**SEPARATE DISSENTING OPINION OF** **JUDGE EDUARDO VIO GROSSI**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF WONG HO WING *v.* PERU**

**JUDGMENT OF JUNE 30, 2015**

**(Preliminary objection, merits, reparations and costs)**

**INTRODUCTION**

This dissenting opinion[[1]](#footnote-1) to the Judgment indicated above[[2]](#footnote-2) is issued because the Judgment rejected the preliminary objection concerning failure to comply with the rule of prior exhaustion of domestic remedies filed by the Republic of Peru.[[3]](#footnote-3) The grounds for this dissent relate to the moment at which this rule should be complied with. The Judgment takes the view that this should be, at the latest, when the Inter-American Commission on Human Rights[[4]](#footnote-4) takes a decision on the admissibility of the petition or communication[[5]](#footnote-5) that has given rise to the corresponding case;[[6]](#footnote-6) to the contrary, in this opinion, I maintain that this rule should be complied with at the time the petition is lodged, and this should be verified by the Commission both when this occurs and when deciding on the petition’s admissibility. In other words, while the Judgment considers that compliance with this rule is a requirement for the admissibility of the petition, in this opinion, I consider that compliance with the rule is a requirement for its presentation and, consequently, to enable it to be processed.

Bearing in mind the provisions of Article 65(2) of the Court’s Rules of Procedure, this opinion refers only and exclusively to the reasons why the undersigned considers that the Judgment should have admitted the preliminary objection concerning the lack of prior exhaustion of domestic remedies filed by the State and, consequently, must refrain from commenting on the merits of the case. Therefore, this opinions is limited to the operative paragraph on this point adopted in the Judgment.

Nevertheless, I wish to record that the undersigned, as in other cases,[[7]](#footnote-7) has participated in both the deliberation and the voting by the Court with regard to each operative paragraph of the Judgment and has done so, however, without issuing a separate opinion on them.

Consequently, and pursuant to the provision of Article 65(2) of the Rules of Procedure that, if a separate concurring or dissenting opinion is issued, it should include the reasoning; then, to the contrary, if no separate opinion is issued, there is no obligation to provide the reasons for the positive or negative vote. Thus, considering that this opinion relates solely and exclusively to the operative paragraph adopted in the Judgment with regard to the said preliminary objection, the undersigned is not obliged to explain the reasons why he voted negatively with regard to the other paragraphs of the Judgment; namely, the operative paragraphs.

By adopting this course of action, the undersigned has proceeded in keeping with the principles of liberty and independence that should govern the actions of a judge, guaranteed by the Convention and the Court’s Statute and Rules of Procedure, which impose no restriction as regards the reason he considers it appropriate to vote according to his conscience or, in particular, by not prohibiting him from explaining, if he so wishes, why he has proceeded in this way.

In addition, it should be borne in mind that this opinion is consistent; moreover, it diverges from the approach taken in the Judgment which simultaneously decided the preliminary objection and the merits of the matter, without first making a formal determination of whether the objection related to the merits and, if it considered that this connection existed, deciding to deal with both matters together. Conversely, the present opinion is based on the fact that the preliminary objection filed by the State regarding failure to comply with the rule of prior exhaustion of domestic remedies is not related to the merits of the case and, consequently, was essentially a preliminary matter that, as such, deserved to be decided before and separately from the merits, so that it could not be considered that the decision on the objection might be influenced, even indirectly, by the merits.

The reasons why the undersigned does not agree with the decision taken in this case concerning the objection filed by the State based on failure to exhaust domestic remedies are explained below, taking into account the applicable provision of the Convention, the facts of the case as they relate to this provision and, lastly, the part of the Judgment that refers to this objection.

1. **PROVISION OF THE CONVENTION CONCERNING THE RULE OF PRIOR EXHAUSTION OF DOMESTIC REMEDIES**

In the first part of this opinion, the undersigned will reiterate and complement some of the general comments made above[[8]](#footnote-8) on the said rule and the procedure that should be followed in this regard; in other words, with regard to the petition, its study and initial processing by the Commission, the State’s response to the petition, its admissibility, and the ruling that corresponds to the Court, to conclude with the consequences of considering the rule of prior exhaustion of domestic remedies to be a requirement of admissibility rather than of the petition.

1. **General comments**

Article 46 of the Convention recognizes the rule of prior exhaustion of domestic remedies and stipulates that:

*“1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:*

*a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;*

*b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;*

*c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and*

*d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.*

*2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:*

*a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;*

*b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or*

*c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.”*

As a preliminary observation, it should be noted that this provision is *sui generis,* exclusive to the Convention. For example, it does not appear in the same terms in the Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights,[[9]](#footnote-9) Article 35 of which refers to the requirement of prior exhaustion of domestic remedies more generally and, also, does not include the specific exceptions established in Article 46(2) of the American Convention.[[10]](#footnote-10)

Furthermore, it should also be emphasized that the European Convention establishes that this requirement must be met prior to litigating before the European Court of Human Rights – a judicial body – while, in the case of the American Convention, it must be met prior to lodging the petition before the Commission – a non-judicial body it should be noted. And this is relevant insofar as *“[t]he main function* *of the Commission shall be to promote respect for and defense of human rights”*[[11]](#footnote-11)and, in exercise of this function, *“to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention,*”[[12]](#footnote-12) including submission of the respective case to the Court.[[13]](#footnote-13)

Thus, the Commission should promote and defend human rights and can even act as a plaintiff before the Court and, accordingly, does not necessarily share the impartiality that must characterize a judicial body. Consequently, Article 46(1)(a) of the Convention is also conceived as a limit to the actions of the Commission which may become a party in the consequent litigation that this non-judicial body has itself originated. Hence, the intention of this provision is to prevent the Commission from acting before the requirement or rule that it establishes has been duly complied with in a timely manner; in other words, from proceeding with the matter even though the domestic remedies have not been exhausted.

And it is in the same spirit that the said Article 46(2) of the Convention specifically establishes the cases in which the rule of prior exhaustion of domestic remedies is not applicable; namely, inexistence of due process of law to exercise the domestic remedies, impossibility of exercising them, and delay in deciding them. Thus, this norm does not establish any other exceptions than those indicated; therefore, it is not admissible to cite, or even admit, an exception that is not established in the said article, because, if it were, this could strip the general rule established in Article 46(1)(a) of the Convention of any meaning or practical effects and, above all, it would leave its application to the discretion and, perhaps, the arbitrariness of the Commission.

As a second general comment, it is worth calling attention to the reference made in Article 46(1)(a) of the Convention to the circumstance “*that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.”* The allusion to such principles signifies that they are not the ones subsequently established in paragraph 2 of this article because, if they were, this allusion would not have been necessary. Accordingly, it is included in order to recall that the rule of prior exhaustion of domestic remedies is established by principles of international law, even prior to or irrespective of the provisions of any treaty, in this case the Convention, and that these principles involve other rules, such as the rule indicating that any objection that relates to the merits of the case in question is not strictly preliminary and must be decided when deciding on the merits.

Third, attention should be called to the fact that, with regard to the provision transcribed above, the Judgment indicates that “*[t]he Court recalls that the rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt it from responding before an international organ for acts it is accused of before it has had the occasion to remedy them by its own means*.*”*[[14]](#footnote-14)

The foregoing appears to signify that the Court would follow the thesis according to which the said rule, since it is conceived in the interests of the State, without considering the attitude of the petitioner, would mean that the State’s international responsibility for the violation of an obligation established by the Convention would be engaged from the time at which one of its organs committed an internationally wrongful act, even though it had not had the opportunity to redress this internationally wrongful act.

Now, whether this or any other thesis is followed, in the practice, the ultimate intention of the said rule is to enable the State to establish, as soon as possible, the effective exercise of, and respect for, the human rights that have been violated. This is the object and purpose of the Convention[[15]](#footnote-15) and, consequently, should happen as soon as practicable in everyone’s interests, making the intervention of the inter-American jurisdiction unnecessary.[[16]](#footnote-16)

This means that, in situations in which it has been argued in the respective sphere of the domestic jurisdiction that the State has not complied with its undertakings as regards respecting and ensuring the free and full exercise of human rights, it is possible to claim the intervention of the international jurisdictional body and not before, so that, if admissible, the State is ordered to comply with the international obligations it has violated, to guarantee that it will not violate them again, and to make reparation for all the consequences of such violations.[[17]](#footnote-17)

Therefore, this rule is also a mechanism to encourage the State to comply with its human rights obligations without waiting for the inter-American system to order it to do so as a result of litigation. Thus, its practical effect is that the State re-establish respect for human rights as soon as possible and, to that end, it could be said that this rule has been established also and, above all, to benefit the victim of human rights violations.[[18]](#footnote-18)

Based on the above, it can be concluded that this rule has been established in the Convention as an essential component of the whole inter-American system for the promotion and protection of human rights, by stressing that, as indicated in the second paragraph of its Preamble, the “*international protection […] reinforc[es] or complement[s] the protection provided by the domestic law of the American States*.*”[[19]](#footnote-19)*

And this relates to the international juridical structure that, fundamentally, is still based on the principle of sovereignty, which, in the case of the inter-American system, is embodied in Articles 1(1)[[20]](#footnote-20) and 3(b)[[21]](#footnote-21) of the Charter of the Organization of American States. Consequently, and in keeping with the principle of public law that one can only do what the law expressly authorizes, the provisions of the Convention that establish restrictions to State sovereignty must be interpreted and applied taking this reality into account.

Thus, the rule of prior exhaustion of domestic remedies is also an expression of the exercise of State sovereignty and of the need to give the State the preferential opportunity to take action with regard to the presumed human rights violations. Moreover, this has acquired greater relevance nowadays, when all the States Parties to the Convention abide by the democratic rule of law; that is, they endorse democracy.[[22]](#footnote-22)

Consequently, based on the foregoing it can be inferred that compliance with the requirement establish in Article 46(1)(a) of the Convention, transcribed above, must take place before the petition is lodged before the Commission.

1. **The petition**

The first comment that should be made concerning the petition initiating the procedure before the Commission that may conclude before the Court is that compliance with the rule of prior exhaustion of domestic remedies is, essentially, an obligation of the presumed victim or the petitioner. It is the latter who must comply with the requirement of prior exhaustion of domestic remedies; in other words, to be able to allege a violation before the inter-American jurisdictional body,[[23]](#footnote-23) the petitioner must previously do so before the corresponding domestic jurisdictional bodies. Otherwise, this would evidently prevent the prompt and timely achievement of the above-mentioned practical effects. Thus, rather than a benefit granted to the State, this rule is a requirement or obligation that must be met by the presumed victim or the petitioner.

This is why Article 28(h) of the Rules of Procedure of the Commission in force at the time the petition was lodged[[24]](#footnote-24) (hereinafter “the Commission’s Rules of Procedure”) stipulates that the petition must contain information on “*[a]ny steps taken to exhaust domestic remedies, or the impossibility of doing so.*” It should be noted that, by referring to the said Rules of Procedure, attention is being drawn to how the Commission itself, by approving this legal instrument, has interpreted the provisions of the Convention and, in particular in this case, its Article 46(1)(a).

Clearly for the same reason, Article 31(3) of the Commission’s Rules of Procedure refers to the situation in which *“the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article.”* In other words, this provision indicates that the specific exceptions to the rule of prior exhaustion of domestic remedies are established in favor of the presumed victim or the petitioner. Consequently, it is the petitioner and no one else, not even the Commission, who may argue or assert some of the exceptions to the said rule and, evidently, this can only be done when the petition is drawn up.

The second comment regarding the petition relates to the fact that Article 46(1) of the Convention refers to it as “*lodged*,” which means that it should be considered just as it was submitted and if, at that time, it meets the requirements set out in this provision, it should be admitted. Accordingly, it is at that moment – the moment of its submission – when it should have complied with the requirement concerning the prior exhaustion of domestic remedies established in Article 46(1)(a) of the Convention and, only if this is so, the petition “*lodged*” may be “*admitted*” by the Commission.

Similarly, Article 46(1)(b) of the Convention is based on the same concept since it establishes that, for the petition to be admitted, it must have been “*lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.”* Undoubtedly, it should be understood that this should be the judgment handed down on the last remedy that was filed, with no other remedies that may be filed. In other words, the time frame indicated for lodging the petition is calculated from the date of notification of the final decision of the domestic authorities or courts on the remedies that have been filed before them and, consequently, these may have resulted in the State’s international responsibility, which evidently implies that they must have been exhausted when the petition was “*lodged.*”

Meanwhile, Article 26(1) of the Commission’s Rules of Procedure stipulates that the initial processing is carried out of the petitions “*that fulfill all the requirements set forth,*” and such petitions must indicate, as established by the above-mentioned Article 28(h), the “*steps taken to exhaust domestic remedies, or the impossibility of doing so*,” and if they do not meet this requirement, “*the Commission*[, as established in Articles 26(2) and 29(1)(b) of these Rules of Procedure,] *may request the petitioner or his or her representative to fulfill them.*” Moreover, according to the said Article 46(1)(b) of the Convention, the Commission should consider, only those petitions “*lodged within a period of six months* *from the date*” of notification of the decision that exhausted the domestic remedies.

Based on all the above, it can be concluded that, ultimately, compliance with the said rule of prior exhaustion of domestic remedies constitutes a requirement that the petition must meet in order to be “*lodged.*”

1. **Study and initial processing by the Commission**

However, in addition to benefitting both the State and the presumed victim or the petitioner and representing an obligation for the latter, the rule of prior exhaustion of domestic remedies also entails an obligation for the Commission. Indeed, according to Article26(1) of the Commission’s Rules of Procedure, “*[t]he Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure.”* Meanwhile, and as already indicated, Articles 26(2) and 29(1)(b) of the text add that *“[i]f a petition or communication does not meet the requirements set forth in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them.”*

Furthermore*,* Article 29(1) of those Rules of Procedure establishes that, “*[t]he Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented*” and adds that the Commission must register each petition and “*record the date of receipt on the petition itself and acknowledge receipt to the petitioner*.” Lastly, according to Article 30(1) of this instrument, “*[t]he Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure.”*

Consequently, the steps taken by the Executive Secretariat, acting on behalf of the Commission, as regards the petition that has been “*lodged*” are not limited merely to verifying whether it includes the required information; rather it must carry out the “*study and initial processing*” of the petition, provided that it “*fulfill[s] all the requirements set forth,”* including, evidently, the most important, namely, that “*the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.”* Thus, the Commission, acting through its Executive Secretariat, must carry out an initial control of conventionality of the petition, ensuring that it meets the requirements established in the Convention in order to be considered “*lodged*.”

Reasonably, the foregoing infers that the domestic remedies must have been exhausted before the petition is lodged before the Commission because, to the contrary, the logic and need for the “*study and initial processing*” by the Commission’s Executive Secretariat cannot be understood, or the reason why the petitioner may be requested to complete it, or why the petitioner should indicate the steps taken to exhaust domestic remedies; furthermore, the time frame indicated for its presentation would be meaningless.

Lastly, bearing in mind that the Commission’s function consists in studying the petition, requesting its completion, and processing it, it must be concluded that all of this must be carried out in keeping with the terms in which the petition has been “*lodged*.” Thus, it can be affirmed that, just as “*it is not the task* *of the Court, or of the Commission, to identify* ex officio *the domestic remedies that remain to be exhausted, so that it is not incumbent on the international organs to rectify the lack of precision of the State’s arguments,”[[25]](#footnote-25)* it is not their task to rectify the petition or accord it a broader scope than the one it expresses and requires. Thus, the Commission must abide by what is requested of it.

This thesis is supported by the provisions established for the situation in which it is not necessary, or it is impossible, to exhaust such remedies previously. In this regard, Article 32(2) of the Commission’s Rules of Procedure indicate that “*[i]n those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as* *determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.”* In other words, under that alternative, the Commission must also consider the date on which the alleged violation occurred, which obviously must have happened prior to the submission of the petition.

Consequently, the Commission’s function when a petition is lodged confirms that the requirement of prior exhaustion of domestic remedies must be met before it acts.

1. **Response or observations of the State**

Article 30(1) and (2) of the Commission’s Rules of Procedure indicate that *“[t]he Commission, through its Executive Secretariat, […] shall forward the relevant parts of the petition to the State in question.”*

Evidently, the relevant parts forwarded to the State must include, as indicated in Article 28(h) of these Rules of Procedure, information on *“[a]ny steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure.”* And Article 30(3) cited above adds that “[*t]he State shall submit its response within two months from the date the request is transmitted”;* a response that, evidently, must contain the preliminary objection of absence of prior exhaustion of domestic remedies by the presumed victim or the petitioner, if the State wishes to file this objection.

Moreover, similarly, Article 31(3) of the Commission’s Rules of Procedure stipulates that *“[w]hen the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.*”

In other words, if the petitioner alleges in his petition that he is unable to prove that he has previously exhausted the domestic remedies, the State may contest this allegation, in which case it must prove that they have not been exhausted, provided that this is not evident from the case file. It is in relation to this possibility that the Court’s assertion that, “[*w]hen arguing the failure to exhaust domestic remedies, the State must specify the domestic remedies that remain to be exhausted, and prove that these remedies were available, adequate, appropriate and effective,”[[26]](#footnote-26)* should be understood.

Nevertheless, it should be recalled that, logically, also in the case – which is not expressly considered in the Commission’s Rules of Procedure – that the petitioner indicates in his petition that he has previously exhausted the domestic remedies (that is, he has met the requirements of Article 46(1)(a) of the Convention), the State may file the objection that this has not occurred.

Thus, it is clear that compliance with the rule of prior exhaustion of domestic remedies or the impossibility of complying with it must be indicated in the petition, because, otherwise, the State could not respond to this. In other words, it is only if the petition indicates that this rule has been complied with or that it is impossible to do so, that the State may argue that it has not been complied with and, in this case, it must prove the availability, adequacy, appropriateness and effectiveness of the domestic remedies that were not exhausted, all of which shows, once again, that this requirement must have been met previously; that is, before drawing up the petition the relevant parts of which are forwarded to the State precisely so that it may respond to them.

Furthermore, Article 30(5) and (6) of the Commission’s Rules of Procedure point in the same direction. Indeed, they establish that “*[p]rior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter VI of the […] Rules of Procedure*,” which leaves no margin of doubt that the said “*additional observations*” must relate to the petition, as it was “*lodged*” and not constitute a new petition or modify the original one, unless, as is logical, this entails its withdrawal.

Consequently, it is undeniable that this response by the State logically and necessarily must relate to the petition that was “*lodged*” before the Commission, and that it is at that moment, and not afterwards, that the legal proceedings, or the adversarial proceedings, as regards the exhaustion of domestic remedies are instituted.

And, for the same reason, it is at that moment that the domestic remedies must have been exhausted or that the petitioner indicates the impossibility of exhausting them. To affirm that those remedies could be exhausted after the petition has been “*lodged*” and, consequently, notified to the State, would affect the essential procedural balance and would leave the State defenseless, because it could not file the pertinent preliminary objection in time and in due form.

It is in this context that the criterion “*consistently affirmed* [by the Court that] *an objection to the jurisdiction of the Court based on the supposed failure to exhaust domestic remedies must be filed at the appropriate procedural opportunity; that is, during the admissibility stage of the proceedings before the Commission”*[[27]](#footnote-27)should be understood.

1. **Admissibility of the petition**

The preceding consideration is also evident from Article 31(1) of the Commission’s Rules of Procedure, which establishes that “*[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law*.”

This provision requires the Commission to “*verify,*” that is, to confirm [Note: *verificar-comprobar*[[28]](#footnote-28)in the Spanish text], the filing and exhaustion of the domestic remedies, in order to *“decide”* on admissibility. And, this is logical, because that decision could be not to admit the petition because such remedies have not been exhausted. This means that, in order to take a decision on the admissibility of the petition, the Commission must verify whether the rule of prior exhaustion of domestic remedies has been complied with and, if not, the corresponding decision would be to declare the petition inadmissible. The essential requisite that enables the Commission to decide on the admissibility of the petition is, thus, the verification it must make that the petition has complied with the rule of prior exhaustion of domestic remedies, and not merely that this rule has been complied with.

In addition, it should be noted that, although it is logical that the preliminary objection of prior failure to exhaust domestic remedies should be filed during the procedure on the admissibility of the petition – which extends from the date the petition is received and processed by the Commission, through its Executive Secretariat, until the moment at which the Commission rules on its admissibility – this does not mean that it should be at this latter moment (that is, at the end of this procedure) when the said requirement should have been met. It only means that, at that moment, the Commission must rule on or rather “*verify*”[[29]](#footnote-29) whether it was met when the petition was lodged.

This is evident if it is considered that Article 36(1) of the Commission’s Rules of Procedure establishes that *“[o]nce it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter*.”

Hence, it is indisputable that the moment at which the Commission rules on the admissibility of the petition is distinct from the moment when it is lodged or completed. This is clear when it is recalled that the Commission’s Rules of Procedure establish an “*initial processing”*[[30]](#footnote-30)of thepetition, that the petition must be “*register[ed*],”[[31]](#footnote-31) and that the “*relevant parts*”[[32]](#footnote-32) must be forwarded to the State. It is only after the State has submitted its observations that the Commission determines the admissibility of the petition and, to this end, “*shall verify,*”[[33]](#footnote-33) that is, confirm, that the corresponding requirements have been met – including those relating to the prior exhaustion of domestic remedies – and, consequently, “*shall decide*” on admissibility or inadmissibility.

In short, the Commission’s Rules of Procedure do not establish that it is when the Commission decides on the admissibility of the petition that the domestic remedies should have been exhausted. Rather, to the contrary, they indicate that it is when the Commission “*shall verify*” whether such remedies were filed and exhausted in a timely manner or whether this was unnecessary and, on this basis, “*shall decide*” – in other words, make a second control of conventionality of the petition, checking it against the provisions of the Convention as regards the requirements that should have been met – and, thus, it may either be admitted or rejected.

1. **The Court’s ruling**

Lastly, in relation to the Court’s function as regards compliance with the requirements that the petition must meet, it should be recalled that, according to Article 61(2) of the Convention, *“[i]n order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.*”

Thus, the Court must verify that the requirement of prior exhaustion of domestic remedies has been duly complied with before the Commission. As the Court has asserted, “*in matters that it is hearing, the Court has the authority to carry out a control of the legality of the Commission’s actions,”[[34]](#footnote-34)* and that it “*has the authority to review whether the Commission has complied with the statutory and regulatory provisions, as well as those of the Convention.”[[35]](#footnote-35)*

And it could not be otherwise, because if it were not so, the Commission would be accorded the broadest possible authority to take an exclusive and final decision on the admission or rejection of a petition, which would clearly mean that this power would be discretionary and could even be arbitrary, undermining the jurisdiction of the Court, because, in this hypothesis, the Court would have no alternative but merely to be an entity that confirms or observes, without even ratifying, the actions of the Commission, and there can be no doubt that this is not in keeping with the letter and spirit of the said Article 61(2) of the Convention.

1. **Consequences of considering the rule of prior exhaustion of domestic remedies as a requirement for the admissibility of the petition and not a requirement of the petition itself**

In addition to the above considerations, it should be reiterated that if it were not compulsory to have exhausted the domestic remedies before lodging the petition, it would be permissible that, at least for some time – that is, between the moment at which the petition is lodged and the moment at which the decision is taken on its admissibility (which in many situations may be considered extremely lengthy) – the same case could be dealt with simultaneously by both the domestic jurisdiction and the international jurisdiction. This would evidently render the statement in the second paragraph of the Preamble meaningless, and even the rule of prior exhaustion of domestic remedies as a whole. In other words, in this situation, the inter-American jurisdiction would not reinforce or be complementary to the domestic jurisdiction, but rather would substitute it or, at least, could be used to bring pressure to bear on the latter and, clearly, this is not what the Convention seeks.

Moreover, it might constitute an incentive, which could be considered perverse, to lodge petitions before the Commission when the said requirement has not been met in the hope that it can be complied with before the Commission decides on their admissibility and, evidently, this was not anticipated or sought by the Convention.

In addition, this begs the question of whether the “*study and initial processing*” of the petition is required, if it could be lodged without having previously exhausted the domestic remedies. Indeed, if this requirement was only compulsory when deciding on the admissibility of the petition, it is legitimate to question why it would be necessary to make an initial study of the petition and, furthermore, what would be the reason for and the practical effect of the Convention making a distinction between the moment of the lodging of the petition and the moment of its admissibility. Likewise, if it is considered that the said requirement or rule must be complied with when the decision on the admissibility of the petition is taken and not when it is lodged, it is logical to question the meaning of the petition itself.

It should also be noted that, if the criterion that this compliance should have taken place at the time the petition is lodged or completed is not respected and, to the contrary, the thesis is adopted that compliance is determined when the Commission decides on the admissibility of the petition, this would result in situations of evident injustice or arbitrariness, insofar as the moment of this compliance would ultimately depend not on the victim or the petitioner, but on the Commission’s ruling when deciding on the admissibility or inadmissibility of the petition. Thus, the requirement would evidently not be the same in all cases, or known with due anticipation.

1. **THE FACTS RELATING TO THE OBJECTION OF PRIOR FAILURE TO EXHAUST DOMESTIC REMEDIES**

Based on the norms that have been mentioned, the relevant facts relating to the objection of non-compliance with the rule of prior exhaustion of domestic remedies are as follows.

1. **Those set out in the petition**

The petition of March 27, 2009, indicated that “*[i]n this case, the petitioner ha[d] duly exhausted the ordinary remedies of the domestic jurisdiction because, as established in the third and fourth paragraphs of article 521 of the Code of Criminal Procedure, in extradition proceedings, there is a single entity that decides a request of this nature[.] In other words, the jurisdictional extradition proceedings had concluded with the final judgment delivered by the Second Transitory Criminal Chamber of the Supreme Court of Justice which declared that the extradition request was admissible.”*

As revealed by the above, the petitioner expressly indicated that, prior to the petition, he had exhausted the remedies established in the domestic jurisdiction, and did not make any mention of the situations indicated in Article 46(2) of the Convention in which it is unnecessary to apply the requirement under Article 46(1)(a) of this instrument. In other words, the situations in which it is not necessary to have previously exhausted the domestic remedies in order to lodge a petition before the Commission.

1. **Those contained in the State’s response or observations**

Meanwhile, in its observations on this petition presented on April 29, 2009, the State indicated that *“Wong Ho Wing ha[d] not complied with exhausting the remedies of the domestic jurisdiction; thus, this party ask[ed] the Inter-American Commission to declare the inadmissibility of this petition pursuant to Article 46 of the American Convention on Human Rights, because the 56th Criminal Court of Lima decided to declare that the application for* habeas corpus *was well-founded in part and that the decision issued by the Second Transitory Criminal Chamber of the Supreme Court of Justice on January 20, 2009, was null, and that the Chamber should issue a new decision”* and that *“[t]his* habeas corpus *proceeding was still being processed.”*

The note added that “*[i]n addition, the extradition proceedings with regard to Wong Ho Wing have not concluded because, pursuant to article 515 of the new Code of Criminal Procedure, it is the Peruvian Government that takes the final decision on the extradition by means of a Supreme Decision issued with the agreement of the Council of Ministers, following a report of the Official Commission on Extraditions and Prisoner Transfers.”*

In this regard, the note ends by indicating that: “[*i]n a decision of February 12, 2009, the 56th Criminal Court of Lima ordered the temporary suspension of the extradition procedure against the Chinese citizen, Wong Ho Wing, until the* habeas corpus *proceeding had concluded.”*[[36]](#footnote-36)

Thus, the State cited three reasons to support its position on the inadmissibility of the petition; namely, the ongoing processing when the petition was lodged of an application for *habeas corpus* filed by the petitioner himself; the processing of the extradition procedure, also at that time, and, lastly, the suspension of the procedure by a court order.

1. **Those relating to the Admissibility Report**

The Admissibility Report of November 1, 2010, indicates that “*the presumed victim first argued the failure to comply with the legal and constitutional requirements for admission of the extradition request throughout the advisory proceeding decided in the final instance by the Supreme Court of Justice on January 27, 2010*”; *[s]econd, he submitted two applications for* habeas corpus *against the members of the Second Transitory Criminal Chamber and of the Permanent Criminal Chamber of the aforementioned Supreme Court, pointing to alleged defects in the advisory proceeding and an alleged inadequate evaluation of the guarantees provided by the Government of the People’s Republic of China concerning the non-application of the death penalty*,” and added that “*[i]n addition, the presumed victim filed a preventive application for* habeas corpus *against the President of the Republic and the Council of Ministers, which has been pending a final decision on constitutional injury from the Constitutional Court since July 14, 2010*.”

The Admissibility Report also adds that *“[b]ased on the foregoing considerations, the [Commission] consider[ed] that the presumed victim [had] exhausted the available remedies under domestic law aimed at rectifying the alleged irregularities in the advisory proceeding in which the final decision was taken by the Permanent Criminal Chamber of the Supreme Court of Justice on January 27, 2010*.” Thus, the Commission concluded that, “[*c]onsequently, the requirement established in Article 46(1)(a) of the American Convention has been met*.”

First, attention should be drawn to the fact that the Admissibility Report refers to facts and/or judicial actions that took place after the petition had been lodged and to the corresponding observations of the State as grounds for the decision to admit the petition. In other words, it follows its consistent practice of determining whether the domestic remedies had been exhausted prior to this report, and not whether they had been exhausted prior to the petition.[[37]](#footnote-37)

It should also be pointed out that, in order to found the decision issued in this report, the Commission does not refer to the provisional measures that, on May 28, 2010, had ordered the State to refrain from extraditing Wong Ho Wing until December 17, 2010, to allow the Inter-American Commission on Human Rights to examine and decide on petition P-366-09 lodged before that organ on March 27, 2009. In other words, the report does not consider that the possible extradition of Wong Ho Wing, and therefore the corresponding proceedings, had been suspended on the orders of the Court at the request of the Commission itself.

1. **CONSIDERATIONS ON THE JUDGMENT**

The Judgment refers to two of the arguments made by the State with regard to its preliminary objection. One consists in the fact that, when the initial petition was lodged, the domestic remedies had not been exhausted, and the other to the fact that, when deciding on admissibility, the Commission did not take into account that other applications for *habeas corpus* filed by the representative were being processed.[[38]](#footnote-38) This opinion is only concerned with the first argument, regarding which the Judgment gives four reasons to reject the preliminary objection filed by the State based on the petitioner’s failure to comply with the obligation to exhaust the domestic remedies before lodging the petition.

The first reason is stated as follows: “[*a]s the State mentioned, the decisions that, according to the Commission, exhausted the domestic remedies were adopted after the initial petition had been lodged. However, the Court notes that, by requiring that “admission by the Commission of a petition or communication […] shall be subject to” the said exhaustion (underlining added), Article 46 of the American Convention, should be interpreted in the sense that exhaustion of the remedies is required when deciding on the admissibility of the petition and not when this is lodged.”[[39]](#footnote-39)*

Thus, the Judgment is aligned with the Court’s invariable position that the requirement of prior exhaustion of domestic remedies must be met at the time the Commission takes a decision on the admissibility of the petition and not when the latter is lodged; a position that, as indicated in Part I of this document – and especially in its sections B, C and D – this opinion does not share, above all, because it runs counter to the express provisions of Article 46(1)(a): by disregarding the qualifying term of “*lodged*” attributed to the petition in order to indicate that it is with regard to the petition as lodged that the admissibility or inadmissibility should be declared; by not weighing the State’s observations and the fact that these could only refer to the petition as lodged, which established the adversarial proceedings on the matter, and regarding which the Commission should take a decision and, lastly, by not considering that, in order to decide on admissibility, the Commission should “*verify,*” – that is, confirm – that the requirement of prior exhaustion of domestic remedies has been met, which, undoubtedly and consequently, should have occurred before that moment.

It should also be noted that the Judgment appears to contain a contradiction because, when setting out the Court’s second reason for rejecting the preliminary objection in question, it affirms that: “*[o]nce the petition has been forwarded to the State, the admissibility stage starts and, consequently, the adversarial proceedings on whether the petition meets the admissibility requirements, including the requirement of exhaustion of domestic remedies*,” and that “*it is when examining admissibility that the Commission decides whether or not the petition complies with this requirement, or whether any of the exceptions established in the Convention are applicable*. [[40]](#footnote-40) This appears to suggest that the Judgment follows the thesis set out in this opinion; namely, that it is on the adversarial proceedings established or constituted by the petition and the corresponding observations of the State that the Commission’s decision on the admissibility or inadmissibility of the “*lodged*” petition should be based.

However, this is not so. The second reason indicated in the Judgment to reject the said preliminary objection is that“*the Commission’s Rules of Procedure make a distinction* *between the time at which the initial processing is carried out, when it only examines whether the petition includes information on “any steps taken to exhaust domestic remedies, or the impossibility of doing so,” and the moment when it decides on admissibility, when it determines whether such remedies were exhausted, or applies an exception to this requirement.*”[[41]](#footnote-41) Thus, the Judgment appears to lessen the obligation contained in Article 28(h) of the Commission’s Rules of Procedure or to place the emphasis on the fact that the petition must include “*information,”* rather than that this information must be specifically on “*any steps taken to exhaust domestic remedies, or the impossibility of doing so.”* In other words, it appears that, according to the Judgment, it is sufficient that a general mention is made of some information on such steps in order to meet the requirement to consider the petition, and not that the steps taken up until that time – that is, up until the lodging of the petition - to exhaust such remedies are indicated clearly and specifically.

To the contrary, this opinion affirms that the obligation established in Article 28(h) is not merely that of providing “*information*” that steps were taken, but rather to provide specific “*information*” on “*any steps taken to exhaust domestic remedies, or the impossibility of doing so.”* Hence, the obligation consists in describing the steps specifically taken which mean that the said remedies have already been exhausted or indicating the impossibility of exhausting them. This obligation does not consist, consequently, in providing general information that steps were taken, but in providing specific information on the steps that were taken and that prove that either the domestic remedies were exhausted, or that it was impossible to do this.

The third reason cited by the Judgment to reject the objection in question is indicated as follows: “*[t]he* *Court recalls that the rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt it from responding before an international organ for acts it is accused of before it has had the occasion to remedy them by its own means. Nevertheless, the subsidiary nature of the inter-American system is not affected by the fact that the analysis of compliance with the requirement of exhaustion of domestic remedies is made based on the situation when a decision is taken on a petition’s admissibility. To the contrary, if any domestic remedy is pending, the State has the opportunity to resolve the situation alleged during the admissibility stage*.”[[42]](#footnote-42)

With this assertion, the Judgment forgets that compliance with the rule of prior exhaustion of domestic remedies is basically an obligation that, even though it may benefit the State or be in its interests, is essentially required of the petitioner; in other words, it is the petitioner who must comply with it. The Judgment, to the contrary, seems to understand that this rule is a State obligation, because it indicates that, if any remedy is pending, the State can resolve or rectify the situation. However, with this phrase, the Court is also providing an incentive for lodging petitions before the Commission even if domestic remedies have not been exhausted, because these can be exhausted later; thus making it possible for the domestic jurisdiction to co-exist with the inter-American jurisdiction in the same case.

In addition, the Judgment appears to disregard the fact that it is not for the State to exhaust the remedies, but rather, when appropriate, it corresponds to the State to decide the situation alleged in the remedies that the petitioner has filed in its jurisdiction and, if the petitioner has not filed any remedies or if they are pending, it is not incumbent on the State to provide any solution, because its international responsibility has not yet been engaged.

The fourth reason cited by the Judgment for not admitting the objection in question is as follows: “*[i]n addition, the Court considers that it would be contrary to the principle of procedural economy if petitions were not admitted based on the fact that, at the time of the initial presentation, domestic remedies had not been exhausted and if, when the admissibility of these remedies was analyzed, they have been exhausted. The European Court of Human Rights […] has ruled similarly in some cases, as has the International Court of Justice in relation to access to its jurisdiction.*”[[43]](#footnote-43)

With the reference to procedural economy, the Judgment provides more direct encouragement. Hence, it is necessary to reiterate the assertion made previously in this opinion that, if was not compulsory to have exhausted domestic remedies before lodging the petition, it would be permissible that, at least for a time, the same case could be examined simultaneously by the domestic jurisdiction and the international jurisdiction, and this could constitute a perverse incentive to lodge petitions before the Commission even when the said requirement has not been met, in the hope that it can be complied with before the Commission takes a decision on their admissibility. Evidently, that possibility was not envisaged or sought by the Convention.

Furthermore, regarding the references to precedents in the case of the European Court of Human Rights and the International Court of Justice made by the Judgment in support of this decision,[[44]](#footnote-44) it is sufficient to point out that neither the European Convention of Human Rights nor the Rules of Procedure of the International Court of Justice contain a provision such as that of Article 46(1)(a) of the Convention. In addition, both these bodies are courts rather than a non-judicial entity, as in the case of the Commission, before which compliance with the requirement in question must be substantiated. This means that, in the European case, the rule is that, before resorting to the European Court of Human Rights the remedies of the domestic jurisdiction must be exhausted. This is the general rule, admitting the exception only if this exhaustion is achieved shortly after the presentation of the case. And, in the case of the International Court of Justice, the cases referred to relate to recognition of that court’s jurisdiction and not to the filing of a preliminary objection concerning the prior exhaustion of domestic remedies. Consequently, the cases referred to do not represent precedents.

**CONCLUSION**

In short and as pointed out previously, as Article 46(1)(a) of the Convention clearly states and based on the congruent understanding of Articles 26(1) and 2, 28(h), 30(1),(2) and (3), 31 and 32 of the Commission’s Rules of Procedure, which interpret the said article of the Convention, it can be concluded, unequivocally, that compliance with the rule of prior exhaustion of domestic remedies must have occurred at the time the petition is lodged before the Commission, taking into consideration, also, any observations made by the State when responding to the relevant parts of the petition forwarded to it.

However, this was not considered to be so in the Judgment, which, to the contrary, indicates that the decision on the objection filed by the State based on the petitioner’s failure to comply with this rule was taken by verifying that this requirement had been met when the Commission took a decision on the petition’s admissibility. Hence, the ruling infringes the provisions of Article 46(1)(a) of the Convention and the said regulatory provisions.

The undersigned also dissents from the Judgment because, the “*reinforcing or complementing”* nature of the Convention that inspires the inter-American system of human rights as a whole is nullified, encouraging the lodging of cases before the system without the domestic remedies having been exhausted previously, which will result in such cases being examined simultaneously by the domestic jurisdiction and the inter-American jurisdiction.

Proceeding in this way not only makes the rule of prior exhaustion of domestic remedies meaningless and inapplicable, but is also contrary to the Court’s affirmation that it *“must safeguard the just balance between the protection of human rights, the ultimate purpose of the system, and the legal certainty and procedural balance that ensure the stability and reliability of the international protection.”*[[45]](#footnote-45)

Consequently, it is in this sense that the undersigned shares the assertion of the Court itself as regards “*the tolerance of ‘evident violations of the procedural rules established by the Convention itself* [and, it should be added, by the Rules of Procedure of the Court and of the Commission,*] would entail the loss of authority and credibility essential for the organs responsible for administering the system for the protection of human rights.*”[[46]](#footnote-46) And this is so, because it is precisely these rules that guarantee the impartiality and independence of the Court when imparting justice in cases relating to human rights.

Strict compliance with the rule of prior exhaustion of domestic remedies is not, therefore, a mere legal formality. Rather, respect for this rule strengthens and enhances the inter-American human rights system, because it guarantees the principles of legal certainty, procedural balance and complementarity that sustain the system, leaving no margin or, at least, the smallest margin possible, for the perception that the Court’s rulings do not respond, strictly and exclusively, to considerations of justice – beyond the explicable discrepancies that they may elicit, particularly from those who consider them adverse.

Considering that its case law is binding only for the State that has undertaken to comply with the “*judgment of the Court*” in the case to which it is a party,[[47]](#footnote-47) and that, for the other States Parties to the Convention it is only a subsidiary source of public international law, in other words, a “*subsidiary means for the determination of rules of law*,[[48]](#footnote-48) this dissenting opinion is evidently issued in the hope that it contributes to the reflection on the rule of prior exhaustion of domestic remedies and, thus, leads to the Court’s case law in this regard adopting the criteria described above in the near future.

Moreover, this opinion evidently takes into account, as also did another opinion,[[49]](#footnote-49) of the fact that one of the particular imperatives faced by a tribunal such as the Inter-American Court is that of acting with full awareness that, as an autonomous and independent entity, there is no superior authority that controls it, which means that, true to the important role assigned to it, it must strictly respect the limits of this role, and remain and evolve in the sphere inherent to a jurisdictional entity.

Without doubt, acting as indicated above is the best contribution that the Court can make to the development and consolidation of the inter-American system of human rights – a requirement *sine qua non* for the proper safeguard of those rights – an institutional framework within which it is incumbent on the Commission to promote respect for and to defend those rights,[[50]](#footnote-50) on the Court to interpret and apply the Convention in the cases that are submitted to it,[[51]](#footnote-51) and on the States to amend the Convention if they consider this necessary.[[52]](#footnote-52) The development and strength of this system is rooted in compliance by each of them with their specific roles.

Eduardo Vio Grossi

Judge

Pablo Saavedra Alessandri

Secretary

1. Article 66(2) of the American Convention on Human Rights (hereinafter “the Convention”): “*[i]f the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.”*

   Article 24(3) of the Statute of the Inter-American Court of Human Rights (hereinafter “the Court”): “*[t]he* *decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate.”*

   Article 65(2) of the Court’s Rules of Procedure: “*[a]ny judge who has taken part in the consideration of a case is entitled to append a separate concurring or dissenting opinion to the judgment. These opinions shall be submitted within a time frame to be established by the President so that the other judges may take cognizance thereof before notice of the judgment is served. The opinions shall only refer to the issues covered in the judgment.”* [↑](#footnote-ref-1)
2. Hereinafter “the Judgment,” [↑](#footnote-ref-2)
3. Hereinafter “the State.” [↑](#footnote-ref-3)
4. Hereinafter “the Commission.” [↑](#footnote-ref-4)
5. Hereinafter “the petition.” [↑](#footnote-ref-5)
6. *Cf.* para. 26 of the Judgment. [↑](#footnote-ref-6)
7. Dissenting opinion of Judge Eduardo Vio Grossi, *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, and Dissenting opinion of Judge Eduardo Vio Grossi, *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C No. 244. [↑](#footnote-ref-7)
8. Dissenting opinion of Judge Eduardo Vio Grossi, *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292. [↑](#footnote-ref-8)
9. Nor is it established in the Statute or the Rules of Procedure of the International Court of Justice. Hence, in that sphere, it is only of a jurisprudential nature. [↑](#footnote-ref-9)
10. “Admissibility criteria. 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.” [↑](#footnote-ref-10)
11. Article 41 of the Convention, first phrase. [↑](#footnote-ref-11)
12. Article 41(f) of the Convention. [↑](#footnote-ref-12)
13. Articles 51 and 61(1) of the Convention. [↑](#footnote-ref-13)
14. Para. 27 of the Judgment. [↑](#footnote-ref-14)
15. Art. 1(1) of the Convention: “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” [↑](#footnote-ref-15)
16. Art. 33 of the Convention: “[t]he following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: (a) the Inter-American Commission de Human rights, referred to as the Commission, and (b) the Inter-American Court of Human Rights, referred to as the Court”. [↑](#footnote-ref-16)
17. Art. 63(1) of the Convention: “[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”. [↑](#footnote-ref-17)
18. Hereinafter “the victim.” [↑](#footnote-ref-18)
19. Segundo paragraph of the Preamble of the Convention: “[r]ecognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States.”

    Perhaps it is Article 25(1) of the Convention that best expresses the subsidiary nature of the inter-American human rights system, when it indicates that: “[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.” [↑](#footnote-ref-19)
20. “The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency.” [↑](#footnote-ref-20)
21. “The American States reaffirm the following principles: […] b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law.” [↑](#footnote-ref-21)
22. The Inter-American Democratic Charter adopted at the twenty-eighth special session of the General Assembly of the Organization of American States by a resolution dated September 11, 2001. [↑](#footnote-ref-22)
23. Article 44 of the Convention: “[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”.

    Article 61(1) of the Convention: “[o]nly the States Parties and the Commission shall have the right to submit a case to the Court.” [↑](#footnote-ref-23)
24. Approved by the Commission at its 109th special session held from December 4 to 8, 2000, and amended at its 116th regular period of sessions held from October 7 to 25, 2002, at its 118th regular period of sessions held from October 6 to 24, 2003, at its 126th regular period of sessions held from October 16 to 27, 2006, and at its 132nd regular period of sessions held from July 17 to 25, 2008. [↑](#footnote-ref-24)
25. *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, para. 49. [↑](#footnote-ref-25)
26. *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, para. 49. [↑](#footnote-ref-26)
27. *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, para. 49. [↑](#footnote-ref-27)
28. *Diccionario de la Lengua Española*, *Real Academia Española*, 23rd edition, October 2014. [↑](#footnote-ref-28)
29. Article 31(1) of the Commission’s Rules of Procedure. [↑](#footnote-ref-29)
30. Article 29 of the Commission’s Rules of Procedure. [↑](#footnote-ref-30)
31. Idem. [↑](#footnote-ref-31)
32. Article 30(2) of the Commission’s Rules of Procedure. [↑](#footnote-ref-32)
33. Article 31(1) of the Commission’s Rules of Procedure. [↑](#footnote-ref-33)
34. *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015, para. 37. [↑](#footnote-ref-34)
35. *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015, para. 75. [↑](#footnote-ref-35)
36. See also paras. 18 and 22 of the Judgment. [↑](#footnote-ref-36)
37. *Cf.* para. 19 of the Judgment. [↑](#footnote-ref-37)
38. *Cf.* para. 23 of the Judgment. [↑](#footnote-ref-38)
39. Para. 25 of the Judgment. [↑](#footnote-ref-39)
40. Para. 26 of the Judgment. [↑](#footnote-ref-40)
41. Para. 26 of the Judgment. [↑](#footnote-ref-41)
42. Para. 27 of the Judgment. [↑](#footnote-ref-42)
43. Para. 28 of the Judgment. [↑](#footnote-ref-43)
44. Idem. [↑](#footnote-ref-44)
45. *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, para. 37. [↑](#footnote-ref-45)
46. *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C 244, para. 43. [↑](#footnote-ref-46)
47. Article 68 of the Convention: “1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State.” [↑](#footnote-ref-47)
48. Article 38 of the Statute of the International Court of Justice: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”

    Article 59 of this Statute: “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”. [↑](#footnote-ref-48)
49. Record of complaint submitted to the Court on August 17, 2011, by Judge Eduardo Vio Grossi and Dissenting opinion of this judge, *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234. [↑](#footnote-ref-49)
50. First phrase of Article 41 of the Convention: “[t]he main function of the Commission shall be to promote respect for and defense of human rights.” [↑](#footnote-ref-50)
51. Article 62(3) of the Convention: “[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.” [↑](#footnote-ref-51)
52. Article 76 of the Convention: “1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two‑thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.”

    Article 39 of the Vienna Convention on the Law of Treaties: “General rule regarding the amendment of treaties. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.” [↑](#footnote-ref-52)