SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. I subscribe to the decision of the Court to reject the preliminary objection raised by the respondent Government, and to continue to hear the instant case on its merits. I feel obliged to add this Separate Opinion in order to leave on record the basis of my reasoning and my position on the central point of the preliminary objection presented by the Government of Peru, that is, the objection raised before the Court of non-exhaustion of domestic remedies in the circumstances of the present case of *Loayza Tamayo*.

2. May I, first of all, reiterate my understanding, expressed in my Dissenting Opinion in the Resolution of the Court of 18 May 1995 in the case of *Genie Lacayo* concerning Nicaragua, to the extent that, in the context of the international protection of human rights, the preliminary objection of non-exhaustion of domestic remedies is one of *pure admissibility* (and not of competence), and, as such, in the current system of the American Convention on Human Rights, should be resolved in a well-founded and *definitive* manner by the Inter-American Commission on Human Rights.

3. Contrary to what may be inferred, the extensive interpretation of the Court's own faculties, which it advanced in the *cases concerning Honduras*,[1] so as to comprise also issues related to preliminary objections of admissibility (based on a question of fact), does not always necessarily contribute to a more effective protection of the guaranteed human rights. In reality, such a conception leads to the undesirable reopening and reexamination of an objection of pure admissibility, which obstruct the procedure and thereby perpetuate a procedural imbalance which favors the respondent party. This is not a question of "restricting" the powers of the Court in particular, but rather of strengthening the system of protection *as a whole*, in its current stage of historical evolution, remedying such imbalance, and thus contributing to the full realization of the object and purpose of the American Convention on Human Rights.

4. The *preliminary objections*, if and when interposed, should be, by

1 Judgments of 1987 on Preliminary Objections, in the cases of *Velásquez Rodríguez*, paragraph 29; *Godínez Cruz*, paragraph 32; and *Fairén Garbi and Solís Corrales*, paragraph 34.

their very definition, *in limine litis*, at the stage of admissibility of the petition and before any and all consideration of the merits. This applies even more forcefully when dealing with a preliminary objection of pure admissibility, as is that of non-exhaustion of domestic remedies in the present context of protection. If this objection is not raised *in limine litis*, it is tacitly waived (as the Court has already admitted, for example, in the *Gangaram Panday* case, concerning Suriname),[2] and, more recently, in the *Castillo Páez* case, concerning Peru.[3]

5. Therefore, the respondent Government cannot subsequently raise that preliminary objection before the Court, as it failed to raise it, in a timely manner, for the decision of the Commission. If, as in the present case, the respondent Government waived that objection by not raising it *in limine litis* in the prior procedure before the Commission, it is inconceivable that the respondent Government may freely withdraw that waiver in the subsequent procedure before the Court (*estoppel/forclusion*).

6. The grounds of my position, which I reiterate here with conviction, are expounded in detail in my Separate Opinion in the Judgment of the Court of 4 December 1991, in the *Gangaram Panday* case (Preliminary Objections). There is no need to repeat them here *ipsis literis*, but rather to single out and develop some aspects which I deem especially relevant in relation to the present case of *Loayza-Tamayo*, just as I did in my Separate Opinion in the Judgment of the Court of 30 January 1996 in the *Castillo Páez* case (Preliminary Objections).

7. Just as the Commission's decisions on the inadmissibility of petitions or communications are considered definitive and non-appealable, its decisions of admissibility should be treated likewise, also considered definitive and unsusceptible to reopening by the respondent Government in the subsequent procedure before the Court. Why is it that the respondent Government is allowed to attempt to reopen a decision on admissibility by the Commission before the Court and an individual complainant

2 Judgment of 1991 on Preliminary Objections, *Gangaram Panday* case, paragraphs 39-40; see also the Judgment on Preliminary Objections, *Neira Alegría et al.* case concerning Peru, of the same year, paragraphs 30-31; and the judgments cited *supra* (Note 1) in the *three cases concerning Honduras*, paragraphs 88-90 (*Velásquez Rodríguez*), 90-92 (*Godínez Cruz*), and 87-89 (*Fairén Garbi and Solís Corrales*); and earlier, Decision of the Court of 1981 in the matter of *Viviana Gallardo et al.*, paragraph 26.

3 The 1996 Judgment on the Preliminary Objections in the *Castillo Páez* case, paras. 41-45.

does not have the same faculty to question a decision on inadmissibility of the Commission before the Court?

8. Such reopening of review by the Court of a decision on admissibility by the Commission creates an imbalance between the parties, in favor of the respondent governments (all the more so since individuals currently do not even have *locus standi* before the Court). This being so, the decisions of inadmissibility by the Commission should also be allowed to be reopened by the alleged victims and submitted to the Court. Either all decisions -of admissibility or not- of the Commission are allowed to be reopened before the Court, or they are all kept exclusive to the Commission.

9. This understanding is the one that is best suited to the basic notion of *collective guarantee* underlying the American Convention on Human Rights, as well as all treaties of international protection of human rights. Instead of reviewing the decisions on admissibility by the Commission, the Court should be able to concentrate more on the examination of questions of substance in order to fulfill with more speed and security its role of interpreting and applying of the American Convention, determining the occurrence or not of violations of the Convention and its juridical consequences. The Court is not, in my view, a tribunal of appeals of decisions of the Commission on admissibility.

10. The alleged reopening of questions of pure admissibility before the Court surrounds the process with uncertainties, prejudicial to both parties. It further generates the possibility of divergent or conflicting decisions on the matter by the Commission and the Court, thus fragmenting the unity inherent in a decision of admissibility. This in no way contributes to the perfecting of the system of guarantees of the American Convention. The principal concern of both the Court and the Commission should lie, not in the zealous internal distribution of attributions and competences in the jurisdictional mechanism of the American Convention, but rather in the adequate coordination between the two organs of international supervision so as to assure the most effective protection possible of the guaranteed human rights.

11. In the instant case of *Loayza Tamayo*, the Commission had pointed out the prior exhaustion of domestic remedies and declared the petition or communication admissible (case No. 11.154, *Report 20/94*, of 26 Sep-

tember 1994, pp. 14-16 and 31). As the dossier of the case reveals and the public hearing before the Court of 23 September 1995 confirms, the question was only brought up by the Government of Peru in an advanced stage of the proceedings before the Commission[4] in the period of the consideration of the preparation of the Commission's Report on the case (above mentioned document), beyond the time limit (and not *in limine litis*), and, even so, not as a preliminary objection of admissibility proper but rather as *de facto* information on proceedings pending in the domestic jurisdiction.[5]

12. The act of pointing out, as a fact and in an extemporaneous manner, the existence of judicial proceedings pending in the domestic courts is not the same as expressly objecting to, on the basis of this fact, the admissibility and examination of the case by the Commission on the international level. In its brief of 15 March 1995 on the preliminary objection presented to the Court, the Government of Peru expressly states that it had not formally interposed to the Commission, the objection, as such, of the non-exhaustion of domestic remedies.[6] Moreover, as the present judgment rightly sets forth, there is no way to prolong indefinitely in time the opportunity granted to the respondent Government to raise a preliminary objection of non-exhaustion of domestic remedies,[7] which exists primarily for its benefit at the stage of admissibility of the petition.

13. The decision of the Commission regarding the admissibility should be considered definitive, impeding the Government to reopen it, and the Court to review it, since, in the present case, the preliminary objection in question was not even raised by the respondent Government in due time (*in limine litis*) for the decision of the Commission. This basis alone is sufficient to reject the preliminary objection interposed by the respondent Government. Given the circumstances of the present case of *Loayza Tamayo*, the objection of the alleged non-exhaustion of domestic reme-

4 Hearing of 16 September 1994 before the Commission.

5 The Government only raised the preliminary objection as such before the Commission in its brief of 23 November 1994 (Report prepared by a Working Group), when the Commission's Report containing its decision on the case had already been adopted.

6 Page 12 of the Government of Peru's brief; *cf.* also the briefs of the Commission of 24 and 25 May 1995.

7 This objection could hardly be interposed before the Court under Article 31(1) of its Rules of Procedure: the scope of this provision is limited, as it does not cover the issue under examination, and is restricted to purely procedural aspects.

dies should be rejected on the basis of its extemporaneous nature and the tacit waiver before the Commission, and the *estoppel* (*forclusion*) before the Court.[8]

14. The *rationale* of my position, such as I have manifested it in the work of the Court,[9] ultimately lays in the aim of assuring the necessary balance or procedural equality of the parties before the Court -that is, between the petitioning plaintiffs and the respondent governments- essential to all jurisdictional systems of international protection of human rights. Without the *locus standi in judicio* of both parties[10] any system of protection finds itself irremediably mitigated, as it is not reasonable to conceive rights without the procedural capacity to vindicate them directly.

15. In the universe of the international law of human rights, it is the individual who alleges violations of his human rights, who alleges having suffered damages, who has to comply with the requirement of prior exhaustion of domestic remedies, who actively participates in an eventual friendly settlement, and who is the beneficiary (he or his relatives) of eventual reparations and indemnities. In the examination of the questions

8 Under the European Convention on Human Rights, according to the *jurisprudence constante* of the European Court of Human Rights, the respondent Government who failed to raise an objection of non-exhaustion of domestic remedies previously before the Commission, is prevented from raising it before the Court (*estoppel*). The European Court has ruled to this effect, *inter alia*, in the cases of *Artico* (1980), *Corigliano* (1982), *Foti* (1982) and *Ciulla* (1989), concerning Italy; *Granger* (1990), concerning the United Kingdom; *Bozano* (1986), concerning France; *De Jong, Blajet and Van der Brink* (1984), concerning Holland; and *Bricmont* (1989), concerning Belgium. In its Judgment of 22 May 1984, in the *Van der Sluijs, Zuiderveld and Klappe* case, concerning Holland, the European Court went even further. In that case, the respondent Government had initially raised an objection of non-exhaustion of domestic remedies before the European Commission, but failed to mention it in its "preliminary" arguments (hearing of November 1983) before the European Court. The delegate of the Commission deduced, in his reply, that the respondent Government appeared no longer to insist upon that objection. Since the Government did not question the Commission's analysis, the Court took formal notice of the Government's "withdrawal" of the objection of non-exhaustion, thus putting an end to the question (Judgment *cit. supra*, paragraphs 38-39 and 52).

9 E.g., in the public hearing of the Court of 17 January 1996, in the *El Amparo* case, concerning Venezuela.

10 It cannot go unnoticed that the question of *locus standi in judicio* of individuals before the Court (in cases already submitted to it by the Commission) is distinct from the right to submit a concrete case for decision by the Court, which Article 61(1) of the American Convention currently reserves only to the Commission and the States Parties to the Convention.

of admissibility before the Commission, the individual complainants and the respondent Governments are *parties*.[11] The reopening of such questions before the Court, without the presence of one of the parties (the petitioning plaintiffs), militates against the principle of procedural equality (*equality of arms/égalité des armes*).

16. In our regional system of protection,[12] the spectre of the persistent denial of the procedural capacity of the individual petitioner before the Inter-American Court, a true *capitis diminutio*, arose from dogmatic considerations, belonging to another historical era, which tended to avoid his direct access to the international judicial organ. Such considerations, in my view, in our time lack support or meaning, even more so when referring to an international tribunal *of human rights*.

17. In the inter-American system of protection, *de lege ferenda* one gradually ought to overcome the paternalistic and anachronistic conception of the total intermediation of the Commission between the individual (the true complaining party) and the Court, according to clear and precise criteria and rules, previously and carefully defined. In the present domain of protection, every international jurist, faithful to the historical origins of his discipline, will know to contribute to the rescue of the position of the human being as a subject of international law (*droit des gens*), endowed with international legal personality and full capacity.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

11 Regarding the admissibility stage of a petition or communication before the Commission, the American Convention refers to "*the party alleging violation of his rights*" [Articles 46(1)(b) and 46(2)(b)], to the "*petitioner*" himself and the State [Article 47(c)], and to the "*parties concerned*" before the Commission [Article 48(1)(f)] having clearly in mind the individual complainants and the respondent Governments. *Cf.* also, in the same sense, Articles 32(a) and (c); 33; 34(4) and (7); 36; 37(2)(b) and (3); and 43(1) and (2) of the Rules of Procedure of the Commission.

12 In the framework of this latter, to the Inter-American Commission, in its turn, is reserved the role of defender of the "public interests" of the system, as guardian of the correct application of the American Convention. If to this role one continues to add the additional function of defender of the interests of the alleged victims, as an "intermediary" between these latter and the Court, an undesirable ambiguity which should be avoided.