CONCURRING OPINION OF JUDGE A. A. CANÇADO TRINDADE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

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

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