the African Charter on Human and Peoples' Rights (Articles 55-58).

18. The evolution of the notion of "victim" (including the potential victim) in the International Law of Human Rights is examined in my course "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) pp. 243-299, esp. pp. 262-283.

19. *Ibid.*, pp. 248-261.

take the initiative of freely resorting to the Commission, without any impediment or difficulty being raised by the State Party at issue²¹.

20. The right of individual petition is, thus, endowed with autonomy, distinct as it is from the substantive rights listed in title I of the European Convention. Any obstacle interposed by the State Party at issue to its free exercise would bring about, therefore, an *additional* violation of the Convention, parallel to other violations which become proved of the substantive rights enshrined in this latter. Its autonomy was in no way affected by the fact of having been originally foreseen in an optional clause of the Convention (Article 25).

21. In the second place, and reinforcing this point, both the European Commission and Court of Human Rights have understood that the concept itself of victim (in the light of Article 25 of the Convention) ought to be interpreted *autonomously* under the Convention. This understanding today finds solid support in the *jurisprudence constante* under the Convention. Thus, in several decisions in recent years, the European Commission has consistently and invariably warned that the concept of "victim" utilized in Article 25 of the Convention ought to be interpreted *in an autonomous way and independently of concepts of domestic law* such as those of the interest or quality to interpose a judicial action or to participate in a legal process²².

22. The European Court, in its turn, in the case *Norris versus Ireland* (1988), pondered that the conditions which govern individual petitions under Article 25 of the Convention "are not necessarily the same as national criteria relating to *locus standi*", which may even serve purposes distinct from those contemplated in the above-mentioned Article 25²³. The autonomy of the right of individual petition at international level *vis-à-vis* provisions of domestic law thus clearly ensues therefrom. The elements singled out in this case-law of protection apply equally under

20. Compare the Judgment, of 20.03.1991, of the European Court of Human Rights in the case *Cruz Varas and Others versus Sweden* (Merits, Series A, vol. 201), pp. 33-34 and 36, pars. 92-93 and 99, with the Opinion, of 07.06.1990, of the European Commission of Human Rights in the same case (Annex, *in ibid.*), pp. 50-52, pars. 118, 122 and 125-126. The Commission went further than the Court, arguing, moreover, that, in failing to comply with a request of not deporting the individual complainant (H. Cruz Varas, Chilean), Sweden violated the obligation provided for in Article 25 *in fine* of the European Convention of not impeding the efficacy of the right of individual petition; the European Court, in a decision adopted by 10 votes to 9, did not agree with the Commission - in a less persuasive form than this latter - on this point in particular.

21. Cf. in this sense: European Commission of Human Rights (EComHR), case *Scientology Kirche Deutschland e.V. versus Germany* (appl. n. 34614/96), decision of 07.04.1997, 89 *Decisions and Reports* (1997) p. 170; EComHR, case *Zentralrat Deutscher Sinti und Roma y R. Rose versus Germany* (appl. n. 35208/97), decision of 27.05.1997, p. 4 (unpublished); EComHR, case *Greek Federation of Customs Officials, N. Gialouris, G. Christopoulos and 3333 Other Customs Officials versus Greece* (appl. n. 24581/94), decision of 06.04.1995, 81-B *Decisions and Reports* (1995) p. 127; EComHR, case *N.N. Tauira and 18 Others versus France* (appl. n. 28204/95), decision of 04.12.1995, 83-A *Decisions and Reports* (1995) p. 130 (petitions against the French nuclear tests in the atoll of Mururoa and in that of Fangataufa, in French Polynesia); EComHR, case *K. Sygounis, I. Kotsis and Police Union versus Greece* (appl. n. 18598/91), decision of 18.05.1994, 78 *Decisions and Reports* (1994) p. 77; EComHR, case *Association of Air Pilots of the Republic, J. Mata el Al. versus España* (appl. n. 10733/84), decision of 11.03.1985, 41 *Decisions and Reports* (1985) p. 222. - According to this same case-law, to fulfil the condition of "victim" (under Article 25 of the Convention) there ought to be a "sufficiently direct link" between the individual complainant and the alleged damage, resulting from the alleged violation of the Convention.

22. European Court of Human Rights, case *Norris versus Ireland*, Judgment of 26.10.1988, Series A, vol. 142, p. 15, par. 31.

procedures of other human rights treaties which require the condition of "victim" for the exercise of the right of individual petition (cf. supra).

23. Each of those procedures, despite differences in their legal nature, has contributed, in its own way, to the gradual strengthening of the procedural capacity of the complainant at international level. In an express recognition of the relevance of the right of individual petition, the Declaration and Programme of Action of Vienna, the main document adopted by the II World Conference on Human Rights (1993), urged its adoption, as an additional method of protection, by means of Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women and to the Covenant on Economic, Social and Cultural Rights²⁴. That document recommended, moreover, to the States Parties in human rights treaties, the acceptance of all the available optional procedures of individual petitions or communications²⁵.

II. The Right of Individual Petition under the American Convention on Human Rights.

24. In the inter-American system of protection of human rights, the right of individual petition has constituted an effective way of facing not only individual cases but also massive and systematic violations of human rights²⁶, even before the entry into force of the American Convention on Human Rights (i.e., in the initial practice of the Inter-American Commission on Human Rights). Its importance has been fundamental, and could never be minimized. The consolidation of the right of individual petition under Article 44 of the American Convention on Human Rights was endowed with special significance. Not only was its importance, for the mechanism of the Convention as a whole, duly emphasized in the *travaux préparatoires* of that provision of the Convention²⁷, as it also represented an advance in relation to what, until the adoption of the Pact of San José in 1969, had been achieved in that respect, in the ambit of the International Law of Human Rights.

25. The other regional Convention then in force, the European Convention, only accepted the right of individual petition originally enshrined in an optional clause (Article 25 of the Convention), conditioning the *legitimitas ad causam* to the demonstration of the condition of *victim* by the individual complainant, - what, in its turn, generated a remarkable jurisprudential development of the notion of "victim" under the European Convention (supra). The American Convention, in a distinct way, rendered the right of individual petition (Article 44 of the Convention) mandatory, of

23. Declaration and Programme of Action of Vienna of 1993, part II, pars. 40 and 75, respectively. - The elaboration of both Draft Protocols is virtually concluded, in their essential features, now waiting for the approval on the part of the States.

24. Declaration and Programme of Action of Vienna of 1993, part II, par. 90.

25. I thus regret not to be able to share the insinuation present in part of the contemporary European specialized bibliography on the matter, in the sense that the right of individual petition would perhaps not be effective in relation to massive and systematic violations of human rights. The experience accumulated from this side of the Atlantic, in the inter-American system of protection, points exactly to the opposite sense, and thanks to the right of individual petition many lives were saved and justice was accomplished in concrete cases amidst generalized situations of violations of human rights.

26. Cf. OAS, *Conferencia Especializada Interamericana sobre Derechos Humanos - Actas y Documentos* (San José of Costa Rica, 07-22 November 1969), doc. OAS/Ser.K/XVI/1.2, Washington D.C., General Secretariat of the OAS, 1978, pp. 43, 47 and 373.

automatic acceptance by the ratifying States, extending it to "any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization" of American States (OAS), - what discloses the capital importance attributed to it²⁸.

26. This was, recognizedly, one of the great advances achieved by the American Convention, at conceptual and normative, as well as operational, levels. It would thus not be justified that, after twenty years of operation of our regional Convention²⁹, one would admit to surround with restrictions the wide extent of the *legitimatío ad causam*, on the part of *any person*, under Article 44 of the American Convention. One is to extract the consequences of the wide extent of Article 44 of the Convention, in so far as the condition of individual petitioners is concerned³⁰. Furthermore, in the same line of reasoning, Article 1(1) of the American Convention provides for the general obligation of the States Parties to respect the rights set forth therein and to secure their free and full exercise to *any person* subject to its jurisdiction (whether national, foreigner, refugee or stateless person, indistinctly, irrespective of his or her legal status in the domestic law).

27. One is to bear in mind always the autonomy of the right of individual petition *vis-à-vis* the domestic law of the States. Its relevance cannot be minimized, as it may occur that, in a given internal legal order, an individual becomes unable, by the circumstances of a legal situation, to take judicial measures by himself. This does not mean that he would be deprived to do so in the exercise of the right of individual petition under the American Convention, or another human rights treaty.

28. But the American Convention goes further than that: the *legitimatío ad causam*, which it extends to every and any petitioner, can even do without a manifestation on the part of the victim himself or herself. The right of individual petition, thus widely conceived, has as an immediate effect the enlargement of the extent of protection, above all in cases in which the victims (e.g., those detained *incommunicado*, disappeared persons, among other situations) find themselves unable to act *motu proprio*, and stand in need of the initiative of a third party as petitioner in their behalf.

29. One of the distinctive features of the emancipation of the human being, *vis-à-vis* his own State, as subject of the International Law of Human Rights, lies precisely in the *denationalization* of the protection in the present context. Nationality disappears as a *vinculum juris* for the exercise of protection (differently from the discretionary diplomatic protection in the inter-State *contentieux*, based upon fundamentally distinct premises), sufficing that the individual complainant -

27. The other type of petition, the inter-State one, was only provided for on an optional basis (Article 45 of the American Convention, contrary to the scheme of the European Convention -Article 24 - in this particular), what stresses the relevance attributed to the right of individual petition. This point did not pass unnoticed from the Inter-American Court of Human Rights, which, in its second Advisory Opinion, on the *Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (of 24.09.1982), invoked this particularity as illustrative of the "overriding importance" attributed by the American Convention to the obligations of the States Parties *vis-à-vis* the individuals, vindicated by these latter without the intermediation of another State (paragraph 32).

28. As from its entry into force, on 18 July 1978.

29. Cf., in this sense, my Dissenting Opinion in the case of *El Amparo* (Resolution on Interpretation of Judgment, of 16.04.1997), par. 29, n. 12, reproduced in: OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos - 1997*, p. 142.

irrespective of nationality or domicile - is (even though temporarily) under the jurisdiction of one of the States Parties to the human rights treaty at issue.

30. In relation to the question raised in the fifth and sixth preliminary objections in the present case *Castillo Petruzzi versus Peru* (pertaining to the legal personality and the *legitimatío ad causam* of the petitioning entity, FASIC), it would be inconsistent with this new conception of protection that one were to attempt to condition the *legitimatío ad causam* of a non-governmental entity to the legal requisites of a given internal legal order; it is not surprising at all, thus, that it suffices (under the American Convention) that such entity be legally recognized in *any* of the member States of the Organization. The American Convention does not require a given legal status of such entity, nor does it impose any formal requisites; the only requirement is that the entity at issue be "legally recognized in one or more member States" of the OAS.

31. To circumscribe such requisite to the domestic law of a given State would go against the letter and spirit of the American Convention. Thus, one ought not to attempt to give to this requisite a dimension which it does not have, as, ultimately, the right of individual petition under the American Convention - as pointed out by the Court in the present Judgment - is widely open to *any person or group of persons*. The faculty of the respondent State to seek to determine the legal recognition of a petitioning non-governmental entity, under Article 44 of the Convention, is not questioned, providing that one does not thereby pretend to subordinate it to pertinent provisions of its own internal legal order or of the domestic law of a given State.

32. Just like the right itself of individual petition *per se* under the American Convention (and other human rights treaties) in general, this requisite of legality of a non-governmental entity in particular is also *denationalized*³¹. The protection of human rights set in operation by the exercise of the right of individual petition takes place in the light of the notion of *collective guarantee*, underlying the American Convention (as well as the other human rights treaties). It is in this context that one is to assess the wide extent of the *legitimatío ad causam* under Article 44 of the American Convention.

30. Under the European Convention of Human Rights, for example, the requisite of legal recognition of a petitioning non-governmental entity (under Article 25) does not even exist. The practice of the European Commission of Human Rights endorses the interpretation that the reference of Article 25 of the Convention to "non-governmental organization" *tout court*, without conditionings or qualifications, had the purpose of impeding the exclusion of any persons, other than physical persons, enabled to resort to the European Commission; cf. *Les droits de l'homme et les personnes morales* (1969 Louvain Colloquy), Brussels, Bruylant, 1970, p. 20 (intervention of H. Golsong); and cf. *Actes du Cinquième Colloque International sur la Convention Européenne des Droits de l'Homme* (1980 Frankfurt Colloquy), Paris, Pédone, 1982, pp. 35-78 (report by H. Delvaux). In its turn, the European Court of Human Rights, in its judgment of 09.12.1994 in the case of the *Holy Monasteries versus Greece*, decided to dismiss an attempt to impose restrictions (other than that of the condition of "victim") to the non-governmental organization at issue. In the cas d'espèce, the respondent State argued that, given the links which it maintained with the Greek Orthodox Church and the "considerable influence" of this latter in the State activities and in public administration, the complainant Monasteries were not non-governmental organizations in the sense of Article 25 of the European Convention (par. 48). The Court dismissed this argument, in finding that the Monasteries referred to did not exercise governmental powers. Their classification as entities of public law was intended only to extend to them legal protection vis-à-vis third parties. As the Holy Monasteries were under the "spiritual supervision" of the local archbishop and not under the supervision of the State, they were distinct from this latter, from which they were "completely independent". Accordingly, - the European Court concluded, - the complainant Monasteries were non-governmental organizations in the sense of Article 25 of the European Convention (par. 49).

33. The denationalization of the protection and of the requisites of the international action of safeguard of human rights, besides sensibly enlarging the circle of protected persons, rendered it possible to individuals to exercise rights emanated directly from international law (*derecho de gentes*), implemented in the light of the above-mentioned notion of collective guarantee, and no longer simply "granted" by the State. With the access of individuals to justice at international level, by means of the exercise of the right of individual petition, concrete expression was at last given to the recognition that the human rights to be protected are inherent to the human person and do not derive from the State. Accordingly, the action in their protection does not exhaust -cannot exhaust - itself in the action of the State.

34. Of all the mechanisms of international protection of human rights, the right of individual petition is the most dynamic one, in even granting the initiative of action to the individual himself (the ostensibly weaker party *vis-à-vis* the public power), distinctly from the exercise *ex officio* of other methods (such as those of fact-finding and reports) on the part of the international supervisory organs. It is the one which best reflects the specificity of the International Law of Human Rights, in comparison with other solutions proper to Public International Law (as it can be inferred from the judgment of 1995 of the European Court of Human Rights in the important case *Loizidou versus Turkey*, which is bound surely to become *locus classicus* on the matter)³².

35. In the public hearings before the Inter-American Court, in distinct cases, - above all in the hearings pertaining to reparations, - a point which has particularly drawn my attention has been the observation, increasingly more frequent, on the part of the victims or their relatives, to the effect that, had it not been for the access to the international instance, justice would never have been done in their concrete cases. Let us be realistic: without the right of individual petition, and the consequent access to justice at international level, the rights enshrined into the American Convention would be reduced to a little more than dead letter. It is by the free and full exercise of the right of individual petition that the rights set forth in the Convention become *effective*. The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, - allowing myself the metaphor, - that the right of individual petition is undoubtedly the most luminous star in the universe of human rights.

31. It may be recalled that, in the case *Loizidou versus Turkey* (judgment on preliminary objections of 23.03.1995), the European Court of Human Rights discarded the possibility of restrictions -by the Turkish declarations - in relation to the key provisions of Article 25 (right of individual petition), and of Article 46 (acceptance of its jurisdiction in contentious matters) of the European Convention. To sustain another position, it added, "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of the European public order (*ordre public*)" (par. 75). The Court discarded the argument of the respondent State that one could infer the possibility of restrictions to the optional clauses of Articles 25 and 46 of the Convention by analogy with the State practice under Article 36 of the Statute of the International Court of Justice. The European Court not only recalled the practice to the contrary (accepting such clauses without restrictions) of the States Parties to the European Convention, but also stressed the fundamentally distinct context in which the two tribunals operate, the International Court of Justice being "a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention" (pars. 82 and 68). The Hague Court, - reiterated the European Court, - settles legal questions in the inter-State *contentieux*, distinctly from the functions of the supervisory organs of a "normative treaty" (*law-making treaty*) like the European Convention. Accordingly, the "unconditional acceptance" of the optional clauses of Articles 25 and 46 of the Convention does not leave margin for analogy with the practice of States under Article 36 of the Statute of the International Court of Justice (pars. 84-85).

36. The right of individual petition is a *fundamental clause* (*cláusula pétrea*) of the human rights treaties that provide for it, - as exemplified by Article 44 of the American Convention, - upon which is erected the juridical mechanism of the emancipation of the human being *vis-à-vis* his own State for the protection of his rights in the ambit of the International Law of Human Rights. Another fundamental clause is that of the acceptance of the contentious jurisdiction of the Inter-American Court of Human Rights, which does not admit limitations other than those expressly contained in Article 62 of the American Convention.

37. It is not the function of the Court to secure the due application by the State Party of its own domestic law, but rather to secure the correct application of the American Convention in the ambit of its domestic law, so as to protect all the rights set forth in the Convention. Any understanding to the contrary would withdraw from the Court the faculties of protection inherent to its jurisdiction, unduly depriving the American Convention of effects in the domestic law of the States Parties. This being so, beyond what the human rights treaties expressly provide for in this respect, such fundamental clauses (*cláusulas pétreas*) do not admit restrictions of domestic law.

38. The above-mentioned fundamental clauses (*cláusulas pétreas*) -the right of individual petition and the compulsory jurisdiction of the Inter-American Court in contentious matters - constitute a matter of international *ordre public*, which could not be at the mercy of limitations not provided for in the treaties of protection, invoked by the States Parties for reasons or vicissitudes of domestic order. If the right of individual petition had not been originally conceived and consistently understood in this way, the international protection of human rights would have advanced very little in this half-century of evolution. The right of individual petition, so widely and liberally recognized under the American Convention on Human Rights, constitutes, as already pointed out, a definitive conquest of the International Law of Human Rights, to be always decidedly safeguarded by the Inter-American Court of Human Rights, as it has just done in the present Judgment on preliminary objections in the case *Castillo Petruzzi*.

III. The Right of Individual Petition *De Lege Ferenda*: From *Locus Standi* to *Jus Standi* before the Inter-American Court of Human Rights.

39. To these thoughts in support of the wide scope of the right of individual petition under the American Convention, may I add a final consideration *de lege ferenda*: in the inter-American system of protection, the right of individual petition will reach its plenitude the day it can be exercised by the petitioners no longer before the Inter-American Commission, but rather directly before the Inter-American Court of Human Rights³³. The *jurisdictional* solution constitutes the most perfected and evolved means of international protection of human rights. The European system of protection waited almost half a century³⁴ to give concrete expression to this reality.

40. Its institutional improvement by means of the imminent entry into force of Protocol n. 11 to the European Convention reflects, ultimately, the unequivocal

32. As it will very soon occur, in the European system of protection, with the entry into force of Protocol XI (of 1994) to the European Convention of Human Rights, next 01 November 1998.

33. Since the adoption in 1950 and entry into force in 1953 of the European Convention of Human Rights until the imminent entry into force of its above-mentioned Protocol XI, on 01.11.1998.

recognition that human rights ought to be protected at international level by a permanent judicial organ, with compulsory jurisdiction in contentious matters, to which individuals have the right of direct access independently of the acceptance of an optional clause by their respective States³⁵. In proceeding in this line of reasoning, those responsible for the operation of the European system of protection have at last succeeded in overcoming the hesitations projected in the original mechanism of the European Convention³⁶, emanated from dogmas and fears proper to a historical stage already surpassed³⁷.

41. This evolution singles out precisely what I have allowed myself in this Concurring Opinion to call *fundamental clauses* (*cláusulas pétreas*) of the international protection of human rights in the framework of our regional system, namely, the right of individual petition and the compulsory jurisdiction of the judicial organ of protection (accepted without limitations other than those expressly contained in the human rights treaty at issue)³⁸. Under the American Convention, distinctly from the European, the right of individual petition was conceived from the start as *mandatory*; our regional Convention has extended it, in a more liberal way, *automatically to any person* under the jurisdiction of the States Parties. Almost thirty years after its adoption, we face today the challenge and necessity of a new qualitative advance.

42. This means to seek to secure, not only the direct representation of the victims or their relatives (*locus standi*) in the procedure before the Inter-American Court in cases already forwarded to it by the Commission (in all stages of the proceedings and not only in that of reparations³⁹), but rather the right of direct access of individuals before the Court itself (*jus standi*), so as to bring a case directly before it, as the sole future jurisdictional organ for the settlement of concrete cases under the American Convention. To that end, individuals would do without the Inter-American Commission, which would, nevertheless, retain functions other than the contentious one⁴⁰, prerogative of the future permanent Inter-American Court⁴¹.

34. To these elements one can add the greater agility and improvement of the procedure, and the stimulus to the development of a homogeneous and clearly consistent case-law. Cf. Council of Europe, Protocol n. 11 to the Convention for the *Protection of Human Rights and Fundamental Freedoms and Explanatory Report*, Strasbourg, C.E., 1994, pp. 3-52, esp pp. 25-28, 30, 35 and 43; and, for a particularly detailed study of Protocol n. 11, cf. A. Drzemczewski, "A Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol n. 11", 6 *Collected Courses of the Academy of European Law* (1997)-II, pp. 121-244.

35. Which served as model to that of the American Convention.

36. Cf., in this sense, Rolv Ryssdall, "The Coming of Age of the European Convention on Human Rights", 1 *European Human Rights Law Review* (1996) pp. 18-29.

37. Articles 44 and 62, respectively, of the American Convention on Human Rights.

38. As occurs under the current Regulations of the Court, Article 23.

39. Like those of the undertaking of missions of *in loco* observation and the elaboration of reports.

40. Enlarged, functioning in chambers, and with considerably larger human and material resources.

43. It would, therefore, be an institutional structure distinct from that of the European system of protection, attentive to the reality of the needs of protection of our continent. But it would have in common with that system, the purpose of overcoming duplications, delays and procedural imbalances, inherent to the current mechanism of protection under the American Convention⁴², which require its improvement. Above all, this qualitative advance would fulfill, in my understanding, an imperative of justice. The *jus standi* - no longer only *locus standi in judicio*, - without restrictions, of individuals, before the Inter-American Court itself, represents, - as I have indicated in my Opinions in other cases before the Court⁴³, - the logical consequence of the conception and formulation of rights to be protected under the American Convention at international level, to which it ought to correspond necessarily the full juridical capacity of the individual petitioners to vindicate them.

44. The jurisdictionalization of the mechanism of protection becomes an imperative as from the recognition of the essentially distinct roles of the individual petitioners - the true complainant party - and of the Commission (organ of supervision of the Convention which assists the Court). Under the American Convention, the individuals mark presence at the *beginning* of the process, in exercising the right of petition in view of the alleged damages, as well as at the *end* of it, as beneficiaries of the reparations, in cases of proven violations of their rights; there is no sense in denying them presence *during* the process. The right of access to justice at international level ought in fact to be accompanied by the guarantee of procedural equality (*equality of arms/égalité des armes*) in the proceedings before the judicial organ, an element essential to any jurisdictional mechanism of protection of human rights, without which such mechanism will be irremediably mitigated.

45. In order to reach this degree of procedural improvement, we ought to count on the necessary and indispensable full belief on the part of the States that integrate the inter-American system of protection that the *jus standi* of individuals before the Court is a measure to the benefit not only of the petitioners but also of themselves (those which become respondent States), as well as of the mechanism of protection as a whole. And this by virtue of the jurisdictionalization, an additional guarantee of the prevalence of the *rule of law* in the whole *contentieux* of human rights under the American Convention.

46. If we really wish to act at the height of the challenges of our times, it is to the consolidation of such *jus standi* that we ought to promptly devote ourselves, with the same clear vision and lucid boldness with which the draftsmen of the American Convention originally conceived the right of individual petition. With the conventional basis which was conveyed to us by Article 44 of the American Convention, we do not need to wait half a century to give concrete expression to the *jus standi* above referred to. With the consolidation of this latter, it is the international protection

41. As well as to that of the European Convention, which served as model to it.

42. Cf., in this sense, my Separate Opinions in cases *Castillo Páez* (Preliminary Objections, Judgment of 30.01.1996), pars. 14-17, and *Loayza Tamayo* (Preliminary Objections, Judgment of 31.01.1996), pars. 14-17, respectively, reproduced in: OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos - 1996*, pp. 56-57 and 72-73, respectively.

that, ultimately, in the ambit of our regional system of protection, will have thereby attained its maturity.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

**PARTIAL DISSENTING OPINION OF
JUDGE CARLOS VICENTE DE ROUX-RENGIFO**

I dissent from the judgment adopted by the Court as to the first, second, and fourth preliminary objections raised by the respondent State, because I consider that questions pertaining to the alleged failure to exhaust domestic remedies should be joined to the merits of the case.

As I have argued on another occasion (*cf.* dissenting opinion in the judgment on preliminary objections in the Cantoral Benavides Case), I believe that if the controversy between the parties revolves clearly and forcefully around the alleged non-existence of legal due process or the presumed impossibility of accessing the remedies of the domestic jurisdiction, the Court should not decide, at the stage of preliminary objections, on the exhaustion of said remedies and whether there was or was not a final judgment in that respect. To the contrary, it is appropriate to join these issues to the questions on the merits, taking recourse in the provisions of Articles 46(2)(a) and 46(2)(b) of the American Convention. And among other reasons, for one reason very important for the present case: if the conditions for the nonexistence of legal due process (conditions that should be proved on the merits) are met, the complainants are excused from the obligation to exhaust domestic remedies.

Consequently, my vote is as follows:

1. To join the first, second, and fourth preliminary objections interposed by the Peruvian State to the merits.
2. To admit the third preliminary objection raised by the Peruvian State.
3. To dismiss the fifth, sixth, seventh, eighth, ninth, and tenth preliminary objections interposed by the Peruvian State.
4. To continue to hear the merits of the case, except with respect to the third objection.

Carlos Vicente de Roux-Rengifo
Judge

Manuel E. Ventura-Robles
Secretary

DISSENTING OPINION OF JUDGE VIDAL RAMIREZ

1. I dissent from the decision adopted in the Judgment that dismissed the preliminary objections interposed by the agent of the Government of Peru, for the following reasons:

- 1.1 Article 27 of the American Convention authorizes the States Parties, in cases when necessary and in cases that include those which constitute public danger or emergencies that threaten the independence or security of the State, to adopt measures that as much as possible are compatible with the obligations imposed by International Law and with the rights and guarantees that that norm necessitates.

The Peruvian State has found it necessary to adopt measures of defense before the armed and violent aggression inflicted on its population by terrorist organizations that violated basic human rights.

In this emergency situation Peru classified the crime of aggravated terrorism by the *nomen iuris* of treason against the fatherland and provided that it be tried in the military jurisdiction.

- 1.2 In the present case, as the illegal acts were characterized as aggravated terrorism, their perpetrators were subjected to the military jurisdiction and tried in a previously and legally established proceeding, which began on November 20, 1993, and ended with the final judgment rendered on May 3, 1994.
- 1.3 The Political Constitution of Peru establishes that the filing of writs of habeas corpus and amparo are not suspended during the time of a state of emergency (article 200), and if exceptional laws issued have established some restriction, the constitutional norm prevails over all other legal norms, in application of the principle of the normative hierarchy (article 51), for which reason writs of guarantee could and can be filed by those accused of terrorism.

2. By having submitted the complaint on the date of January 28, 1994, it is therefore evident that, pursuant to Article 46(1)(a) of the American Convention, they had not exhausted domestic remedies.

3. I dissent from the rationale that supports the dismissal of the fourth objection interposed by the agent of the Government of Peru, since the annulment of one proceeding implies the opening of a new one, in which case the new trial does not constitute a violation of the principle of *non bis in idem*.

4. I dissent from the rationale that underlies the dismissal of the fifth and sixth objections interposed by the agent of the Government of Peru inasmuch as Article 44 of the American Convention, in specifying the persons that can petition, distinguishes

non-governmental entities, from "a group of persons." Nongovernmental entity is understood to mean a legal entity duly established with representatives that must act with the power of representation, since they act in *contemplatio domini*, for which reason they should be accredited.

5. The decision as to the tenth preliminary objection interposed by the agent of the Government of Peru should be joined to the merits.

Fernando Vidal-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary