CORTE INTERAMERICANA DE DERECHOS HUMANOS
COUR INTERAMERICAINE DES DROITS DE L'HOMME
CÔRTE INTERAMERICANA DE DIREITOS HUMANOS
INTER-AMERICAN COURT OF HUMAN RIGHTS

El Presidente de la Corte

San José, Costa Rica

(Translation)

November 15, 1989

Your Excellency:

I am honored to address Your Excellency with the purpose of expressing my concern, and that of the other judges who are members of the Permanent Commission to the Court, as to the fact that the Annual Report presented by the Inter-American Court of Human Rights for the year 1989 (AG/doc.2401/89), was not reproduced in its entirety for distribution at the Nineteenth Regular Session of the General Assembly.

Article 65 of the American Convention on Human Rights clearly stipulates that the Court shall submit a report on its endeavors at each session of the General Assembly. This report rightfully belongs to the Court and, as such, we consider that the General Secretariat is not at liberty to shorten it, as it has done this year, curtailing the information to the delegates.

We would greatly appreciate it, Your Excellency, if you would see to it that this unfortunate incident never takes place again in future reports by the Court.

Accept, Excellency, the renewed assurances of my highest and most distinguished consideration.

Héctor Gros Espiell
President

Mister Ambassador
Joao Clemente Baena Soares
Secretary General
Organization of the American States
Washington, D. C.

ORGANIZACION DE LOS ESTADOS AMERICANOS
ORGANIZAÇÃO DOS ESTADOS AMERICANOS
ORGANISATION DES ETATS AMERICAINS
ORGANIZATION OF AMERICAN STATES

17th Street and Constitution Avenue, N.W. Washington, D.C. 20006

(Translation)

November 18, 1989

Mister President:

I am honored to acknowledge receipt of your letter dated November 15, 1989, conveying your concern about the fact that the Annual Report by the Inter-American Court of Human Rights (AG/doc.2401/89) was not reproduced in its entirety for distribution at the XIX Regular Session of the General Assembly.

As you well know, all the reports submitted to the General Assembly must conform to the guidelines established by the General Assembly itself in its Resolution AG/RES.331 (VIII-O/78) concerning the preparation of reports by the Organization's different organs, organisms and entitles, a copy of which I am enclosing herewith.

Without the intention of restricting the information to the delegations attending the General Assembly, in the case of the Court's Annual Report, the Secretariat chose to transcribe only its substantial part, and exclude the reproduction of the annexes because of their lenght.

In this respect, a precautionary note appeared on the title of the document, indicating that such annexes were to be made available at the Secretariat of the Permanent Council, for consultation by any delegation. I enclose a copy of the letter sent by the Assistant Secretary General on May 26th this year, concerning the presentation of reports to the General Assembly.

Judge
Héctor Gros Espiell
President
Inter-American Court of Human Rights
San José, Costa Rica

Finally, the well-known financial difficulties which the Organization is undergoing, reflected in a reduction of approximately 25% of the resources allotted to the General Assembly for this period, made it prudent to adopt the necessary austerity measures in order to adjust to the budgetary reality.

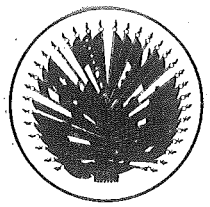
I fully concur with you that the Annual Report by the Inter-American Court of Human Rights is of utmost importance to the Member States. I am certain that in the future we shall jointly encounter a viable solution whereby the General Secretariat can distribute it in a timely fashion, with all of its corresponding annexes.

I take this opportunity to express to you my deepest respect.

Joao Clemente Baena Soares
Secretary General

Encls.

ORGANIZATION OF AMERICAN STATES
INTER-AMERICAN COURT OF HUMAN RIGHTS



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ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1989

GENERAL SECRETARIAT
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006
1989

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I. ORIGIN, STRUCTURE AND COMPETENCE OF THE COURT

A. Creation of the Court

The Inter-American Court of Human Rights was brought into being by the entry into force of the American Convention on Human Rights (Pact of San José, Costa Rica), which occurred on July 18, 1978 upon the deposit of the eleventh instrument of ratification by a member state of the Organization. The Convention had been drafted at the Specialized Inter-American Conference on Human Rights, which took place November 7-22, 1969 in San José, Costa Rica.

The two organs provided for under Article 33 of the Pact are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. They have competence on matters relating to the fulfillment of the commitments made by the Convention.

B. Organization of the Court

In accordance with the terms of its Statute, the Inter-American Court of Human Rights is an autonomous judicial institution which has its seat in San José, Costa Rica and whose purpose is the application and interpretation of the American Convention on Human Rights.

The Court consists of seven judges, nationals of the member states of the Organization of American States, who act in an individual capacity and are elected from among "jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates." (Article 52 of the Convention).

The judges serve for a term of six years. They are elected by an absolute majority vote of the States Parties to the Convention. The election is by secret ballot in a General Assembly of the Organization.

Upon entry into force of the Convention and pursuant to its Article 81, the Secretary General of the Organization requested the States Parties to the Convention to nominate candidates for the position of judge of the Court. In accordance with Article 53 of the Convention, each State Party may propose up to three candidates.

The judicial term runs from January 1 of the year in which a judge assumes office until December 31 of the year in which he completes his term. However, judges continue in office until the installation of their successors or to hear cases that are still pending (Article 5 of the Statute).

Election of judges takes place, insofar as possible, at the OAS General Assembly immediately prior to the expiration of the term of the judges. In the case of vacancies on the Court caused by death, permanent disability, resignation or dismissal, an election is held at the next General Assembly (Article 6 of the Statute).

In order to preserve a quorum of the Court, interim judges may be appointed by the States Parties (Article 6(3) of the Statute).

In the event that one of the judges called upon to hear a case is the national of one of the States Parties to the case, the other States Parties to the case may appoint an **ad hoc** judge. If none of the States Parties to a case is represented on the Court, each may appoint an **ad hoc** judge (Article 10 of the Statute).

The judges are at the disposal of the Court and, pursuant to the Rules of Procedure, meet in two regular sessions a year and in special sessions when convoked by the President or at the request of a majority of the judges. Although the judges are not required to reside at the seat of the Court, the President renders his services on a permanent basis (Article 16 of the Statute and Articles 11 and 12 of the Rules of Procedure).

The President and Vice-President are elected by the judges for a period of two years and they may be reelected (Article 12 of the Statute).

There is a Permanent Commission composed of the President, Vice-President and a judge named by the President. The Court may appoint other commissions for special matters (Article 6 of the Rules of Procedure).

The Secretariat of the Court functions under the direction of the Secretary, who is elected by the Court.

C. Composition of the Court

As of the date of this report, the Court was composed of the following judges, in order of precedence:

Héctor Gros-Espiell (Uruguay), President
Héctor Fix-Zamudio (México), Vice-President
Thomas Buergenthal (United States)
Rafael Nieto-Navia (Colombia)
Policarpo Callejas-Bonilla (Honduras)
Orlando Tovar-Tamayo (Venezuela)
Sonia Picado-Sotela (Costa Rica)

The interim Secretary of the Court is Lic. Manuel E. Ventura-Robles.

D. Competence of the Court

The American Convention confers two distinct functions on the Inter-American Court of Human Rights. One involves the power to adjudicate disputes relating to charges that a State Party has violated the Convention. In performing this function, the Court exercises its so-called contentious jurisdiction. In addition, the Court also has power to interpret the Convention and certain other human rights treaties in proceedings in which it is not called upon to adjudicate a specific dispute. This is the Court's advisory jurisdiction. It may also be consulted, within their sphere of competence, by the organs enumerated on Chapter X of the Charter of the Organization of the American States, ammended by the Protocol of Buenos Aires.

1. The Court's contentious jurisdiction

The contentious jurisdiction of the Court is spelled out in Article 62 of the Convention, which reads as follows:

> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, **ipso facto**, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
>
> 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
>
> 3. The 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 special agreement.

As these provisions indicate, a State Party does not subject itself to the contentious jurisdiction of the Court by ratifying the Convention. Instead, the Court acquires that jurisdiction with regard to the state only when it has filed the special declaration referred to in paragraphs 1 and 2 of Article 62 or concluded the special agreement mentioned in paragraph 3. The special declaration may be made when a state ratifies the Convention or at any time thereafter; it may also be made for a specific case or a series of cases. But since the states parties are free to accept the Court's jurisdiction at any time in a specific case or in general, a case need not be rejected **ipso facto** when acceptance has not previously been granted, as it is possible to invite the state concerned to do so for that case.

A case may also be referred to the Court by special agreement. In speaking of the special agreement, Article 62(3) does not indicate who may conclude such an agreement. This is an issue that will have to be resolved by the Court.

In providing that "only the States Parties and the Commission shall have the right to submit a case to the Court," Article 61(1) does not give private parties standing to institute proceedings. Thus, an individual who has filed a complaint with the Commission cannot bring that case to the Court. This is not to say that a case arising out of an individual complaint cannot get to the Court; it may be referred to it by the Commission or a State Party, but not by the individual complainant. The Convention, in Article 63(1), contains the following stipulation relating to the judgments that the Court may render:

> If 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.

This provision indicates that the Court must decide whether there has been a breach of the Convention and, if so, what rights the injured party should be accorded. Moreover, the Court may also determine the steps that should be taken to remedy the breach and the amount of damages to which the injured party is entitled.

Paragraph 2 of Article 68 of the Convention exclusively concerns compensatory damages. It provides that the "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." In addition to regular judgments, the Court also has the power to grant what

might be described as temporary injunctions. The power is spelled out in Article 63(2) of the Convention, which reads as follows:

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

This extraordinary remedy is available in two distinct circumstances: the first consists of cases pending before the Court and the second involves complaints being dealt with by the Commission that have not yet been referred to the Court for adjudication.

In the first category of cases, the request for the temporary injunction can be made at any time during the proceedings before the Court, including simultaneously with the filing of the case. Of course, before the requested relief may be granted, the Court must determine if it has the necessary jurisdiction.

The judgment rendered by the Court in any dispute submitted to it is "final and not subject to appeal." Moreover, the "States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." (Articles 67 and 68 of the Convention).

Enforcements of judgments of the Court are ultimately for the General Assembly of the Organization. The Court submits a report on its work to each regular session of the Assembly, specifying the cases in which a state has not complied with the judgments and making any pertinent recommendations (Article 65 of the Convention).

2. The Court's advisory jurisdiction

The jurisdiction of the Inter-American Court of Human Rights to render advisory opinions is set forth in Article 64 of the Convention, which reads as follows:

> 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
>
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compati-

bility of any of its domestic laws with the aforesaid international instruments.

Standing to request an advisory opinion from the Court is not limited to the States Parties to the Convention; instead, any OAS Member State may ask for it as well as all OAS organs, including the Inter-American Commission on Human Rights, specialized bodies such as the Inter-American Commission of Women and the Inter-American Institute of Children, within their fields of competence. Secondly, the advisory opinion need not deal only with the interpretation of the Convention; it may also be founded on a request for an interpretation of any other treaty "concerning the protection of human rights in the American states."

As to the meaning and scope of this phrase, the Court, in response to a request of the Government of Perú, was of the opinion:

Firstly

By unanimous vote

that the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have a right to become parties thereto.

Secondly

By unanimous vote

that, for specific reasons explained in a duly motivated decision, the Court may decline to comply with a request for an advisory opinion if it concludes that, due to the special circumstances of a particular case, to grant the request would exceed the limits of the Court's advisory jurisdiction for the following reasons, inter alia: because the issues raised deal mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system; or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being.

(I/A Court H.R., **"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)**, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1).

The Court's advisory jurisdiction power enhances the Organization's capacity to deal with complex legal issues arising under the Convention, enabling the organs of the OAS, when dealing with disputes involving human rights issues, to consult the Court.

Finally, Article 64(2) permits OAS Member States to seek an opinion from the Court on the extent to which their domestic laws are compatible with the Convention or with any other "American" human rights treaty.

Under the provision, this jurisdiction also extends, in certain circumstances, to pending legislation (see I/A Court H.R., **Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica**, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4). Resort to this provision may contribute to the uniform application of the Convention by national tribunals.

3. Acceptance of the jurisdiction of the Court

A total of ten States Parties have recognized the jurisdiction of the Court. They are Costa Rica, Perú, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala and Suriname.

It should be pointed out that, according to the provisions of Article 62, any State Party to the Convention may accept the jurisdiction of the Court in a specific case without recognizing it for all cases. Cases may also be submitted to the Court by special agreement between States Parties to the Convention.

A table showing the status of ratifications of the American Convention may be found at the end of this report (Appendix VII).

E. Budget

The presentation of the budget of the Court is governed by Article 72 of the American Convention which states that "the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it." Pursuant to Article 26 of its Statute, the Court administers its own budget.

The General Assembly of the Organization, at its Seventeenth Regular Session, approved a budget for the Court of $309.600 for 1988 and $312.300 for the following year.

F. Relations with other organs of the system and with regional and world-wide agencies of the same kind

The Court has close institutional ties with its sister organ of the American Convention, the Inter-American Commission on Human Rights. These ties have been solidified by a series of meetings between members of the two bodies. The Court also maintains cooperative relations with other OAS bodies working in the area of human rights, such as the Inter-American Commission of Women and the Inter-American Juridical Committee. It also maintains relations with the European Court of Human Rights, which was established by the Council of Europe and exercises functions within the framework of that organization comparable to those of the Inter-American Court, and with the pertinent bodies of the United Nations such as the Commission and Committee on Human Rights and the Office of the High Commissioner for Refugees.

II. ACTIVITIES OF THE COURT

A. Eighteenth Regular Session of the General Assembly of the OAS

The Court was represented in the Eighteenth Regular Session of the General Assembly of the Organization, celebrated on November 14 to 19, 1988, in San Salvador, El Salvador, by its Vice-President Judge Héctor Gros-Espiell. The President of the Court, Judge Rafael Nieto-Navia, was not able to attend because of health reasons.

Vice-President Gros-Espiell, in his report concerning the activities of the Court during 1988, to the Commission on Juridical and Political Matters of the Assembly, pointed out the important fact that the Court dictated the first judgment on the merits of a contentious case, on July 29, 1988, "the Velásquez Rodríguez" case, and that the concerned Government in an examplary action "accepted the decision which, although it was the only possible juridical attitude according to the Convention, demonstrated, in this specific case, the Government's recognized compromise to comply with an international sentence." Judge Gros-Espiell also pointed out that the Tribunal adopted for the first time in 1988, in two occasions, the provisional measures to which Article 63(2) of the Convention refers to in the cases "Velásquez Rodríguez," "Godínez Cruz" and "Fairén Garbi and Solís Corrales" and that it was complying in the first of them, with process of fixing the amount and the payment of indemnization according to the dispositions of the Court.

During his presentation a summarized exposition was made of the request for an advisory opinion (OC-10) formulated to the Court by the Government of Colombia and reference was made to the then Draft Additional Protocol to the

American Convention on Human Rights in the Area of Economics, Social and Cultural Rights, to the Draft Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty and to the Draft of the Inter-American Convention on the Forced Dissapearance of Persons.

The Additional Protocol to the American Convention on Human Rights in the Area of Economics, Social and Cultural Rights "Protocol of San Salvador," was suscribed during this Assembly by twelve member states of the Organization (the Present Status of Ratification can be found in Appendix VII of this Report).

During the General Assembly, the States Parties on the Convention re-elected as Judge for a six year term the President of the Court, Judge Rafael Nieto-Navia (Colombia), and also elected Orlando Tovar-Tamayo (Venezuela) and Sonia Picado-Sotela (Costa Rica) for a six year period. The latter two would replace Pedro Nikken (Venezuela) and Rodolfo E. Piza-Escalante (Costa Rica). They also elected Policarpo Callejas-Bonilla (Honduras) to finish Jorge R. Hernández-Alcerro's mandate (Honduras), who resigned because he was named Honduras' Ambassador to the United States of America, designation incompatible with that of Judge of the Court, according to Article 18 of the Court's Statute. Judge Callejas' term will finish at the end of 1991.

In its Resolution on the Annual Report of the Court AG/RES.949 (XVIII-O/88), the Assembly resolved:

1. To express its satisfaction and the recognition by the Organization of American States of the high juridical quality of the work carried out by the Inter-American Court of Human Rights, as reflected in its Annual Report.

2. To call upon the member states of the OAS that have not yet done so to ratify or accede to the American Convention on Human Rights.

3. To express the hope that all the states parties to the Convention will recognize the compulsory jurisdiction of the Court.

4. To express its satisfaction at the fact that the report of the Court indicates that it has attained the full exercise of its jurisdictional and advisory powers, and to further express the hope that the necessary initiatives will continue to be adopted in order to implement all the means and procedures for the protection of human rights embodied in the Convention and in other juridical instruments of the inter-American system.

5. To continue to extend fullest support, as it has done thus far, to the activities of the Inter-American Court of Human Rights.

B. Seventh Special Session of the Court

During this Special Session of the Court, from January 16 to 20, 1989, at the seat of the Tribunal in San José, Costa Rica, the Court met to emit judgment on the "Godínez Cruz" case.

Since Article 54(3) of the American Convention disposes that "The judges shall continue in office until the expiration of their term. However, they shall continue to serve with regard to cases that they have begun to hear and that are still pending, for which purposes they shall not be replaced by the newly elected judges," the composition of the Court for the consideration of the aforementioned case was: Rafael Nieto-Navia (Colombia), President; Rodolfo E. Piza-Escalante (Costa Rica); Thomas Buergenthal (United States); Pedro Nikken (Venezuela); Héctor Fix-Zamudio (México) and Rigoberto Espinal-Irías (Honduras), judge **ad hoc**. The Vice-President of the Court, Judge Héctor Gros-Espiell (Uruguay), was absent from the sessions due to **force majeure**.

The "Godínez Cruz" case was resolved on January 20, 1989. The Court delivered judgment, on that same date, declaring that Honduras had violated, in the case of Saúl Godínez Cruz, Articles 7 (Right to Personal Liberty), 5 (Right to Humane Treatment), and 4 (Right to Life) of the American Convention, in conjunction with Article 1(1) thereof, and decided that Honduras is required to pay fair compensation to the next of kin of the victim (the complete text of the Judgment of January 20, 1989 on the "Godínez Cruz" Case can be found under Appendix I of this Report).

C. Twentieth Regular Session of the Court

The Twentieth Regular Session of the Court was held at its seat from January 23 to 27, 1989. Present were Rafael Nieto-Navia (Colombia), President; Héctor Fix-Zamudio (México); Policarpo Callejas-Bonilla (Honduras); Orlando Tovar-Tamayo (Venezuela) and Sonia Picado-Sotela (Costa Rica). Due to force **majeure** Vice-President Héctor Gros-Espiell (Uruguay), and Judge Thomas Buergenthal (United States) were unable to participate in the session.

During this session Judges Callejas, Tovar and Picado were sworn in. The Tribunal was primarly dedicated to the consideration of the request for advisory opinion (OC-10) submitted by the Colombian Government, in order that the Court may determine the normative **status** of the American Declaration on the Rights and Duties of Man in the frame of the inter-American system for the protection of the human rights, and also to resolve if Article 64 of the American Convention on Human Rights, which refers to the interpretation of "treaties," authorizes the Court to render advisory opinions concerning the before mentioned Declaration.

The Executive Director of the Inter-American Institute of Human Rights reported on the progress of the activities of the institution. The Institute

was created by an agreement between the Court and the Government of Costa Rica of October 15, 1980.

The Court received a request for advisory opinion, by note of January 31, 1989, formulated by the Inter-American Commission on Human Rights. The advisory opinion was put forth by the Commission to have the Court interpret Article 46(1)(a) and Article 46(2) of the American Convention in order to determine how the requirement for the exhaustion of internal legal remedies applies to an indigent, who due to economic circumstances, is not capable of using the legal remedies of his country; or to an individual who is unable to retain legal counsel due to a general fear in the legal community, and thus is barred from access to his country's judicial system (the complete text of the request for advisory opinion can be found under Appendix II of this Report).

D. Eighth Special Session of the Court

The Tribunal celebrated at its seat in San José, Costa Rica, from March 12 to 17, 1989, its Eighth Special Session. This session was held in order to render judgment on the "Fairén Garbi and Solís Corrales" case.

In accordance with Article 54(3) of the American Convention, the following judges were present: Rafael Nieto-Navia (Colombia), President; Héctor Gros Espiell (Uruguay), Vice-President; Rodolfo E. Piza-Escalante (Costa Rica); Thomas Buergenthal (United States); Pedro Nikken (Venezuela); Héctor Fix-Zamudio (México) and Rigoberto Espinal-Irías (Honduras), judge **ad hoc**.

On March 15, 1989, the Court rendered judgment on the "Fairén Garbi and Solís Corrales" case. The Tribunal declared "that in the instant case it has not been proven that Honduras is responsible for the disappearances of Francisco Fairén Garbi and Yolanda Solís Corrales" (the complete text of the March 15, 1989 Judgment can be found in Appendix III of this Report).

The Court during this Eighth Special Session, composed in the aforementioned manner, held a public hearing on March 15, 1989, with the assistance of the Honduran Agent, the Executive Secretary of the Inter-American Commission on Human Rights, in his capacity as Delegate and one of the lawyers of the victim's family as adviser of the Commission, in order to hear different criteria concerning the indemnization which the Government of Honduras must pay to the family of the victims in the "Velásquez Rodríguez" and "Godínez Cruz" cases.

Charles D. Moyer, Esquire, voluntarely retired from the Organization of American States on March 31, 1989. By resolution of the President of the Court of March 15, 1989, Lic. Manuel E. Ventura-Robles, Deputy Secretary, assumed the position of interim Secretary of the Court as of April 1, 1989.

E. Twenty-First Regular Session of the Court

From July 10 to 14, 1989, the Court held at its seat in San José, Costa Rica, its Twenty First Regular Session. All the judges were present, and the Tribunal proceeded to elect its President and Vice-President for a two year period, honor which was bestowed upon Dr. Héctor Gros-Espiell (Uruguay) and Héctor Fix-Zamudio (México), President and Vice-President, respectively (the actual composition of the Court can be found on page No. 3).

During this period of sessions a public hearing was held on Wednesday July 12, 1989, relative to the request for advisory opinion (OC-11), submitted by the Inter-American Commission on Human Rights. Present during this public hearing were Ambassador Oliver Jackmann, Delegate and President of the Inter-American Commission and Lic. Carlos Vargas Pizarro, Agent of the Costa Rican Government and Director of Juridical Affairs of the Ministry of Foreign Relations of Costa Rica.

The Tribunal considered and rendered an opinion on the Advisory Opinion OC-10/89 on July 14, 1989, submitted by the Ilustrious Government of Colombia concerning the interpretation of the American Declaration on the Rights and Duties of Man within the frame of Article 64 of the American Convention on Human Rights. Specifically the Court is of the opinion

> That Article 64(1) of the American Convention authorizes the Court, at the request of the Member States of the OAS or any duly qualified OAS organ, to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of human rights in the American States.

(The complete text of this Advisory Opinion can be found on Appendix IV of this Report).

As it has been the custom during the regular sessions of the Court, the Executive Director of the Inter-American Institute of Human Rights, gave a detailed report on the activities of the institution in the fields of education, investigation, and the promotion of human rights.

F. Ninth Special Session of the Court

During this Ninth Special Session, the Court considered the compensatory damages to be paid by Honduras to the families of the victims in the "Velásquez Rodríguez" and "Godínez Cruz" cases. As it has been mentioned before the composition of the Court for these two cases was as follows: Héctor Gros Espiell (Uruguay), President; Héctor Fix-Zamudio (México), Vice-President; Rodolfo E. Piza-Escalante (Costa Rica); Rafael Nieto-Navia

(Colombia); Pedro Nikken (Venezuela) and Rigoberto Espinal-Irías (Honduras), judge ad hoc. Judge Thomas Buergenthal (United States) was unable to participate in the elaboration and signature of the sentences due to health reasons.

The Court fixed compensatory damages in the amount of seven hundred fifty thousand lempiras to be paid by Honduras to the family of Angel Manfredo Velásquez Rodríguez and in the amount of six hundred fifty thousand lempiras to the family of Saúl Godínez Cruz (the complete text of the compensatory damages judgment of July 21, 1989, on the cases of "Velásquez Rodríguez" and "Godínez Cruz" can be found in Appendix V and Appendix VI, respectively, of this Report).

APPENDIX I

INTER-AMERICAN COURT OF HUMAN RIGHTS

GODINEZ CRUZ CASE

JUDGMENT OF JANUARY 20, 1989

In the Godínez Cruz case,

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

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

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

delivers the following judgment pursuant to Article 44(1) of its Rules of Procedure (hereinafter "the Rules of Procedure") in the instant case submitted by the Inter-American Commission on Human Rights against the State of Honduras.

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted the instant case to the Inter-American Court of Human Rights (hereinafter the "Court") on April 24, 1986. It originated in a petition (No. 8097) against the State of Honduras (hereinafter "Honduras" or "the Government"), which the Secretariat of the Commission received on October 9, 1982.

2. In submitting the case, the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention in the case of Saúl Godínez Cruz. In addition, the Commission asked the Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties."

3. The petition filed with the Commission alleges that Saúl Godínez Cruz, a schoolteacher, disappeared on July 22, 1982 after leaving his house by motorcycle at 6:20 a.m. and while in route to his job at the Julia Zelaya Pre-Vocational Institute in Monjarás de Choluteca. The petition states that an eyewitness saw a man in a military uniform and two persons in civilian clothes arrest a person who looked like Godínez. They placed him and his motorcycle in a double-cabin vehicle without license plates. According to some neighbors, his house had been under surveillance, presumably by government agents, for some days before his disappearance.

4. After transmitting the relevant parts of the petition to the Government, the Commission, on various occasions, requested information on the matter. Since the Commission received no reply, it applied Article 42 (formerly 39) of its Regulations and presumed "as true the allegations contained in the communication of October 9, 1982 concerning the detention and possible disappearance of Saúl Godínez in the Republic of Honduras" and pointed out to the Government that "such acts are most serious violations of the right to life (Art. 4) and the right of personal liberty (Art. 7) of the American Convention" (Resolution 32/83 of October 4, 1983).

5. On December 1, 1983, the Government requested reconsideration of Resolution 32/83 on the grounds that a writ of habeas corpus (exhibición personal), brought on behalf of Saúl Godínez Gómez on August 17, 1982, had been denied because the applicant did not complete the procedure in a timely fashion and that another writ, brought on behalf of Saúl Godínez Cruz and others on July 4, 1983, was still pending on the date that the Government requested the reconsideration. The Government also included information received from security officials on the impossibility of determining the whereabouts of Saúl Godínez Cruz.

6. According to the documents presented to the Court by the Commission, the petitioner, on February 15, 1984, admitted that the writ of habeas corpus

filed on August 17, 1982 had not been pursued "because they denied holding anybody by the name of Saúl Godínez Gómez and the investigating judge fell for that trick."

7. The Commission also alleged that a prisoner claimed to have seen Saúl Godínez in the Central Penitentiary of Tegucigalpa at the end of June of 1983.

8. On May 29, 1984, the Commission informed the Government that it had decided "to reconsider Resolution 32/83 and to continue the study of the case" and requested information on the exhaustion of domestic legal remedies and other matters relevant to the case. The Commission reiterated this request on January 29, 1985.

9. On March 1, 1985, the Government asked the Commission to postpone a final decision on this case because it had set up an Investigatory Commission to study the matter. The Commission agreed to the Government's request on March 11, granting it thirty days in which to present the information requested.

10. On October 17, 1985, the Government presented to the Commission the Report of the Investigatory Commission.

11. On April 7, 1986, the Government informed the Commission that "notwithstanding the efforts of the Investigatory Commission... no new evidence has been discovered." It also pointed out that "the information at hand contains no convincing evidence on which to rule on the alleged disappearances with absolute certainty" and that it was impossible "to identify the persons allegedly responsible."

12. By Resolution 24/86 of April 18, 1986, the Commission decided that the request for reconsideration of its Resolution 32/83 "is unfounded and lacks information other than that already examined." In that same Resolution, the Commission confirmed Resolution 32/83 and referred the matter to the Court.

I

13. The Court has jurisdiction to hear the instant case. Honduras ratified the Convention on September 8, 1977 and recognized the contentious jurisdiction of the Court, as set out in Article 62 of the Convention, on September 9, 1981. The case was submitted to the Court by the Commission pursuant to Article 61 of the Convention and Article 50(1) and (2) of the Regulations of the Commission.

II

14. The instant case was submitted to the Court on April 24, 1986. On May 13, 1986, the Secretariat of the Court transmitted the application to the

Government, pursuant to Article 26(1) of the Rules of Procedure.

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

16. In a note of July 23, 1986, the President confirmed a preliminary agreement that the Government present its submissions by the end of August 1986. On August 21, 1986, the Government requested the extension of this deadline to November 1986.

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

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

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

20. In his Order of January 30, 1987, the President made clear that the application which gave rise to the instant proceeding should be deemed to be the Memorial provided for in Article 30(3) of the Rules of Procedure. He also specified that the deadline of March 20, 1987 granted to the Commission was the time limit set forth in Article 27(3) of the Rules for the presentation of its observations and conclusions on the preliminary objections raised by the Government. The President, after consulting the parties, ordered a public hearing on June 16, 1987 for the presentation of oral arguments on the preliminary objections and left open the time limits for submissions on the merits, pursuant to the above-mentioned article of the Rules of Procedure.

21. By note of March 13, 1987, the Government informed the Court that because

> the Order of January 30, 1987 is not restricted to matters of mere procedure nor to the determination of deadlines, but rather involves the interpretation and classification of the submissions, (the Government) considers it advisable, pursuant to Article 25

of the Statute of the Court and Article 44(2) of its Rules of Procedure, for the Court to affirm the terms of the President's Order of January 30, 1987, in order to avoid further confusion between the parties. As these are the first contentious cases submitted to the Court, it is especially important to ensure strict compliance with and the correct application of the procedural rules of the Court.

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

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

24. The hearing on the preliminary objections raised by the Government took place on June 16, 1987. Representatives of the Government and the Commission participated in this hearing.

25. On June 26, 1987, the Court delivered its judgment on the preliminary objections. In this unanimous decision, the Court:

> 1. Reject(ed) the preliminary objections interposed by the Government of Honduras, except for the issues relating to the exhaustion of the domestic legal remedies, which (were) ordered joined to the merits of the case.
>
> 2. Decide(d) to proceed with the consideration of the instant case.
>
> 3. Postpone(d) its decision on the costs until such time as it renders judgment on the merits.
>
> (**Godínez Cruz Case, Preliminary Objections,** Judgment of June 26, 1987. Series C No. 3).

26. On that same date, the Court adopted the following decision:

> 1. To instruct the President, in consultation with the parties, to set a deadline no later than August 27, 1987 for the Government to submit its Counter-Memorial on the merits and offer its evidence, with an indication of the facts that each item of evidence is intended to prove. In its offer of proof, the Government should show how, when and under what circumstances it wishes to present the evidence.

2. Within thirty days of the receipt of the submission of the Government, the Commission must ratify in writing the request of proof already made, without prejudice to the possibility of amending or supplementing what has been offered. The Commission should indicate the facts that each item of evidence is intended to prove and how, when and under what circumstances it wishes to present the evidence. As soon as possible after receiving the Government's submission referred to in paragraph one, the Commission may also supplement or amend its offer of proof.

3. To instruct the President, without prejudice to a final decision being taken by the Court, to decide preliminary matters that might arise, to admit or exclude evidence that has been offered or may be offered, to order the filing of expert or other documentary evidence that may be received and, in consultation with the parties, to set the date of the hearing or hearings on the merits at which evidence shall be presented, the testimony of witnesses and any experts shall be received, and at which the final arguments shall be heard.

4. To instruct the President to arrange with the respective authorities for the necessary guarantees of immunity and participation of the Agents and other representatives of the parties, witnesses and experts, and, if necessary, the delegates of the Court.

27. In its submission of July 20, 1987, the Commission ratified and supplemented its request for oral testimony and offered documentary evidence.

28. On August 27, 1987, the Government filed its Counter-Memorial and documentary evidence. In its prayer, the Government asked the Court to dismiss "the suit against the State of Honduras on the grounds that it does not find the allegations to be true and that the domestic remedies of the State of Honduras have not yet been exhausted."

29. In his Order of September 1, 1987, the President admitted the testimonial and documentary evidence offered by the Commission. On September 14, 1987 he also admitted the documentary evidence offered by the Government.

30. The Court held hearings on the merits and heard the final arguments of the parties from September 30 to October 7, 1987.

There appeared before the Court

a) for the Government of Honduras:

Edgardo Sevilla Idiáquez, Agent
Ramón Pérez Zúniga, Representative

Juan Arnaldo Hernández, Representative
Enrique Gómez, Representative
Rubén Darío Zepeda, Adviser
Angel Augusto Morales, Adviser
Olmeda Rivera, Adviser
Mario Alberto Fortín, Adviser
Ramón Rufino Mejía, Adviser

b) for the Inter-American Commission on Human Rights:

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

c) Witnesses presented by the Commission to testify as to "whether between the years 1981 and 1984 (the period in which Saúl Godínez disappeared) there were numerous cases of persons who were kidnapped and who then disappeared, and whether these actions were imputable to the Armed Forces of Honduras and enjoyed the acquiescense of the Government of Honduras:"

Miguel Angel Pavón Salazar, Alternate Deputy
Ramón Custodio López, surgeon
Virgilio Carías, economist
Inés Consuelo Murillo, student
Efraín Díaz Arrivillaga, Deputy
Florencio Caballero, former member of the Armed Forces

d) Witnesses presented by the Commission to testify as to "whether between the years 1981 and 1984 effective domestic remedies existed in Honduras to protect those persons who were kidnapped and who then disappeared in actions imputable to the Armed Forces of Honduras:"

Ramón Custodio López, surgeon
Virgilio Carías, economist
Milton Jiménez Puerto, lawyer
Inés Consuelo Murillo, student
René Velásquez Díaz, lawyer
César Augusto Murillo, lawyer
José Gonzalo Flores Trejo, shoemaker

e) Witnesses presented by the Commission to testify on specific facts related to this case:

Enmidida Escoto de Godínez, wife of Saúl Godínez
Alejandrina Cruz, mother of Saúl Godínez

f) The following witnesses offered by the Commission did not appear at these hearings, notwithstanding the fact that they had been summoned by the Court:

Leónidas Torres Arias, former member of the Armed Forces
Linda Drucker, reporter
José María Palacios, lawyer
Mauricio Villeda Bermúdez, lawyer

31. After having heard the witnesses, the Court directed the submission of additional evidence to assist it in its deliberations. Its Order of October 7, 1987 reads as follows:

A. Documentary Evidence

1. To request the Government of Honduras to provide the organizational chart showing the structure of Battalion 316 and its position within the Armed Forces of Honduras.

B. Testimony

1. To call as a witness the nurse, sister of Enmidida Escoto de Godínez.

2. To call as witnesses, Marco Tulio Regalado and Alexander Hernández, members of the Armed Forces of Honduras.

32. By the same Order, the Court set December 15, 1987 as the deadline for the submission of documentary evidence and decided to hear the oral testimony at its January 1988 session.

33. In response to that Order, on December 14, 1987 the Government: a) with respect to the organizational structure of Battalion 316, requested that the Court receive the testimony of its Commandant in a closed hearing "because of strict security reasons of the State of Honduras" and b) requested that the Court hear the testimony of Alexander Hernández and Marco Tulio Regalado "in the Republic of Honduras, in a manner to be decided by the Court and in a closed hearing to be set at an opportune time... because of security reasons and because both persons are on active duty in the Armed Forces of Honduras."

34. By note of December 24, 1987, the Commission objected to hearing the testimony of members of the Honduran military in closed session. This position was reiterated by note of January 11, 1988.

35. On the latter date, the Court decided to receive the testimony of the members of the Honduran military at a closed hearing at the seat of the Court in the presence of the parties.

36. Pursuant to its Order of October 7, 1987 and its decision of January 11, 1988, the Court heard the testimony of Elsa Rosa Escoto Escoto on January 19, 1988, on the following day it also held a closed hearing in San José, which both parties attended, at which it received the testimony of persons who identified themselves as Lieutenant Colonel Alexander Hernández and Lieutenant Marco Tulio Regalado Hernández. The Court also heard the testimony of Colonel Roberto Núñez Montes, Head of the Intelligence Services of Honduras.

37. On January 22, 1988, the Government submitted a brief prepared by the Honduran Bar Association on the legal remedies available in cases of disappeared persons. The Court had asked for this document in response to the Government's request of August 26, 1987.

38. On July 13, 1988, the Commission responded to a request of the Court concerning another case before the Court (Fairén Garbi and Solís Corrales Case). In its response, the Commission included some "final observations" on the instant case.

39. By decision of July 14, 1988, the President refused to admit the "final observations" because they were untimely and because "reopening the period for submissions would violate the procedure opportunely established and, moreover, would seriously affect the procedural equilibrium and equality of the parties."

40. The following non-governmental organizations submitted briefs as amici curiae: Amnesty International, Asociación Centroamericana de Familiares de Detenidos-Desaparecidos, Association of the Bar of the City of New York, Lawyers Committee for Human Rights and Minnesota Lawyers International Human Rights Committee.

III

41. By note of November 4, 1987, addressed to the President of the Court, the Commission asked the Court to take provisional measures under Article 63 (2) of the Convention in view of the threats against the witnesses Milton Jiménez Puerto and Ramón Custodio López. Upon forwarding this information to the Government of Honduras, the President stated that he "does not have enough proof to ascertain which persons or entities might be responsible for the threats, but he strongly wishes to request that the Government of Honduras take all measures necessary to guarantee the safety of the lives and property of Milton Jiménez and Ramón Custodio and the property of the Committee for the Defense of Human Rights in Honduras (CODEH)...." The President also stated that he was prepared to consult with the Permanent Commission of the Court and, if necessary, to convoke the Court for an emergency meeting "for taking the appropriate measures, if that abnormal situation continues." By communications of November 11 and 18, 1987, the Agent of the Government informed the Court that the Honduran government would guarantee Ramón Custodio and Milton Jiménez "the respect of their physical and moral

integrity... and the faithful compliance with the Convention."

42. By note of January 11, 1988, the Commission informed the Court of the death of José Isaías Vilorio, which occurred on January 5, 1988 at 7:15 a.m. The Court had summoned him to appear as a witness on January 18, 1988. He was killed "on a public thoroughfare in Colonia San Miguel, Comayagüela, Tegucigalpa, by a group of armed men who placed the insignia of a Honduran guerrilla movement known as Cinchonero on his body and fled in a vehicle at high speed."

43. On January 15, 1988, the Court was informed of the assassinations of Moisés Landaverde and Miguel Angel Pavón which had occurred the previous evening in San Pedro Sula. Mr. Pavón had testified before the Court on September 30, 1987 as a witness in this case. Also on January 15, the Court adopted the following provisional measures under Article 63(2) of the Convention:

> 1. That the Government of Honduras adopt, without delay, such measures as are necessary to prevent further infringements on the basic rights of those who have appeared or have been summoned to do so before this Court in the "Velásquez Rodríguez," "Fairén Garbi and Solís Corrales" and "Godínez Cruz" cases, in strict compliance with the obligation of respect for and observance of human rights, under the terms of Article 1(1) of the Convention.
>
> 2. That the Government of Honduras also employ all means within its power to investigate these reprehensible crimes, to identify the perpetrators and to impose the punishment provided for by the domestic law of Honduras.

44. After it had adopted the above Order of January 15, the Court received a request from the Commission, dated the same day, that the Court take the necessary measures to protect the integrity and security of those persons who had appeared or would appear before the Court.

45. On January 18, 1988, the Commission asked the Court to adopt the following complementary provisional measures:

> 1. That the Government of Honduras inform the Court, within 15 days, of the specific measures it has adopted to protect the physical integrity of witnesses who testified before the Court as well as those persons in any way involved in these proceedings, such as representatives of human rights organizations.
>
> 2. That the Government of Honduras report, within that same period, on the judicial investigations of the assassinations of José Isaías Vilorio, Miguel Angel Pavón and Moisés Landaverde.

3. That the Government of Honduras provide the Court, within that same period, the public statements made regarding the aforementioned assassinations and indicate where those statements appeared.

4. That the Government of Honduras inform the Court, within the same period, on the criminal investigations of threats against Ramón Custodio and Milton Jiménez, who are witnesses in this case.

5. That it inform the Court whether it has ordered police protection to ensure the personal integrity of the witnesses who have testified and the protection of the property of CODEH.

6. That the Court request the Government of Honduras to send it immediately a copy of the autopsies and ballistic tests carried out regarding the assassinations of Messrs. Vilorio, Pavón and Landaverde.

46. That same day the Government submitted a copy of the death certificate and the autopsy report of José Isaías Vilorio, both dated January 5, 1988.

47. On January 18, 1988, the Court decided, by a vote of six to one, to hear the parties in a public session the following day regarding the measures requested by the Commission. After the hearing, taking into account "Articles 63(2), 33 and 62(3) of the American Convention on Human Rights, Articles 1 and 2 of the Statute of the Court and Article 23 of its Rules of Procedure and its character as a judicial body and the powers which derive therefrom," the Court unanimously decided, by Order of January 19, 1988, on the following additional provisional measures:

1. That the Government of Honduras, within a period of two weeks, inform this Court on the following points:

a. the measures that have been adopted or will be adopted to protect the physical integrity of, and to avoid irreparable harm to, those witnesses who have testified or have been summoned to do so in these cases.

b. the judicial investigations that have been or will be undertaken with respect to threats against the aforementioned individuals.

c. the investigations of the assassinations, including forensic reports, and the actions that are proposed to be taken within the judicial system of Honduras to punish those responsible.

2. That the Government of Honduras adopt concrete measures to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions

> authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention.

This decision was delivered to the parties in Court.

48. Pursuant to the Court's decision of January 19, 1988, the Government submitted the following documents on February 3, 1988:

> 1. A copy of the autopsy report on the death of Professor Miguel Angel Pavón Salazar, certified by the Third Criminal Court of San Pedro Sula, Department of Cortés, on January 27, 1988 and prepared by forensic specialist Rolando Tábora, of that same Court.
>
> 2. A copy of the autopsy report on the death of Professor Moisés Landaverde Recarte, certified by the above Court on the same date and prepared by the same forensic specialist.
>
> 3. A copy of a statement made by Dr. Rolando Tábora, forensic specialist, as part of the inquiry undertaken by the above Court into the deaths of Miguel Angel Pavón and Moisés Landaverde Recarte, and certified by that Court on January 27, 1988.
>
> ...
>
> 4. A copy of the inquiry into threats against the lives of Ramón Custodio and Milton Jiménez, conducted by the First Criminal Court of Tegucigalpa, Central District, and certified by that Court on February 2, 1988.

In the same submission, the Government stated that:

> The content of the above documents shows that the Government of Honduras has initiated a judicial inquiry into the assassinations of Miguel Angel Pavón Salazar and Moisés Landaverde Recarte, under the procedures provided for by Honduran law.
>
> Those same documents show, moreover, that the projectiles were not removed from the bodies for ballistic study because of the opposition of family members, which is why no ballistic report was submitted as requested.

49. The Government also requested an extension of the deadline ordered above "because, for justifiable reasons, it has been impossible to obtain some of the information." Upon instructions from the President, the Secretariat informed the Government on the following day that it was not possible to extend the deadline because it had been set by the full Court.

50. By communication of March 10, 1988, the Inter-Institutional Commission of Human Rights of Honduras, a governmental body, made several observations regarding the Court's decision of January 15, 1988. On the threats that have been made against some witnesses, it reported that Ramón Custodio "refused to bring a complaint before the proper courts and that the First Criminal Court of Tegucigalpa, Department of Morazán, had initiated an inquiry to determine whether there were threats, intimidations or conspiracies against the lives of Dr. Custodio and Milton Jiménez, and had duly summoned them to testify and to submit any evidence," but they failed to appear. It added that no Honduran official "has attempted to intimidate, threaten or restrict the liberty of any of the persons who testified before the Court... who enjoy the same guarantees as other citizens."

51. On March 23, 1988 the Government submitted the following documents:

1. Copies of the autopsies performed on the bodies of Miguel Angel Pavón Salazar and Moisés Landaverde, certified by the Secretary of the Third Criminal Court of the Judicial District of San Pedro Sula.

2. The ballistic report on the shrapnel removed from the bodies of those persons, signed by the Director of the Medical-Legal Department of the Supreme Court of Justice.

52. On October 25, 1988, the Agent submitted newspaper articles published in Honduras on October 20 containing statements of Héctor Orlando Vásquez, former President of the San Pedro Sula branch of the Committee for the Defense of Human Rights in Honduras (CODEH), according to which the Government had no responsibility in the deaths of Miguel Angel Pavón Salazar, Moisés Landaverde Recarte and others. The Inter-Institutional Commission of Human Rights of Honduras, in a document of the same date, asserted that this confirmed the "well-founded suspicions that these murders and alleged disappearances are only an escalation in the attempts of anti-democratic sectors to destabilize the legally constituted system of our country."

IV

53. The Government raised several preliminary objections that the Court ruled upon in its Judgment of June 26, 1987 (**supra** 18-25). There the Court ordered the joining of the merits and the preliminary objection regarding the failure to exhaust domestic remedies, and gave the Government and the Commission another opportunity to "substantiate their contentions" on the matter (**Godínez Cruz Case, Preliminary Objections**, **supra** 25, para. 92).

54. The Court will first rule upon this preliminary objection. In so doing, it will make use of all the evidence before it, including that presented during the proceedings on the merits.

55. The Commission presented witnesses and documentary evidence on this point. The Government, in turn, submitted some documentary evidence, including examples of writs of habeas corpus successfully brought on behalf of some individuals (infra 124(c)). The Government also stated that this remedy requires identification of the place of detention and of the authority under which the person is detained.

56. In addition to the writ of habeas corpus, the Government mentioned various remedies that might possibly be invoked, such as appeal, cassation, extraordinary writ of amparo, ad effectum videndi, criminal complaints against those ultimately responsible and a presumptive finding of death.

57. The Honduran Bar Association in its brief (supra 37) expressly mentioned the writ of habeas corpus, set out in the Law of Amparo, and the suit before a competent court "for it to investigate the whereabouts of the person allegedly disappeared."

58. The Commission argued that the remedies mentioned by the Government were ineffective because of the internal conditions in the country during that period. It presented documentation of three writs of habeas corpus brought on behalf of Saúl Godínez that did not produce results. It also cited a criminal complaint that failed to lead to the identification and punishment of those responsible. In the Commission's opinion, those legal proceedings exhausted domestic remedies as required by Article 46(1)(a) of the Convention.

59. The Court will first consider the legal arguments relevant to the question of exhaustion of domestic remedies and then apply them to the case.

60. Article 46(1)(a) of the Convention provides that, in order for a petition or communication lodged with the Commission in accordance with Articles 44 or 45 to be admissible, it is necessary

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

61. The same article, in the second paragraph, provides that this requirement 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.

62. In its Judgment of June 26, 1987, the Court decided, inter alia, that "the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective" (**Godínez Cruz Case, Preliminary Objections, supra** 25, para. 90).

63. Concerning the burden of proof, the Court did not go beyond the conclusion cited in the preceding paragraph. The Court now affirms that if a State which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2). It must not be rashly presumed that a State Party to the Convention has failed to comply with its obligation to provide effective domestic remedies.

64. The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction (American Convention, Preamble).

65. It is a legal duty of the States to provide such remedies, as this Court indicated in its Judgment of June 26, 1987, when it stated:

> The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1) (**Godínez Cruz Case, Preliminary Objections, supra** 25, para. 93).

66. Article 46(1)(a) of the Convention speaks of "generally recognized principles of international law." Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2).

67. Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited

by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty.

68. Of the remedies cited by the Government, habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty. The other remedies cited by the Government are either for reviewing a decision within an inchoate proceeding (such as those of appeal or cassation) or are addressed to other objectives. If, however, as the Government has stated, the writ of habeas corpus requires the identification of the place of detention and the authority ordering the detention, it would not be adequate for finding a person clandestinely held by State officials, since in such cases there is only hearsay evidence of the detention, and the whereabouts of the victim is unknown.

69. A remedy must also be effective --that is, capable of producing the result for which it was designed. Procedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied.

70. On the other hand, contrary to the Commission's argument, the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion.

71. It is a different matter, however, when it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality. The exceptions of Article 46(2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case.

72. In the Government's opinion, a writ of habeas corpus does not exhaust the remedies of the Honduran legal system because there are other remedies, both ordinary and extraordinary, such as appeal, cassation, and extraordinary writ of amparo, as well as the civil remedy of a presumptive finding of death. In addition, in criminal procedures parties may use whatever evidence they choose. With respect to the cases of disappearances mentioned by the Commission, the Government stated that it had initiated some investigations and had opened others on the basis of complaints, and that the proceedings remain pending until those presumed responsible, either as principals or accomplices, are identified or apprehended.

73. In its conclusions, the Government stated that some writs of habeas corpus were granted from 1981 to 1984, which would prove that this remedy was not ineffective during that period. It submitted various documents to support its argument.

74. In response, the Commission argued that the practice of disappearances made exhaustion of domestic remedies impossible because such remedies were ineffective in correcting abuses imputed to the authorities or in causing kidnapped persons to reappear.

75. The Commission maintained that, in cases of disappearances, the fact that a writ of habeas corpus or amparo has been brought without success is sufficient to support a finding of exhaustion of domestic remedies as long as the person does not appear, because that is the most appropriate remedy in such a situation. It emphasized that neither writs of habeas corpus nor a criminal complaint were effective in the case of Saúl Godínez. The Commission maintained that exhaustion should not be understood to require mechanical attempts at formal procedures; but rather to require a case-by-case analysis of the reasonable possibility of obtaining a remedy.

76. The Commission asserted that, because of the structure of the international system for the protection of human rights, the Government bears the burden of proof with respect to the exhaustion of domestic remedies. The objection of failure to exhaust presupposes the existence of an effective remedy. It stated that a criminal complaint is not an effective means to find a disappeared person, but only serves to establish individual responsibility.

77. The record before the Court shows that the following remedies were pursued on behalf of Saúl Godínez:

a. Habeas Corpus

i. Brought by Alejandrina Cruz, but in the name of Saúl Godínez Gómez, against the DNI on August 17, 1982. Denied on November 10, 1982.

ii. Also brought by Alejandrina Cruz, against the DNI of Choluteca on August 30, 1982. Dismissed on September 6, 1982, according to the report of the Commission.

iii. Brought by various relatives of disappeared persons on behalf of Saúl Godínez and others on July 4, 1983. Denied on September 11, 1984.

b. Criminal Complaint

Brought by his wife, Enmidida Escoto de Godínez, in the First Court of Choluteca on October 9, 1982. The record does not show any disposition of this complaint.

78. Although the Government did not dispute that the above remedies had been attempted, it maintained that the domestic legal remedies had not been exhausted. It emphasized that the petition was submitted to the Commission on the same day that the criminal complaint was brought in the First Court of Choluteca. The Commission, thus, should not have admitted the petition, since the petitioner must first attempt all possibilites --both ordinary and extraordinary-- offered by the domestic judicial system for a case to be admissible. The Government stated that the first writ of habeas corpus was denied because it was brought on behalf of Saúl Godínez Gómez and not Saúl Godínez Cruz and that there was no indication of the person responsible in the criminal complaint. To prove this, the Government submitted a certification of the Supreme Court which contains that information. The Government states that the complaint was abandoned by the petitioner because she did not present the writs of complaint and appeal. It, however, indicated that the Supreme Court requested the file of the case ad effectum videndi and ordered the lower court to continue the investigations for which reason the proceedings are still open. As to the writs of habeas corpus, the Government added that they could not be successful if the detaining authority and the place where Saúl Godínez allegedly was being held were unknown.

79. The Commission maintained that the writ of habeas corpus brought on August 17, 1982 and denied on November 10, 1982 was filed on behalf of Saúl Godínez Cruz and not on behalf of Saúl Godínez Gómez and presented sworn testimony to show that nothing had been done with respect to the criminal complaint brought by Mrs. Godínez and that she had not even been called to ratify it. This complaint does not appear in the entry book of the Choluteca court but does appear in its files.

80. The Commission also contended that Article 46(2) of the Convention provides for exceptions to the rule on the prior exhaustion of domestic remedies which are applicable in the instant case because the domestic legislation did not provide effective remedies to protect the rights of Saúl Godínez and because, according to sworn testimony, after several years nothing had been done with respect to the criminal complaint filed by Enmidida Escoto de Godínez.

81. The record (**infra** Chapter V) contains testimony of members of the Legislative Assembly of Honduras, Honduran lawyers, persons who were at one time disappeared, and relatives of disappeared persons, which purports to show that in the period in which the events took place, the legal remedies in Honduras were ineffective in obtaining the liberty of victims of a practice of enforced or involuntary disappearances (hereinafter "disappearance" or "disappearances"), ordered or tolerated by the Government. The record also contains dozens of newspaper clippings which allude to the same practice. According to that evidence, from 1981 to 1984 more than one hundred persons were illegally detained, many of whom never reappeared, and, in general, the legal remedies which the Government claimed were available to

the victims were ineffective.

82. That evidence also shows that some individuals were captured and detained without due process and subsequently reappeared. However, in some of those cases, the reappearances were not the result of any of the legal remedies which, according to the Government, would have been effective, but rather the result of other circumstances, such as the intervention of diplomatic missions or actions of human rights organizations.

83. The Government argued at the hearing that the Commission should not have admitted the petition since it was presented the same day --October 9, 1982-- that the wife of Saúl Godínez filed a criminal complaint in the First Court of Choluteca. The Court observes that the fact that such objection was not made in a timely manner before the Commission might have been interpreted as a tacit waiver of the defense. However, in the abstract and regardless of whether it is necessary to resort to the criminal courts in a case such as this, the determining factor in weighing the Government's argument is the fact that nothing had been done with regard to the criminal complaint in Honduras as of the date the Government made the objection. In such circumstances it is clearly inappropriate to claim that such action was a domestic remedy whose failure to exhaust would hinder the Court from considering and deciding the instant case.

84. The Government has also indicated that the remedies of habeas corpus were not successful because the claimants did not formalize the complaint at the proper time. Notwithstanding whether writs of habeas corpus are effective in cases of forced disappearance, the Court must conclude that the argument is not well-founded, since writs were successful in spite of not being formalized in some of the cases offered by the Government to show the effectiveness of habeas corpus at the time Saúl Godínez disappeared (supra 73).

85. The evidence offered shows that certain lawyers who filed writs of habeas corpus were intimidated (infra 98 and 100), that those who were responsible for executing the writs were frequently prevented from entering or inspecting the places of detention, and that occasional criminal complaints against military or police officials were ineffective, either because certain procedural steps were not taken or because the complaints were dismissed without further proceedings.

86. The Government had the opportunity to call its own witnesses to refute the evidence presented by the Commission, but failed to do so. Although the Government's attorneys contested some of the points urged by the Commission, they did not offer convincing evidence to support their arguments. The Court summoned as witnesses some members of the armed forces mentioned during the proceeding, but their testimony was insufficient to overcome the weight of the evidence offered by the Commission to show that the judicial and governmental authorities did not act with due diligence in cases of disappearances.

The instant case is such an example.

87. The testimony and other evidence received and not refuted leads to the conclusion that, during the period under consideration, although there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities.

88. Aside from the question of whether between 1981 and 1984 there was a governmental policy of carrying out or tolerating the disappearance of certain persons, the Commission has shown that although writs of habeas corpus and criminal complaints were filed, they were ineffective or were mere formalities. The evidence offered by the Commission was not refuted and is sufficient to reject the Government's preliminary objection that the case is inadmissible because domestic remedies were not exhausted.

V

89. The Commission presented testimony and documentary evidence to show that there were many kidnappings and disappearances in Honduras from 1981 to 1984 and that those acts were attributable to the Armed Forces of Honduras (hereinafter "Armed Forces"), which was able to rely at least on the tolerance of the Government. Three officers of the Armed Forces testified on this subject at the request of the Court.

90. Various witnesses testified that they were kidnapped, imprisoned in clandestine jails and tortured by members of the Armed Forces (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz and Leopoldo Aguilar Villalobos).

91. Inés Consuelo Murillo testified that she was secretly held for approximately three months. According to her testimony, she and José Gonzalo Flores Trejo, whom she knew casually, were captured on March 13, 1983 by men who got out of a car, shouted that they were from Immigration and hit her with their weapons. Behind them was another car which assisted in the capture. She said she was blindfolded, bound, and driven presumably to San Pedro Sula, where she was taken to a secret detention center. There she was tied up, beaten, kept nude most of the time, not fed for many days, and subjected to electrical shocks, hanging, attempts to asphyxiate her, threats of burning her eyes, threats with weapons, burns on the legs, punctures of the skin with needles, drugs and sexual abuse. She admitted carrying false identification when detained, but ten days later she gave them her real name. She stated that thirty-six days after her detention she was moved to a place near Tegucigalpa, where she saw military officers (one of whom was Second Lt. Marco Tulio Regalado Hernández), papers with an Army letterhead, and Armed Forces

graduation rings. This witness added that she was finally turned over to the police and was brought before a court. She was accused of some twenty crimes, but her attorney was not allowed to present evidence and there was no trial (testimony of Inés Consuelo Murillo).

92. Lieutenant Regalado Hernández said that he had no knowledge of the case of Inés Consuelo Murillo, except for what he had read in the newspaper (testimony of Marco Tulio Regalado Hernández).

93. The Government stated that it was unable to inform Ms. Murillo's relatives of her detention because she was carrying false identification, a fact which also showed, in the Government's opinion, that she was not involved in lawful activities and was, therefore, not telling the whole truth. It added that her testimony of a casual relationship with José Gonzalo Flores Trejo was not credible because both were clearly involved in criminal activities.

94. José Gonzalo Flores Trejo testified that he and Inés Consuelo Murillo were kidnapped together and taken to a house presumably located in San Pedro Sula, where his captors repeatedly forced his head into a trough of water until he almost drowned, kept his hands and feet tied, and hung him so that only his stomach touched the ground. He also declared that, subsequently, in a place where he was held near Tegucigalpa, his captors covered his head with a "capucha" (a piece of rubber cut from an inner tube, which prevents a person from breathing through the mouth and nose), almost asphyxiating him, and subjected him to electric shocks. He said he knew he was in the hands of the military because when his blindfold was removed in order to take some pictures of him, he saw a Honduran military officer and on one occasion when they took him to bathe, he saw military barracks. He also heard a trumpet sound, orders being given and the report of a cannon (testimony of José Gonzalo Flores Trejo).

95. The Government argued that the testimony of the witness, a Salvadoran national, was not credible because he attempted to convince the Court that his encounters with Inés Consuelo Murillo were of a casual nature. The Government added that both individuals were involved in illicit activities.

96. Virgilio Carías, who was President of the Socialist Party of Honduras, testified that he was kidnapped in broad daylight on September 12, 1981, when 12 or 13 persons, armed with pistols, carbines and automatic rifles, surrounded his automobile. He stated that he was taken to a secret jail, threatened and beaten, and had no food, water or bathroom facilities for four or five days. On the tenth day, his captors gave him an injection in the arm and threw him, bound, in the back of a pick-up truck. Subsequently, they draped him over the back of a mule and set it walking through the mountains near the Nicaraguan border, where he regained his liberty (testimony of Virgilio Carías).

97. The Government indicated that this witness expressly admitted that he opposed the Honduran government. The Government also maintained that his answers were imprecise or evasive and argued that, because the witness said he could not identify his captors, his testimony was hearsay and of no evidentiary value since, in the Government's view, he had no personal knowledge of the events and only knew of them through others.

98. A Honduran attorney, who stated that he defended political prisoners, testified that Honduran security forces detained him without due process in 1982. He was held for ten days in a clandestine jail, without charges, and was beaten and tortured before he was brought before the court (testimony of Milton Jiménez Puerto).

99. The Government affirmed that the witness was charged with the crimes of threatening national security and possession of arms that only the Armed Forces were authorized to carry and, therefore, had a personal interest in discrediting Honduras with his testimony.

100. Another lawyer, who also said that he defended political detainees and who testified on Honduran law, stated that personnel of the Department of Special Investigations detained him in broad daylight in Tegucigalpa on June 1, 1982, blindfolded him, took him to a place he was unable to recognize and kept him without food or water for four days. He was beaten and insulted. He said that he could see through the blindfold that he was in a military installation (testimony of René Velásquez Díaz).

101. The Government claimed that this witness made several false statements regarding the law in force in Honduras and that his testimony "lacks truth or force because it is not impartial and his interest is to discredit the State of Honduras."

102. The Court received testimony which indicated that somewhere between 112 and 130 individuals were disappeared from 1981 to 1984. A former member of the Armed Forces testified that, according to a list in the files of Battalion 316, the number might be 140 or 150 (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga and Florencio Caballero).

103. The Court heard testimony from the President of the Committee for the Defense of Human Rights in Honduras regarding the existence of a unit within the Armed Forces which carried out disappearances. According to his testimony, in 1980 there was a group called "the fourteen" under the command of Major Adolfo Díaz, attached to the General Staff of the Armed Forces. Subsequently, this group was replaced by "the ten," commanded by Capt. Alexander Hernández, and finally by Battalion 316, a special operations group, with separate units trained in surveillance, kidnapping, execution, telephone tapping, etc. The existence of this group had always been denied until it was mentioned in a communiqué of the Armed Forces in September 1986 (testi-

mony of Ramón Custodio López. See also the testimony of Florencio Caballero).

104. Alexander Hernández, now a Lieutenant Colonel, denied having participated in the group "the ten," having been a part of Battalion 316, or having had any type of contact with it (testimony of Alexander Hernández).

105. The current Director of Honduran Intelligence testified that he learned from the files of his department that in 1984 an intelligence battalion called 316 was created, the purpose of which was to provide combat intelligence to the 101st, 105th and 110th Brigades. He added that this battalion initially functioned as a training unit, until the creation of the Intelligence School, to which all its training functions were gradually transferred, and that the Battalion was finally disbanded in September 1987. He stated that there was never any group called "the fourteen" or "the ten" in the Armed Forces or security forces (testimony of Roberto Núñez Montes).

106. According to testimony on the **modus operandi** of the practice of disappearances, the kidnappers followed a pattern: they used automobiles with tinted glass (which requires a special permit from the Traffic Division), without license plates or with false plates, and sometimes used special disguises, such as wigs, false mustaches, masks, etc. The kidnappings were selective. The victims were first placed under surveillance, then the kidnapping was planned. Microbuses or vans were used. Some victims were taken from their homes; others were picked up in public streets. On one occasion, when a patrol car intervened, the kidnappers identified themselves as members of a special group of the Armed Forces and were permitted to leave with the victim (testimony of Ramón Custodio López, Miguel Angel Pavón Salazar, Efraín Díaz Arrivillaga and Florencio Caballero).

107. A former member of the Armed Forces, who said that he belonged to Battalion 316 (the group charged with carrying out the kidnappings) and that he had participated in some kidnappings, testified that the starting point was an order given by the chief of the unit to investigate an individual and place him under surveillance. According to this witness, if a decision was made to take further steps, the kidnapping was carried out by persons in civilian clothes using pseudonyms and disguises and carrying arms. The unit had four double-cabin Toyota pick-up trucks without police markings for use in kidnappings. Two of the pick-ups had tinted glass (testimony of Florencio Caballero. See also testimony of Virgilio Carías).

108. The Government objected, under Article 37 of the Rules of Procedure, to the testimony of Florencio Caballero because he had deserted from the Armed Forces and had violated his military oath. By unanimous decision of October 6, 1987, the Court rejected the challenge and reserved the right to consider his testimony.

109. The current Director of Intelligence of the Armed Forces testified that intelligence units do not carry out detentions because they "get burned" (are discovered) and do not use pseudonyms or automobiles without license plates. He added that Florencio Caballero never worked in the intelligence services and that he was a driver for the Army General Headquarters in Tegucigalpa (testimony of Roberto Núñez Montes).

110. The former member of the Armed Forces confirmed the existence of secret jails and of specially chosen places for the burial of those executed. He also related that there was a torture group and an interrogation group in his unit, and that he belonged to the latter. The torture group used electric shock, the water barrel and the "capucha." They kept the victims nude, without food, and threw cold water on them. He added that those selected for execution were handed over to a group of former prisoners, released from jail for carrying out executions, who used firearms at first and then knives and machetes (testimony of Florencio Caballero).

111. The current Director of Intelligence denied that the Armed Forces had secret jails, stating that it was not its **modus operandi**. He claimed that it was subversive elements who do have such jails, which they call "the peoples' prisons." He added that the function of an intelligence service is not to eliminate or disappear people, but rather to obtain and process information to allow the highest levels of government to make informed decisions (testimony of Roberto Núñez Montes).

112. A Honduran officer, called as a witness by the Court, testified that the use of violence or psychological means to force a detainee to give information is prohibited (testimony of Marco Tulio Regalado Hernández).

113. The Commission submitted many clippings from the Honduran press from 1981 to 1984 which contain information on at least 64 disappearances, which were apparently carried out against ideological or political opponents or trade union members. Six of those individuals, after their release, complained of torture and other cruel, inhuman and degrading treatment. These clippings mention secret cemeteries where 17 bodies had been found.

114. According to the testimony of his wife, Saúl Godínez was a leader of a teachers' group, who had participated in several strikes and who, at the time that he disappeared, was preparing a new strike. He left his house for work on July 22, 1982 at 6:20 a.m. and never returned. She stated that, at the gas station that he normally used, she was told that he was seen filling his motorcycle tank and that some individuals who usually wait for a ride at the outskirts of Choluteca told her that they saw him pass by. She added that a peasant told her sister, Elsa Rosa Escoto, that he saw a motorcyclist who fit the description of Saúl Godínez being detained at the crossroads of La Leona (testimony of Enmidida Escoto de Godínez).

115. The mother of Saúl Godínez stated that a woman by the name of Amanda Fortín (who had died by the time of the hearing, according to the witness),

who was being held as a subversive in the DNI of Choluteca, sent her a note informing her that Saúl Godínez was being held in the same place. The witness added that the Minister of Education stated in an interview that she understood that Saúl Godínez was being held only for investigation (testimony of Alejandrina Cruz).

116. The sister-in-law of Godínez related that a peasant had told her that he saw someone being detained on the road to Tegucigalpa between 6:30 and 7:00 a.m. on the date of the disappearance of Saúl Godínez. The detainee, who was short and fat, was riding a motorcycle and wearing a white helmet, navy blue pants and a light blue long-sleeved shirt. This description, according to Mr. Godínez' sister-in-law, fits that of Saúl Godínez. The peasant reported that he saw a pick-up truck without license plates parked in the road, and that a soldier got out of the truck and stopped the motorcyclist. At that moment, according to the story, another soldier and two civilians approached, hit the motorcyclist in the head, threw him on the ground and tied him up. He was then put in the vehicle which left, then returned almost immediately to pick up the motorcycle and left again (testimony of Elsa Rosa Escoto Escoto).

117. The same witness also testified that when she accompanied her sister to the local military authorities to check on the whereabouts of Saúl Godínez, they were told to look for him in Cuba or Nicaragua. She also stated that when she was a student of Saúl Godínez, she received anonymous notes in class that threatened him. There were three soldiers among the students in the class, including a lieutenant named Segundo Flores Murillo (testimony of Elsa Rosa Escoto Escoto).

118. A former member of the Armed Forces who said he belonged to the group that carried out kidnappings told the Court that his unit kept a file with the list of those who had disappeared, on which he saw the name Saúl Godínez Cruz (testimony of Florencio Caballero).

119. The Government argued that the only conclusion that could be drawn from the testimony of Enmidida Escoto and Alejandrina Cruz is the date on which they last saw Saúl Godínez. It also stated that the witnesses had not been able to identify the peasant who was said to have seen the kidnapping, and that there is no explanation of what happened, since there is neither proof nor a precise indication of the individuals who planned or carried out the acts.

120. The Commission submitted a photocopy of an alleged declaration of Francisco Berríos, who stated that he had been captured on May 19, 1983 and transferred to the Central Penitentiary of Tegucigalpa on June 27, where, among other prisoners, he met Saúl Godínez. Mr. Berríos declared that Godínez had told him that he had been detained on the outskirts of Choluteca from where he was coming on motorcycle and that he was subsequently taken to an enclosed house constructed of concrete in Támara, where he was blindfolded and tortured, and was later transferred to the DNI cells in Tegucigalpa.

121. Among the documents that the Commission presented to the Court is a note dated December 1, 1983, with which the Minister of Foreign Affairs of Honduras forwarded written statements of Víctor Manuel Meza Argueta, Ciriaco Castillo García, Police Sergeant Félix Pedro García Rodríguez and Major Juan Blas Salazar Meza, Director of the DNI.

122. According to the declaration of Mr. Meza Argueta, dated July 20, 1983, Saúl Godínez had been seen near Monjarás acting suspiciously. He added that "as an honest man and a good Honduran, he reported this to the DNI for investigation." Mr. Castillo García presented a complaint in similar terms to the Director of the DNI on August 3, 1983 requesting that "patrols be sent from Tegucigalpa." Sergeant García, sub-delegate of the FUSEP in Monjarás, stated on October 5, 1983 that, according to his information, Saúl Godínez was in Cuba and that he was going to Nicaragua in December in order to begin terrorist activities in Honduras. Finally, the Director of the DNI informed the Minister of Foreign Affairs that Godínez had been seen in the area of Monjarás "acting suspiciously against the security of the State of Honduras" and that it was "difficult for the Honduran Police to try to identify and locate" Godínez and other individuals who had allegedly disappeared. No other details were provided and none of those who signed these declarations was offered as a witness.

123. The Commission also presented evidence to show that from 1981 to 1984 domestic judicial remedies in Honduras were ineffective in protecting human rights, especially the rights of disappeared persons to life, liberty and personal integrity.

124. The Court heard the following testimony with respect to this point:

a. The legal procedures of Honduras were ineffective in ascertaining the whereabouts of detainees and ensuring respect for their physical and moral integrity. When writs of habeas corpus were brought, the courts were slow to name judges to execute them and, once named, those judges were often ignored by police authorities. On several occasions, the authorities denied the detentions, even in cases in which the prisoners were later released. There were no judicial orders for the arrests and the places of detention were unknown. When writs of habeas corpus were formalized, the police authorities did not present the persons named in the writs (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Milton Jiménez Puerto and Efraín Díaz Arrivillaga).

b. The judges named by the Courts of Justice to execute the writs did not enjoy all the necessary guarantees. Moreover, they feared reprisals because they were often threatened. Judges were imprisoned on more than one occasion and some of them were physically mistreated by the authorities. Law professors and lawyers who defended political prisoners were pressured not to act in cases of human rights violations. Only two dared bring writs of habeas corpus on behalf of disappeared persons and one of those was arrested while he was filing a writ (testimony of

Milton Jiménez Puerto, Miguel Angel Pavón Salazar, Ramón Custodio López, César Augusto Murillo, René Velásquez Díaz and Zenaida Velásquez).

c. In no case between 1981 and 1984 did a writ of habeas corpus on behalf of a disappeared person prove effective. If some individuals did reappear, this was not the result of such a legal remedy (testimony of Miguel Angel Pavón Salazar, Inés Consuelo Murillo, César Augusto Murillo, Milton Jiménez Puerto, René Velásquez Díaz and Virgilio Carías).

VI

125. The testimony and documentary evidence, corroborated by press clippings, presented by the Commission, tend to show:

a. That there existed in Honduras from 1981 to 1984 a systematic and selective practice of disappearances, carried out with the assistance or tolerance of the government;

b. That Saúl Godínez was a victim of that practice and was kidnapped and presumably tortured, executed and clandestinely buried by agents of the Armed Forces of Honduras, and

c. That in the period in which those acts occurred, the legal remedies available in Honduras were not appropriate or effective to guarantee his rights to life, liberty and personal integrity.

126. The Government, in turn, submitted documents and based its argument on the testimony of three members of the Honduran Armed Forces, two of whom were summoned by the Court because they had been identified in the proceedings as directly involved in the general practice referred to. This evidence may be summarized as follows:

a. The testimony purports to explain the organization and functioning of the security forces accused of carrying out the specific acts and denies any knowledge of or personal involvement in the acts of the officers who testified;

b. Some documents purport to show that no civil suit had been brought to establish a presumption of the death of Saúl Godínez, and

c. Other documents purport to prove that the Supreme Court of Honduras received and acted upon some writs of habeas corpus and that some of those writs resulted in the release of the persons on whose behalf they were brought.

127. The record contains no other direct evidence, such as expert opinion, inspections or reports.

VII

128. Before weighing the evidence, the Court must address some questions regarding the burden of proof and the general criteria considered in its evaluation and finding of the facts in the instant proceeding.

129. Because the Commission is accusing the Government of the disappearance of Saúl Godínez, it, in principle, should bear the burden of proving the facts underlying its petition.

130. The Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove that an individual has been disappeared.

131. The Government did not object to the Commission's approach. Nevertheless, it argued that neither the existence of a practice of disappearances in Honduras nor the participation of Honduran officials in the alleged disappearance of Saúl Godínez had been proven.

132. The Court finds no reason to consider the Commission's argument inadmissible. If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Saúl Godínez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this.

133. The Court must determine what the standards of proof should be in the instant case. Neither the Convention, the Statute of the Court nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment (cfr. **Corfu Channel**, Merits, Judgment, I.C.J. Reports 1949; **Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)**, Merits, Judgment, I.C.J. Reports 1986, paras. 29-30 and 59-60).

134. The standards of proof are less formal in an international legal proceeding than in a domestic one. The latter recognize different burdens of proof, depending upon the nature, character and seriousness of the case.

135. The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwith-

standing what has already been said, is capable of establishing the truth of the allegations in a convincing manner.

136. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts.

137. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim.

138. Since this Court is an international tribunal, it has its own specialized procedures. All the elements of domestic legal procedures are therefore not automatically applicable.

139. The above principle is generally valid in international proceedings, but is particularly applicable in human rights cases.

140. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.

141. In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.

142. The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State.

143. Since the Government only offered some documentary evidence in support of its preliminary objections, but none on the merits, the Court must reach its decision without the valuable assistance of a more active participation by Honduras, which might otherwise have resulted in a more adequate presentation of its case.

144. The manner in which the Government conducted its defense would have sufficed to prove many of the Commission's allegations by virtue of the principle that the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not com-

pelled as a matter of law. This result would not hold under criminal law, which does not apply in the instant case (supra 140 and 141). The Court tried to compensate for this procedural principle by admitting all the evidence offered, even if it was untimely, and by ordering the presentation of additional evidence. This was done, of course, without prejudice to its discretion to consider the silence or inaction of Honduras or to its duty to evaluate the evidence as a whole.

145. In its own proceedings and without prejudice to its having considered other elements of proof, the Commission invoked Article 42 of its Regulations, which reads as follows:

> The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34 paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

Because the Government did not object here to the use of this legal presumption in the proceedings before the Commission and since the Government fully participated in these proceedings, Article 42 is irrelevant here.

VIII

146. In the instant case, the Court accepts the validity of the documents presented by the Commission and by Honduras, particularly because the parties did not oppose or object to those documents. The foregoing does not apply to the unsigned statement alleged to have been given under oath by Francisco Berríos in February 1984, which cannot be considered independent proof either as a deposition because it does not meet the formal requirements for written proof or as testimony because it was not given in a hearing nor challenged by the parties. This does not mean, however, that it cannot be considered as one more piece of circumstantial evidence, in accordance with the criteria set forth in paragraph 134 **et seq.**

147. During the hearings, the Government objected, under Article 37 of the Rules of Procedure, to the testimony of witnesses called by the Commission. By decision of October 6, 1987, the Court rejected the challenge, holding as follows:

> b. The objection refers to circumstances under which, according to the Government, the testimony of these witnesses might not be objective.
>
> c. It is within the Court's discretion, when rendering judgment, to weigh the evidence.
>
> d. A violation of the human rights set out in the Convention is established by facts found by the Court, not by the method of

proof.

f. When testimony is questioned, the challenging party has the burden of refuting that testimony.

148. During cross-examination, the Government's attorneys attempted to show that some witnesses were not impartial because of ideological reasons, origin or nationality, family relations, or a desire to discredit Honduras. They even insinuated that testifying against the State in these proceedings was disloyal to the nation. Likewise, they cited criminal records or pending charges to show that some witnesses were not competent to testify (supra 91, 95, 97, 99 and 108).

149. It is true, of course, that certain factors may clearly influence a witness' truthfulness. In this sense, the Court cannot ignore the fact that all of the witnesses who testified regarding the disapperance of Saúl Godínez had very strong family ties to the victim. However, the Government did not present any concrete evidence to show that the witnesses had not told the truth, but rather limited itself to making general observations regarding their alleged incompetency or lack of impartiality. This is insufficient to rebut testimony which is fundamentally consistent with that of other witnesses. The Court cannot ignore such testimony.

150. Moreover, some of the Government's arguments are unfounded within the context of human rights law. The insinuation that persons who, for any reason, resort to the inter-American system for the protection of human rights are disloyal to their country is unacceptable and cannot constitute a basis for any penalty or negative consequence. Human rights are higher values that "are not derived from the fact that (an individual) is a national of a certain state, but are based upon attributes of his human personality" (American Declaration of the Rights and Duties of Man, Whereas clauses, and American Convention, Preamble). Contrary to the above insinuations, international systems for the protection of human rights are based on the premise that the State is at the service of the community and not the reverse. It is violations of human rights that are subject to punishment: this can never be true for resorting to those systems or for contributing to the application of the law by them.

151. Neither is it sustainable that having a criminal record or charges pending is sufficient in and of itself to find that a witness is not competent to testify in Court. As the Court ruled, in its decision of October 6, 1987, in the instant case,

> under the American Convention on Human Rights, it is impermissible to deny a witness, **a priori**, the possibility of testifying to facts relevant to a matter before the Court, even if he has an interest in that proceeding, because he has been prosecuted or even convicted under internal laws.

152. Many of the press clippings offered by the Commission cannot be considered as documentary evidence as such. However, many of them contain public and well-known facts which, as such, do not require proof; others are of evidentiary value, as has been recognized in international jurisprudence (**Military and Paramilitary Activities in and against Nicaragua**, supra 133, paras. 62-64), insofar as they textually reproduce public statements, especially those of high-ranking members of the Armed Forces, of the Government, or even of the Supreme Court of Honduras, such as some of those made by the President of the latter. Finally, others are important as a whole insofar as they corroborate testimony regarding the responsibility of the Honduran military and police for disappearances.

IX

153. The Court now turns to the relevant facts that it finds to have been proven. They are as follows:

ON THE PRACTICE OF DISAPPEARANCES

a. During the period 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras, and many were never heard from again (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

b. Those disappearances followed a similar pattern. The victims were first followed and kept under surveillance and then kidnapped by force, often in broad daylight and in public places, by armed men in civilian clothes and disguises, who acted with apparent impunity and who used vehicles without any official identification, with tinted windows and with false license plates or no plates (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

c. It was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

d. The disappearances were carried out in a systematic manner, regarding which the Court considers the following circumstances particularly relevant:

i. The victims were usually persons whom Honduran officials considered dangerous to State security (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Inés Consuelo Murillo, José Gonzalo Flores Trejo, Zenaida Ve-

lásquez, César Augusto Murillo and press clippings). In addition, the victims had usually been under surveillance for long periods of time (testimony of Ramón Custodio López and Florencio Caballero);

ii. The arms employed were reserved for the official use of the military and police, and the vehicles used had tinted glass, which requires special official authorization. In some cases, Government agents carried out the detentions openly and without any pretense or disguise; in others, government agents had cleared the areas where the kidnappings were to take place and, on at least one occasion, when government agents stopped the kidnappers they were allowed to continue freely on their way after showing their identification (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Florencio Caballero);

iii. The kidnappers blindfolded the victims, took them to secret, unofficial detention centers and moved them from one center to another. They interrogated the victims and subjected them to cruel and humiliating treatment and torture. Some were ultimately murdered and their bodies were buried in clandestine cemeteries (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Florencio Caballero, René Velásquez Díaz, Inés Consuelo Murillo and José Gonzalo Flores Trejo);

iv. When queried by relatives, lawyers and persons or entities interested in the protection of human rights, or by judges charged with executing writs of habeas corpus, the authorities systematically denied any knowledge of the detentions or the whereabouts or fate of the victims. That attitude was seen even in the cases of persons who later reappeared in the hands of the same authorities who had systematically denied holding them or knowing their fate (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings);

v. Military and police officials as well as those from the Executive and Judicial Branches either denied the disappearances or were incapable of preventing or investigating them, punishing those responsible, or helping those interested discover the whereabouts and fate of the victims or the location of their remains. The investigative committees created by the Government and the Armed Forces did not produce any results. The judicial proceedings brought were processed slowly with a clear lack of interest and some were ultimately dismissed (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings).

154. ON THE DISAPPEARANCE OF SAUL GODINEZ

a. That Saúl Godínez, a leader of a teachers' group, disappeared on the morning of July 22, 1982. Nothing is known of his whereabouts since that date (testimony of Alejandrina Cruz, Enmidida Escoto de Godínez, Elsa Rosa Escoto Escoto and press clippings).

b. That, although the Court has not received any direct evidence that the disappearance of Saúl Godínez was the work of governmental agents, there does exist considerable circumstantial evidence with sufficient weight to establish the judicial presumption that this disappearance was carried out within the framework of the aforementioned practice. To wit:

i. The activities of Saúl Godínez, as a trade union leader, were of the type that were specially subjected to official repression. He was a leader of a teachers' group who had participated in several strikes and at the time of his disappearance he was involved in the preparation of a new strike (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Enmidida Escoto de Godínez). These activities were of the type considered "dangerous" by those who carried out disappearances at that time (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Florencio Caballero);

ii. There are also indications that shortly prior to his disappearance, he had been threatened, watched and followed (testimony of Enmidida Escoto de Godínez and Elsa Rosa Escoto Escoto);

iii. There are indications that he was captured in a desolate area in the manner in which disappearances were usually carried out (testimony of Enmidida Escoto de Godínez and Elsa Rosa Escoto Escoto) and that he was held in places of detention under the control of Honduran officials (testimony of Alejandrina Cruz);

iv. In the case of Saúl Godínez, there was the same failure of the Armed Forces and the Government to investigate and reveal his whereabouts, and the same ineffectiveness of the courts where three writs of habeas corpus and a criminal complaint were brought, as in other cases of disappearances (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Enmidida Escoto de Godínez, Alejandrina Cruz, press clippings and documentary evidence);

v. The only explanation intimated by Honduran authorities regarding the disappearance of Saúl Godínez was the suggestion that he had joined subversive groups or had gone to Cuba. This latter explanation was even given by the judge before whom a criminal complaint was brought. No action was taken on that complaint (testimony of Alejandrina Cruz). The same suggestion is found in documents provided to

the Commission by the Government (written statements of Sergeant Félix Pedro García Rodríguez, Víctor Manuel Meza Argueta, Ciriaco Castillo and Major Juan Blas Salazar Meza). The fact that none of those whose statements appear in these documents was offered as a witness by the Government and that the statements were not corroborated with any other evidence, far from proving the truth of this rumor, rather shows an attempt to link Godínez to activities considered dangerous to national security;

vi. Other than the above, there has been no other attempt by the Government to explain the facts nor any statement offered to prove that Saúl Godínez had been kidnapped by common criminals or by other persons unrelated to the practice of disappearances existing at that time, or that he had disappeared voluntarily. The defense of the Government rested solely on the lack of direct proof, which, as the Court has already said (**supra** 136-137) is inadequate and insufficient in cases such as this;

vii. The very existence of a practice of disappearances is a relevant factor within the framework set out to establish a judicial presumption (**supra** 130-132).

155. The Court must emphasize in this respect that, in cases of forced disappearances of human beings, circumstantial evidence on which a judicial presumption is based is especially valid (**supra** 136-137). This is evidence which is used in every judicial system and which may be the only means available, when human rights violations imply the use of State power for the destruction of direct evidence in an attempt at total impunity or the crystallization of some sort of perfect crime, to meet the object and purpose of the American Convention and permit the Court to carry out effectively the functions that the Convention assigns it.

156. Based upon the above, the Court finds that the following facts have been proven in this proceeding: (1) a practice of disappearances carried out or tolerated by Honduran officials existed between 1981 and 1984; (2) the circumstances surrounding the disappearance of Saúl Godínez coincide with those of that practice; and (3) the Government of Honduras failed to guarantee the human rights affected by that practice.

X

157. Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years.

158. The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.

159. The establishment of a Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights, by Resolution 20(XXXVI) of February 29, 1980, is a clear demonstration of general censure and repudiation of the practice of disappearances, which had already received world attention at the UN General Assembly (Resolution 33/173 of December 20, 1978), the Economic and Social Council (Resolution 1979/38 of May 10, 1979) and the Subcommission for the Prevention of Discrimination and Protection of Minorities (Resolution 5B(XXXII) of September 5, 1979). The reports of the rapporteurs or special envoys of the Commission on Human Rights show concern that the practice of disappearances be stopped, the victims reappear and that those responsible be punished.

160. Within the Inter-American system, the General Assembly of the Organization of American States (OAS) and the Commission have repeatedly referred to the practice of disappearances and have urged that disappearances be investigated and that the practice be stopped (AG/RES.443 (IX-0/79) of October 31, 1979; AG/RES.510 (X-0/80) of November 27, 1980; AG/RES.618 (XII-0/82) of November 20, 1982; AG/RES.666 (XIII-0/83) of November 18, 1983; AG/RES.742 (XIV-0/84) of November 17, 1984 and AG/RES.890 (XVII-0/87) of November 14, 1987; Inter-American Commission on Human Rights: Annual Report 1978, pp. 24-27; Annual Report, 1980-1981, pp. 113-114; Annual Report, 1982-1983, pp. 46-47; Annual Report, 1985-1986, pp. 37-40; Annual Report, 1986-1987, pp. 277-284 and in many of its Country Reports, such as OAS/Ser.L/V/II.49, doc. 19, 1980 (Argentina); OAS/Ser.L/V/II.66, doc. 17, 1985 (Chile) and OAS/Ser. L/V/II.66, doc. 16, 1985 (Guatemala)).

161. International practice and doctrine have often categorized disappearances as a crime against humanity, although there is no treaty in force which is applicable to the States Parties to the Convention and which uses this terminology (Inter-American Yearbook on Human Rights, 1985, pp. 368, 686 and 1102). The General Assembly of the OAS has resolved that it "is an affront to the conscience of the hemisphere and constitutes a crime against humanity" (AG/RES.666, **supra**) and that "this practice is cruel and inhuman, mocks the rule of law, and undermines those norms which guarantee protection against arbitrary detention and the right to personal security and safety" (AG/RES.742, **supra**).

162. Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.

163. The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty by providing that:

> 1. Every person has the right to personal liberty and security.
>
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
>
> 3. No one shall be subject to arbitrary arrest or imprisonment.
>
> 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
>
> 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
>
> 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

164. Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to the integrity of the person by providing that:

> 1. Every person has the right to have his physical, mental, and moral integrity respected.

> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

In addition, investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the Convention.

165. The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention, the first clause of which reads as follows:

> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

166. The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The existence of this practice, moreover, evinces a disregard of the duty to organize the State in such a manner as to guarantee the rights recognized in the Convention, as set out below.

167. In addition, the practice of disappearances itself creates a climate incompatible with the guarantee of human rights by the States Parties in the Convention, in that it relaxes the minimum standards of conduct that should govern security forces and allows such forces to violate those rights with impunity.

XI

168. The Commission has asked the Court to find that Honduras has violated the rights guaranteed to Saúl Godínez by Articles 4, 5 and 7 of the Convention. The Government has denied the charges and seeks to be absolved.

169. This requires the Court to examine the conditions under which a particular act, which violates one of the rights recognized by the Convention, can be imputed to a State Party thereby establishing its international responsibility.

170. Article 1(1) of the Convention provides:

> Article 1. Obligation to Respect Rights
>
> 1. The 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.

171. This article specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated.

172. The Commission did not specifically allege the violation of Article 1(1) of the Convention, but that does not preclude the Court from applying it. The precept contained therein constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, **iura novit curia**, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them (**"Lotus"**, Judgment No. 9, 1927, P.C.I.J., Series A No. 10, p. 31 and Eur. Court H.R., **Handyside Case**, Judgment of 7 December 1976, Series A No. 24, para. 41).

173. Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.

174. The first obligation assumed by the States Parties under Article 1(1) is "to respect the rights and freedoms" recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State. On another occasion, this Court stated:

> The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the State or to which the State has

> but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power (**The Word "Laws" in Article 30 of the American Convention on Human Rights**, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 21).

175. The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

176. The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation, it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.

177. The obligation of the States is, thus, much more direct than that contained in Article 2, which reads:

> **Article 2. Domestic Legal Effects**
>
> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

178. According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.

179. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

180. This principle suits perfectly the nature of the Convention, which is violated whenever public power is used to infringe the rights recognized therein. If acts of public power that exceed the State's authority or are illegal under its own laws were not considered to compromise that State's obligations under the treaty, the system of protection provided for in the Convention would be illusory.

181. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State.

182. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

183. Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant, the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention.

184. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

185. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does

not, in itself, prove the failure to take preventive measures.

186. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case. The establishment of a practice of disappearances by a given government signifies, in and of itself, that it has abandoned its juridical duty to prevent violations of human rights committed under cover of public authority.

187. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

188. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

189. As the Court has verified above, the failure of the judicial system to act upon the writs brought before various tribunals in the instant case has been proven. Not one writ of habeas corpus was processed. No judge had access to the places where Saúl Godínez might have been detained. The criminal investigation that was demanded was not pursued nor processed at all. There was, therefore, a complete failure of the theoretically adequate mechanisms of the Honduran state to investigate the disappearance of Saúl Godínez, or to comply with the duties to compensate for damages and punish those responsible.

190. Nor did the organs of the Executive Branch carry out a serious investigation to establish the fate of Saúl Godínez. There was no investigation of public allegations of a practice of disappearances nor a determination of whether Saúl Godínez had been a victim of that practice. The Commission's requests for information were ignored to the point that the Commission had

to presume, under Article 42 of its Regulations, that the allegations were true. The offer of an investigation in accord with Resolution 32/83 of the Commission resulted in an investigation by the Armed Forces, the same body accused of direct responsibility for the disappearances. This raises grave questions regarding the seriousness of the investigation. The Government often resorted to asking relatives of the victims to present conclusive proof of their allegations even though those allegations, because they involved crimes against the person, should have been investigated on the Government's own initiative in fulfillment of the State's duty to ensure public order. This is especially true when the allegations refer to a practice carried out within the Armed Forces, which, because of its nature, is not subject to private investigations. No proceeding was initiated to establish responsibility for the disappearance of Saúl Godínez and apply punishment under internal law. All of the above leads to the conclusion that the Honduran authorities did not take effective action to ensure respect for human rights within the jurisdiction of that State as required by Article 1(1) of the Convention.

191. The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.

192. There exists sufficient proof, and the Court has so stated, to conclude that the disappearance of Saúl Godínez was carried out by individuals who acted under cover of public authority. However, even had that fact not been proven, the circumstance that the State apparatus created a climate in which the crime of enforced disappearance was impunely committed and that, after the disappearance of Saúl Godínez, the failure to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it it to ensure Saúl Godínez the free and full exercise of his human rights.

193. The Court notes that the legal order of Honduras does not authorize such acts and that internal law defines them as crimes. The Court also recognizes that not all levels of the Government of Honduras were necessarily aware of those acts, nor is there any evidence that such acts were the result of official orders. Nevertheless, those circumstances are irrelevant for the purposes of establishing whether Honduras is responsible under international law for the violations of human rights perpetrated within the practice of disappearances.

194. According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical

or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.

195. The Court, therefore, concludes that the facts found in this proceeding show that the State of Honduras is responsible for the involuntary disappearance of Saúl Godínez Cruz. Thus, Honduras has violated Articles 7, 5 and 4 of the Convention.

196. As a result of the disappearance, Saúl Godínez was the victim of an arbitrary detention, which deprived him of his physical liberty without legal cause and without a determination of the lawfulness of his detention by a judge or competent tribunal. Those acts directly violate the right to personal liberty recognized by Article 7 of the Convention (supra 163) and are a violation imputable to Honduras of the duties to respect and ensure that right under Article 1(1).

197. The disappearance of Saúl Godínez violates the right to personal integrity recognized by Article 5 of the Convention (supra 164). First, the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee under Article 5(1) and 5(2) to treatment respectful of his dignity. Second, although it has not been directly shown that Saúl Godínez was physically tortured, his capture by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture, constitute a failure of Honduras to fulfill the duty imposed by Article 1(1) to ensure the rights under Article 5(1) and 5(2) of the Convention. The guarantee of physical integrity and the right of detainees to treatment respectful of their human dignity require States Parties to take reasonable steps to prevent situations which are truly harmful to the rights protected.

198. The above reasoning is applicable to the right to life recognized by Article 4 of the Convention (supra 165). The context in which the disappearance of Saúl Godínez occurred and the lack of knowledge six and a half years later about his fate create a reasonable presumption that he was killed. Even if there is a minimal margin of doubt in this respect, it must be presumed that his fate was decided by authorities who systematically executed detainees without trial and concealed their bodies in order to avoid punishment. This, together with the failure to investigate, is a violation by Honduras of a legal duty under Article 1(1) of the Convention to ensure the rights recognized by Article 4(1). That duty is to ensure every person subject to its jurisdiction the inviolability of the right to life and the right not to have one's life taken arbitrarily. These rights imply an obligation on the part of States Parties to take reasonable steps to prevent situations that could result in the violation of that right.

XII

199. Article 63(1) of the Convention provides:

> If 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.

Clearly, in the instant case the Court cannot order that the victim be guaranteed the enjoyment of the rights or freedoms violated. The Court, however, can rule that the consequences of the breach of the rights be remedied and that just compensation be paid.

200. During this proceeding the Commission requested the payment of compensation, but did not offer evidence regarding the amount of damages or the manner of payment. Neither did the parties discuss these matters.

201. The Court shall fix, after hearing the interested parties, the amount of the compensation in execution of this judgment and, therefore, retains jurisdiction in the case, unless the parties reach an agreement in the interim. The Court reserves the right to approve any such agreement.

XIII

202. With no pleading to support an award of costs, it is not proper for the Court to rule on them (Art. 45(1), Rules of Procedure).

XIV

203. **NOW, THEREFORE,**

THE COURT:

Unanimously

1. Rejects the preliminary objection interposed by the Government of Honduras alleging the inadmissibility of the case for the failure to exhaust

domestic legal remedies.

Unanimously

2. Declares that Honduras has violated, in the case of Saúl Godínez Cruz, its obligations to respect and to ensure the right to personal liberty set forth in Article 7 of the Convention, read in conjunction with Article 1(1) thereof.

Unanimously

3. Declares that Honduras has violated, in the case of Saúl Godínez Cruz, its obligations to respect and to ensure the right to humane treatment set forth in Article 5 of the Convention, read in conjunction with Article 1(1) thereof.

Unanimously

4. Declares that Honduras has violated, in the case of Saúl Godínez Cruz, its obligation to ensure the right to life set forth in Article 4 of the Convention, read in conjunction with Article 1(1) thereof.

Unanimously

5. Decides that Honduras is hereby required to pay fair compensation to the next of kin of the victim.

Unanimously

6. Decides that the form and amount of such compensation shall be fixed by the Court and, for this purpose, retains jurisdiction in the case.

Unanimously

7. Does not find it necessary to render a decision concerning costs.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this twentieth day of January, 1989.

(s) Rafael Nieto-Navia
President

(s) Rodolfo E. Piza E.

(s) Thomas Buergenthal

(s) Pedro Nikken

(s) Héctor Fix-Zamudio

(s) Rigoberto Espinal Irías

(s) Charles Moyer
Secretary

Judge Héctor Gros-Espiell participated in the consideration and hearings of this case but could not sign the judgment because he was not present.

APPENDIX II

OAS/Ser.L/V/II.74
Doc. 6
September 6, 1988
Original: English

74TH SESSION

REQUEST FOR ADVISORY OPINION

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Washington, D. C.

REQUEST FOR ADVISORY OPINION

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
Washington D. C.

The Inter-American Commission on Human Rights, as the organ under the Charter of the Organization of American States having the function to promote the observance and protection of human rights and in the exercise of the powers granted it by Article 64(1) of the American Convention on Human Rights, hereby requests the Inter-American Court of Human Rights to render an advisory opinion relating to the interpretation of Article 46(1)(a) and 46(2) of the Convention.

In accordance with the provisions of Article 49(2)(b) of the Rules of Procedure of the Inter-American Court of Human Rights, the Commission presents its request for an advisory opinion in the following terms:

A. Provisions to be interpreted

The provisions on which the Inter-American Commission on Human Rights seeks an advisory opinion is Article 46(1)(a) and 46(2) of the American Convention on Human Rights, which reads as follows:

Article 46

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.

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.

The Commission wishes to point out that its request for an advisory opinion refers specifically to two different situations.

The first relates to the effect of this provision on an indigent person, who because of economic circumstances is unable to take advantage of the legal procedures within a country.

The second situation concerns the requirement of exhaustion of internal legal remedies when an individual is unable to retain counsel because licensed attorneys refuse to represent such an individual out of fear for their own lives, personal security or material well-being.

In respect to the first situation, the Commission poses the following questions:

1. Does the requirement of the exhaustion of internal legal remedies apply to an indigent, who because of economic circumstances is unable to avail himself of the legal remedies within a country?

2. In the event that this requirement is waived for indigents, what criteria should the Commission consider in making its determination of admissibility in such cases?

With regard to the second situation:

1. Does the requirement of the exhaustion of internal legal remedies apply to an individual complainant, who because he is unable to retain representation due to a general fear in the legal community cannot avail himself of the legal remedies provided by law in a country?

2. In the event that this requirement is waived for such persons, what criteria should the Commission consider in making its determination of admissibility in these cases?

B. The request for an advisory opinion relates to the sphere competence of the Commission

Under Article 33 of the American Convention on Human Rights, the Commission is one of the organs having competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to the Convention.

In addition, Article 41 of the Convention stipulates that the Commission has as its main function the promotion of the respect for and defense

of human rights and Article 64(1) of the Convention provides that the Commission, as an organ listed in Chapter X of this Chapter of the OAS may, within its sphere of competence, consult the Court on the interpretation of the Convention.

Moreover, as the Court itself has stated, "given the broad powers relating to the promotion and observance of human rights which Article 112 of the OAS Charter confers on the Commission... the Commission enjoys, as a practical matter, an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention" (**The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)**, Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 16).

C. Considerations giving rise to the request

The Commission, when it receives a petition lodged in accordance with Article 44 of the Convention, must decide on the admissibility of the petition. One of the requirements of the Convention that must be met in order that a petition be declared admissible is that the internal legal remedies have been exhausted (Art. 46(1)(a)). The Convention itself, however, sets out certain circumstances under which the terms of Article 46(1)(a) need not be complied with (Art. 46(2)).

1. Indigency

The Commission has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in the domestic legislation because he cannot afford legal assistance or, in some cases, the obligatory filing fees.

The Commission is aware that some States provide free legal assistance to persons who qualify because of their economic status. However, this practice does not obtain in all of the countries and even in those countries where it exists, it often covers only highly urbanized areas.

When the legal remedies of a State are not in fact available to an alleged victim of a violation of human rights and should the Commission be obligated to dismiss his complaint for failure to meet the requirement of Article 46(1)(a), does this not bring into play the possibility of a discrimination based on "social condition" (Article 1(1) of the Convention)?

2. Lack of Counsel

Complainants have alleged to the Commission that they have been unable to retain counsel to represent them, thereby limiting their ability to effectively pursue the internal legal remedies putatively available at law.

This situation has occurred where an atmosphere of fear prevails and lawyers do not accept cases which they believe could place their own lives and those of their families in jeopardy.

When, as a practical matter, such a situation occurs and an alleged victim of an human rights violation brings the matter to the attention of the Inter-American Commission on Human Rights, should the Commission admit such a complaint or dismiss it as inadmissible?

D. Name and address of the Delegates of the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights names as its delegates for all purposes relating to this request its Chairman, its First Vice Chairman, and its Second Vice Chairman, who are authorized to act jointly or separately. The address for notifications, summonses, communications and the like is the office of the Secretariat of the Commission located in the city of Washington, D. C., seat of the Organization of American States, 1889 F Street, N. W., Washington, D. C. 20006, U. S. A.

APPENDIX III

INTER-AMERICAN COURT OF HUMAN RIGHTS

FAIREN GARBI AND SOLIS CORRALES CASE

JUDGMENT OF MARCH 15, 1989

In the Fairén Garbi and Solís Corrales case,

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

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

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

delivers the following judgment pursuant to Article 44(1) of its Rules of Procedure (hereinafter "the Rules of Procedures") in the instant case submitted by the Inter-American Commmission on Human Rights against the State of Honduras.

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted the instant case to the Inter-American Court of Human Rights (hereinafter the "Court") on April 24, 1986. It originated in a petition (No. 7951) against the State of Honduras (hereinafter "Honduras" or "the Government"), which the Secretariat of the Commission received on January 14, 1982.

2. In submitting the case, the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention in the case of Francisco Fairén Garbi and Yolanda Solís Corrales. In addition, the Commission asked the Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties."

3. The petition filed with the Commission alleges that Costa Rican citizens, Francisco Fairén Garbi, a student and public employee, and Yolanda Solís Corrales, a teacher, disappeared in Honduras on December 11, 1981, as they were traveling through that country to México. Honduran officials denied they entered Honduras. Nevertheless, the Government of Nicaragua certified they had left Nicaragua for Honduras at the Las Manos border post, on December 11, 1981, at 4:00 p.m. It later submitted photocopies of the immigration cards in the handwriting of the travelers.

4. According to the record the Commmission forwarded to the Court:

a) the Government of Honduras, by document of January 24, 1982, and its Ambassador in Costa Rica, in a paid advertisement in the Costa Rican newspaper "La Nación," announced that Francisco Fairén Garbi and Yolanda Solís Corrales had "at no time entered the territory of the Republic of Honduras." On February 19, 1982, citing the investigations of the Ministry of Foreign Relations of her country, the Honduran Ambassador to Costa Rica made the same statement to the petitioner;

b) on February 11, 1982, the Secretary General of Immigration of Honduras certified that Yolanda Solís Corrales, proceeding from Nicaragua in a "private vehicle," did enter Honduran territory at Las Manos border post on December 12, 1981; that "there is no record of Francisco Fairén having entered our country; nor is there any record of the departure of either of the Costa Ricans;"

c) on March 10, 1982, the Minister of Foreign Relations of Honduras informed his Costa Rican counterpart that Francisco Fairén Garbi and Yolanda Solís Corrales had entered Honduran territory from Nicaragua, at Las Manos on December 11, 1981, and left for Guatemala at El Florido on the following day. The same information had been given to the

Commission on March 8, 1982;

d) on January 14, 1982, the Guatemalan Consul in San José, Costa Rica, certified that Francisco Fairén Garbi and Yolanda Solís Corrales did not enter or leave Guatemala between December 8 and 12 of 1981. On February 3, at the request of the petitioner, the Office of Immigration certified that Yolanda Solís Corrales "entered the country on December 12, 1981, at the border post of El Florido, Camotán, Chiquimula, under passport No. P-1-419-121-78;" that Francisco Fairén Garbi "entered the country from Honduras, on December 12, 1981, at the border post of El Florido, Camotán, Chiquimula, under passport No. P-9-048-377-81;" that Yolanda Solís Corrales "left the country on December 14, 1981, through the Valle Nuevo border post towards El Salvador;" and that Francisco Fairén Garbi "left the country on December 14, 1981, through the Valle Nuevo border post towards El Salvador;"

e) the Department of Motor Vehicles of Costa Rica certified that no driver's license had been issued to Yolanda Solís Corrales;

f) on December 28, 1981, the body of a man was found at the place called La Montañita, near Tegucigalpa;

g) on June 9, 1982, the Government confirmed to the Commission that Francisco Fairén Garbi and Yolanda Solís Corrales left Honduran territory for Guatemala on December 12, 1981, and left Guatemala for El Salvador on December 14, 1981, which was certified by Guatemalan officials.

5. By Resolution 16/84 of October 4, 1984, the Commission declared "that the acts denounced constitute serious violations of the right to life (Art. 4) and the right to personal liberty (Art. 7) of the American Convention" and that the Government "is responsible for the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales."

6. On October 29, 1984, the Government requested reconsideration of Resolution 16/84 on the grounds that the persons who had disappeared had left its territory, presumably for Guatemala; that it would consent to the exhumation of the body found in La Montañita, following the procedure establisned by the laws of Honduras; and that it had given specific orders to the authorities to investigate the allegations contained in the petition. The Government also argued that it had established an Investigatory Commission made up of members of the Armed Forces of Honduras (hereinafter "Armed Forces") to ascertain the facts and to establish the appropriate legal responsibilities. It further noted that "with the firm conviction that in this case --as shown in paragraph 10 of Resolution (16/84)-- the remedies provided on the national plane have not been exhausted (it had) decided to forward all the documentation on this deplorable matter to the Investigatory Commission, so it might reopen the investigation and verify the truth of the allegations."

7. On October 17, 1985, the Government gave the Commission the report issued by the Investigatory Commission, according to which "the authorities such as the DNI, Immigration, etc., are not holding these persons and no documentation of those offices has been seen which proves that those foreigners included in the list were captured or entered the country legally."

8. On April 7, 1986, the Government informed the Commission that

> despite the efforts of the Investigatory Commission established by Decree 232 of June 14, 1984, no new evidence has been discovered. The information at hand contains no convincing evidence on which to rule on the alleged disappearances with absolute certainty. In view of the impossibility of identifying the persons allegedly responsible, the interested parties were publicly exhorted to make use of the available judicial remedies to bring charges against the public authorities or private parties they deem responsible.

9. By Resolution 23/86 of April 18, 1986, the Commission ratified Resolution 16/84 and referred the matter to the Court.

I

10. The Court has jurisdiction to hear the instant case. Honduras ratified the Convention on September 8, 1977 and recognized the contentious jurisdiction of the Court, as set out in Article 62 of the Convention, on September 9, 1981. The case was submitted to the Court by the Commission pursuant to Article 61 of the Convention and Article 50(1) and (2) of the Regulations of the Commission.

II

11. The instant case was submitted to the Court on April 24, 1986. On May 13, 1986, the Secretariat of the Court transmitted the application to the Government, pursuant to Article 26(1) of the Rules of Procedure.

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

13. In a note of July 23, 1986, the President confirmed a preliminary agreement that the Government present its submissions by the end of August 1986. On August 21, 1986, the Government requested the extension of this deadline to November 1986.

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

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

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

17. In his Order of January 30, 1987, the President made clear that the application which gave rise to the instant proceeding should be deemed to be the Memorial provided for in Article 30(3) of the Rules of Procedure. He also specified that the deadline of March 20, 1987 granted to the Commission was the time limit set forth in Article 27(3) of the Rules for the presentation of its observations and conclusions on the preliminary objections raised by the Government. The President, after consulting the parties, ordered a public hearing on June 16, 1987 for the presentation of oral arguments on the preliminary objections and left open the time limits for submissions on the merits, pursuant to the above-mentioned article of the Rules of Procedure.

18. By note of March 13, 1987, the Government informed the Court that because

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

19. In a motion contained in its observations of March 20, 1987, the Commission asked the President to rescind paragraph 3 of his Order of January 30, 1987 in which he had set the date for the public hearing. The Commission also observed that "in no part of its Memorial had the Government

of Honduras presented its objections as preliminary objections." In its note of June 11, 1987, the Government did however refer to its objections as "preliminary objections."

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

21. The hearing on the preliminary objections raised by the Government took place on June 16, 1987. Representatives of the Government and the Commission participated in this hearing.

22. On June 26, 1987, the Court delivered its judgment on the preliminary objections. In this unanimous decision, the Court:

> 1. Reject(ed) the preliminary objections interposed by the Government of Honduras, except for the issues relating to the exhaustion of the domestic legal remedies, which (were) ordered joined to the merits of the case.
>
> 2. Decide(d) to proceed with the consideration of the instant case.
>
> 3. Postpone(d) its decision on the costs until such time as it renders judgment on the merits.
>
> (**Fairén Garbi and Solís Corrales Case, Preliminary Objections,** Judgment of June 26, 1987. Series C No. 2).

23. On that same date, the Court adopted the following decision:

> 1. To instruct the President, in consultation with the parties, to set a deadline no later than August 27, 1987 for the Government to submit its Counter-Memorial on the merits and offer its evidence, with an indication of the facts that each item of evidence is intended to prove. In its offer of proof, the Government should show how, when and under what circumstances it wishes to present the evidence.
>
> 2. Within thirty days of the receipt of the submission of the Government, the Commission must ratify in writing the request of proof already made, without prejudice to the possibility of amending or supplementing what has been offered. The Commission should indicate the facts that each item of evidence is intended to prove and how, when and under what circumstances it wishes to present the evidence. As soon as possible after receiving the Government's submission referred to in paragraph one, the Commission may also supplement or amend its offer of proof.
>
> 3. To instruct the President, without prejudice to a final decision being taken by the Court, to decide preliminary matters

that might arise, to admit or exclude evidence that has been offered or may be offered, to order the filing of expert or other documentary evidence that may be received and, in consultation with the parties, to set the date of the hearing or hearings on the merits at which evidence shall be presented, the testimony of witnesses and any experts shall be received, and at which the final arguments shall be heard.

4. To instruct the President to arrange with the respective authorities for the necessary guarantees of immunity and participation of the Agents and other representatives of the parties, witnesses and experts, and, if necessary, the delegates of the Court.

24. In its submission of July 20, 1987, the Commission ratified and supplemented its request for oral testimony and offered documentary evidence.

25. On August 27, 1987, the Government filed its Counter-Memorial and documentary evidence. It asked that the matter be "dismissed because the allegations were untrue and the Government was not responsible for any of the actions of which it was accused."

26. In his Order of September 1, 1987, the President admitted the testimonial and documentary evidence offered by the Commission. On September 14, 1987 he also admitted the documentary evidence offered by the Government.

27. By communication of September 24, 1987, in response to the request of the Court, the Government of Costa Rica submitted certified copies of the records complied by the Ministry of Foreign Relations, the Legislative Assembly, and the "Ministerio Público" of that country, on the disappearance in Honduras of Francisco Fairén Garbi and Yolanda Solís Corrales, among others.

28. The Court held hearings on the merits and heard the final arguments of the parties from September 30 to October 7, 1987.

There appeared before the Court

a) for the Government of Honduras:

Edgardo Sevilla Idiáquez, Agent
Ramón Pérez Zúniga, Representative
Juan Arnaldo Hernández, Representative
Enrique Gómez, Representative
Rubén Darío Zepeda, Adviser
Angel Augusto Morales, Adviser
Olmeda Rivera, Adviser
Mario Alberto Fortín, Adviser

Ramón Rufino Mejía, Adviser

b) for the Inter-American Commission on Human Rights:

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

c) Witnesses presented by the Commission to testify as to "whether between the years 1981 and 1984 (the period in which Francisco Fairén Garbi and Yolanda Solís Corrales) there were numerous cases of persons who were kidnapped and who then disappeared, and whether these actions were imputable to the Armed Forces of Honduras and enjoyed the acquiescense of the Government of Honduras:"

Miguel Angel Pavón Salazar, Alternate Deputy
Ramón Custodio López, surgeon
Virgilio Carías, economist
Inés Consuelo Murillo, student
Efraín Díaz Arrivillaga, Deputy
Florencio Caballero, former member of the Armed Forces

d) Witnesses presented by the Commission to testify as to "whether between the years 1981 and 1984 effective domestic remedies existed in Honduras to protect those persons who were kidnapped and who then disappeared in actions imputable to the Armed Forces of Honduras:"

Ramón Custodio López, surgeon
Virgilio Carías, economist
Milton Jiménez Puerto, lawyer
Inés Consuelo Murillo, student
René Velásquez Díaz, lawyer
César Augusto Murillo, lawyer
José Gonzalo Flores Trejo, shoemaker

e) Witnesses presented by the Commission to testify on specific facts related to this case:

Elizabeth Odio Benito, former Minister of Justice of Costa Rica
Antonio Carrillo Montes, former Consul General of Costa Rica in Honduras

29. Despite the summons by the Court, the following witnesses offered by the Commission failed to appear at these hearings:

Bernd Niehaus, former Minister of Foreign Relations of Costa Rica
Antonio Menjíbar, a Salvadoran detained in Honduras
Leónidas Torres Arias, former member of the Honduran military
José María Palacios, attorney
Mauricio Villeda Bermúdez, attorney
Linda Rivera de Toro, the judge who carried out the writ of habeas corpus on behalf of Francisco Fairén Garbi and Yolanda Solís Corrales
Linda Drucker, journalist
Israel Morales Chinchilla, Chief Inspector of Immigration of Guatemala
Jorge Solares Zavala, Immigration Inspector of Guatemala
Mario Méndez Ruiz, Immigration Inspector of Guatemala
Fernando Antonio López Santizo, former Assistant Director of Immigration of Guatemala
Carlos Augusto López Santizo, former Consul General of Guatemala in Costa Rica, who had deceased at the time of the hearings.

Licentiate Linda Rivera de Toro gave sworn testimony before a Notary Public on January 7, and September 28, 1987. By letter of August 25, 1987, Dr. Bernd Niehaus ratified his "statements made about this case before the Special Investigatory Commission of the Legislative Assembly of Costa Rica."

30. After having heard the witnesses, the Court directed the submission of additional evidence to assist it in its deliberations. Its Order of October 7, 1987 reads as follows:

A. Documentary Evidence

1. To request the Inter-American Commission on Human Rights to submit the original immigration cards and the automobile entry permit granted by the governments of Guatemala, Honduras and Nicaragua.

2. To request the Government of Honduras to provide the organizational chart showing the structure of Battalion 316 and its position within the Armed Forces of Honduras.

3. To request Dr. Carlos E. Colombari Armijo, the dentist of Francisco Fairén Garbi, to furnish the certified dental records, and to ask the Government of Costa Rica for a copy of the personal data contained on the passport application. Clyde Collins Snow, Ph.D., the forensic pathologist offered by the Commission, or any other that it may call, shall submit an opinion on the autopsy (of the cadaver found at La Montañita), on the basis of the information obtained. The Inter-American Commission on Human Rights shall cover the costs.

4. To request the Honduran Bar Association to explain the legal procedure for exhumation in that country and to give its opinion on the right of a foreigner to request an exhumation.

B. Testimony

1. To call as a witness Mr. Francisco Fairén Almengor (the father of Francisco Fairén Garbi).

2. To call the following Guatemalan citizens as witnesses: Jorge Solares Zavala, Mario Méndez Ruiz, Mario Ramírez and Fernando A. López Santizo (Immigration officials).

3. To call as witnesses, Marco Tulio Regalado and Alexander Hernández, members of the Armed Forces of Honduras.

C. To Reiterate a Request:

1. To the Government of Honduras regarding the location of the body found at (the place known as) La Montañita.

31. By the same Order, the Court set December 15, 1987 as the deadline for the submission of documentary evidence and decided to hear the oral testimony at its January session.

32. In response to that Order, on December 14, 1987 the Government: a) with respect to the organizational structure of Battalion 316, requested that the Court receive the testimony of its Commandant in a closed hearing "because of strict security reasons of the State of Honduras" and b) requested that the Court hear the testimony of Alexander Hernández and Marco Tulio Regalado "in the Republic of Honduras, in a manner to be decided by the Court and in a closed hearing to be set at an opportune time... because of security reasons and because both persons are on active duty in the Armed Forces of Honduras." Likewise, on December 22, 1987, it submitted the opinion requested of the Honduras Bar Association (**infra**, 55).

33. By note of December 24, 1987, the Commission objected to hearing the testimony of members of the Honduran military in closed session. This position was reiterated by note of January 11, 1988.

34. On the latter date, the Court decided to receive the testimony of the members of the Honduran military at a closed hearing at the seat of the Court in the presence of the parties.

35. Pursuant to its Order of October 7, 1987 and its decision of January 11, 1988, the Court in an audience of January 19, 1988 heard the testimony of Francisco Fairén Almengor. The following Guatemalan witnesses did not appear: Israel Morales Chinchilla (summoned to testify by Resolution of January 11, 1988), Jorge Solares Zavala, Mario Méndez Ruiz, Mario Ramírez and Fernando A. López Santizo (summoned to testify by Decision of October 7, 1987). According to the Commission, those witnesses could not be found, except for Mr. López Santizo, who on October 2, 1987, sent the Court a

statement on his role in this case as Assistant Director of Immigration of Guatemala.

36. The Court also held a closed hearing on January 20, 1988 in San José, to which both parties attended, at which it received the testimony of persons who identified themselves as Lieutenant Colonel Alexander Hernández and Lieutenant Marco Tulio Regalado Hernández. The Court also heard the testimony of Colonel Roberto Núñez Montes, Head of the Intelligence Services of Honduras.

37. On January 19, 1988, the Commission, sua sponte and "determined to place all available evidence at the disposition of the Court," submitted receipt No. 318558. The receipt had a signature at the bottom reading "Francisco Fairén G.," and showed that a 1971 Opel automobile, Costa Rican license plate No. 39991 entered Guatemala at the border check point of El Florido on December 12, 1981. The receipt was submitted with the expert opinion of David P. Grimes, which points out some differences between the signature on the receipt and originals or photocopies of the signature of Francisco Fairén Garbi. The opinion concludes that "it will be necessary to examine additional current signatures," before expressing a final opinion.

38. By resolution of January 22, 1988, the Court authorized the President "in consultation with the Permanent Commission, to appoint one or more handwriting experts to determine the authenticity of the signature that reads 'Francisco Fairén' on the receipt" in question. The President of the Court appointed Dr. Dimas Oliveros Sifontes, a Venezuelan handwriting expert, to submit his opinion.

39. On March 2, 1988, the Ministry of Internal Affairs of Guatemala informed the Court that, following an investigation carried out under its auspices and another by representatives of the Inter-American Commission on Human Rights, the government "is unable to certify that Francisco Fairén Garbi and Yolanda Solís Corrales entered and departed from Guatemala in the month of December, 1981, as it had reported by note of October 6, 1987. Moreover, the Government of Guatemala is now of the opinion... (that) they never entered Guatemala, and that the report of 1982 is the correct one." The note emphasizes that "the lists of entries into the country through the border post of El Florido for the month of December, 1981, were not found among the records of the Division of Inspection of the Office of Immigration of Guatemala," and that "although the names of Francisco Fairén Garbi and Yolanda Solís Corrales appear on the lists of departures at the check point of Valle Nuevo for December 14, 1981, that list appears to be signed by Oscar Gonzalo Orellana Chacón, although the signature corresponds to that of José Víctor García Aguilar." Finally, the Government states that "therefore, the Government of Guatemala respectfully asks the illustrious Court to please consider that the current official opinion of the Government of Guatemala on this matter is that Francisco Fairén Garbi and Yolanda Solís Corrales never entered its territory (underlinings in the original).

40. On May 31, 1988, the Government of Honduras submitted its response to the communication of the Minister of Government of Guatemala, in which it adduced that the certification granted by the Office of Immigration of Guatemala on February 3, 1982, "cannot be rescinded by a mere opinion although it is the opinion of a government official."

41. On July 13, 1988, the Commission submitted that the communication of the Minister of Government of Guatemala "constitutes the final and definitive reply of that illustrious government to the Court's inquiry... (which is) the result of an exhaustive investigation."

42. In that submission, the Commission also made some "final observations" regarding the instant case. By decision of July 14, 1988, the President refused to admit those "observations" because they were untimely and because "reopening the period for submissions would violate the procedure opportunely established and, moreover, would seriously affect the procedural equilibrium and equality of the parties."

43. On July 28, 1988, the Court decided to request the Government of El Salvador to certify "whether in December, 1981, Costa Rican citizens needed a visa to enter that country" and "whether Francisco Fairén Garbi and Yolanda Solís Corrales had a visa that would allow them to enter El Salvador in December, 1981."

44. On September 21, 1988, the Government of El Salvador informed the Court "that in the month of December, 1981, Costa Rican citizens did not need a visa to enter our country" and that it found no record of the entry of Francisco Fairén Garbi or Yolanda Solís Corrales at the border posts of Las Chinamas (Valle Nuevo), Hachadura, San Cristóbal, or Anguiatu between December 1 and 21 of 1981.

45. The handwriting expert appointed by the President presented his report on August 12, 1988. He concluded that the signature on receipt No. 318558 which reads "Francisco Fairén G." is genuine.

46. In its submission of December 5, 1988, the Commission presented its observations on the expert opinion, stating that "the exposition of the expert, Oliveros, is clearly insufficient to support the conclusion of his report." Moreover, it submitted an affidavit in which Fausto Reyes Caballero affirms he belonged to Battalion 316 in San Pedro Sula and that the falsification of public documents and signatures was one of its activities.

47. The following non-governmental organizations submitted amicus curiae briefs to the Court: Amnesty International, Asociación Centroamericana de Familiares de Detenidos-Desaparecidos, Association of the Bar of the City of New York, Lawyers Committee for Human Rights and Minnesota Lawyers International Human Rights Committee.

III

48. Regarding the procedures related to the exhumation of a body found at the place called La Montañita (supra 4.f) and 6), the Consul General of Costa Rica in Tegucigalpa, Honduras, reported to his goverment on January 29, 1981, that "if the relatives wish to exhume the body, an attorney with a power of attorney would have to present the request to the First Criminal Court, and it would be advisable to bring a medical record, especially dental records." By note of its Minister of Foreign Relations, Bernd Niehaus, dated February 17, 1982, the Government of Costa Rica asked the Government of Honduras to have the Judge of the First Criminal Court of Tegucigalpa authorize the exhumation of the body the autopsy refers to (infra 49) and to allow a Costa Rican forensic specialist and dentist to participate in the exhumation. On February 22, 1982, the Government of Honduras responded to the Government of Costa Rica that its note had been "transmitted to the President of the Supreme Court of Honduras, so that he could make an appropriate ruling in accordance with the law." On April 6, 1982, through the Honduran Embassy in San José, Costa Rica, Foreign Minister Niehaus reiterated the request for an immediate exhumation of the body found in La Montañita. By communication of October 29, 1984, the Foreign Ministry of Honduras informed the Commmission that its government "is agreeable to the exhumation, following the procedure provided by the substantive and other norms of Honduran law." While affirming that no court had received a request for exhumation, it accepted that, should the body be exhumed, a Costa Rican forensic examiner could participate in the exhumation.

49. In its submission of March 20, 1987, the Commission asked the Court to request the Government to submit a copy of the autopsy report on the body found at La Montañita. In responding to the President's decision of September 1, 1987, the Government forwarded a copy on January 18, 1988, which corresponds to one sent by the Commission, **motu proprio**, on August 19, 1987.

50. On July 14 and 20, 1987, the Commission asked for the exhumation of the body found at La Montañita. In its submission of August 19, 1987, it informed the Court that, despite the "countless steps taken, it was impossible (for the Commission) to determine where the body was buried," and reiterated the request.

51. By decision of September 1, 1987, the Court, resolved:

> To suspend the exhumation of the body of "La Montañita" offered in evidence by the Commission, given the Commission's letter of August 19, 1987, to the President of the Court, unless the Court decides it should proceed, in which case, the Commission should promptly submit a documented rationale regarding the need of that evidence for the just resolution of the instant case, together with all other elements of proof it considers useful.

On August 28, 1987, the Court had already asked the Government to inform it where the body was buried, and the order for discovery of October 7, 1987, reiterated that request.

52. On August 27, 1987, the Government submitted a copy of official letter No. 3065 of the Supreme Court, dated December 23, 1983, according to which the First and Second Criminal Courts of Tegucigalpa reported that no one had requested the exhumation of a body which "it is presumed" could be that of Francisco Fairén Garbi.

53. By submission of November 3, 1987, the Commission offered a report prepared by the Argentine Team of Forensic Anthropology on the autopsy report of the body found at La Montañita. According to the Commission, "the exhumation of the body found at 'La Montañita' is essential." It reiterated that "the cooperation of the Government of Honduras is necessary to carry out the exhumation, and that the Government must first determine the precise place the body was buried."

54. On December 14, 1987, the Government submitted a copy of the "Record of the Examination of an Unidentified Cadaver" of December 8, 1981. At this time Francisco Fairén Garbi had not entered Honduran territory. It also submitted a statement of December 12, 1987, issued by the Director of the Medical-Legal Office of the Supreme Court, which said "to the present date, NO relative of Francisco Fairén Garbi or Yolanda Solís Corrales has asked this office to exhume any cadaver" (upper case of the original). On January 18, 1988, it submitted a copy of the same statement.

55. According to an opinion of December 14, 1987, submitted at the request of the Court by the Honduran Bar Association, the request for exhumation of a cadaver "does not require any formality at all, or even the appointment of a legal representative," although a "court order" and "express permission of the health authorities." It adds that "the relatives, the judicial authority, the state attorney or any party who can show a legitimate interest," even a foreigner, can request an exhumation.

56. On December 17, 1987, the Government submitted a medical-legal opinion signed by Dr. Dennis A. Castro Bobadilla, in which he criticizes the opinion of the Argentine Team of Forensic Anthropology calling it "not serious, unscientific, based upon suppositions, illogical, and even irresponsible, in that it shows an evident bias in pretending that the victim was subject to some type of torture of execution." Dr. Castro Bobadilla added that "based upon the data of the autopsy, it can be affirmed that the death was homicide" (sic) and that "exhumation is recommended in order to determine identity and if possible the cause of death." On January 11, 1988, the Commission expressed "its most absolute rejection of the unfortunate concepts" contained in the report of Dr. Castro Bobadilla.

57. On December 24, 1987, the Commission asked the Court to insist that the Government identify the location of the burial site of the body found at La

Montañita. The President did so by communication of January 8, 1988.

58. On January 13, 1988, in accord with the provisions of the general discovery order of October 7, 1987, the Commission submitted Autopsy Report No. 259 of December 29, 1981, which took into account the dental records of Francisco Fairén Garbi prepared by Dr. Clyde Collins Snow. It enclosed another report prepared by the Argentine Team of Forensic Anthropology. Neither is conclusive because of the sparse information contained in the autopsy report.

59. On January 20, 1989, the Court entered an order by which it:

> 1. Urges the Government of Honduras to provide the Court with the information to which this Order refers. (The location of the cadaver found in La Montañita).
>
> 2. Requires the Government of Honduras that it order and carry out the exhumation and identification of the body found in the place known as La Montañita on December 28, 1981, the autopsy of which was conducted the day after (Autopsy No. 259.81). The Government is given thirty days as of today to comply with this Order. At the end of that period, it shall inform the Court of the final results thereof.
>
> 3. The President shall appoint such persons as he deems suitable to attend and, given the case, to participate in the exhumation and identification of the body. These persons shall present separate reports to the Court.

60. On February 17, 1989, the Government informed the Court that

> members of the Inter-Institutional Commission of Human Rights went to the cemetery where the remains of the cadaver corresponding to Autopsy Report 259-81 was buried in 1981, and were able to observe that, unfortunately, because of the ravages of nature and the passage of time there have been cave-ins and landslides throughout this zone, which were made worse by the recent hurricane known as Gilbert, and it is now impossible to find the exact place where that body was buried. As illustration and proof, we attach newspaper clippings and photos of the area.

61. On March 10, 1989, in response to the Government's report, the Commission asserted that

> the main question is to determine whether in response to the petitions of the father of Francisco Fairén, the Government of Costa Rica, and of the Commission, the Government of Honduras took the necessary steps to clarify the situation of the cadaver found at "La Montañita," considering that its failure to carry out those measures and its minimal cooperation serves to establish the direct responsibility of the Honduran Government in this matter.

IV

62. By note of November 4, 1987, addressed to the President of the Court, the Commission asked the Court to take provisional measures under Article 63 (2) of the Convention in view of the threats against the witnesses Milton Jiménez Puerto and Ramón Custodio López. Upon forwarding this information to the Government of Honduras, the President stated that he "does not have enough proof to ascertain which persons or entities might be responsible for the threats, but he strongly wishes to request that the Government of Honduras take all measures necessary to guarantee the safety of the lives and property of Milton Jiménez and Ramón Custodio and the property of the Committee for the Defense of Human Rights in Honduras (CODEH)...." The President also stated that he was prepared to consult with the Permanent Commission of the Court and, if necessary, to convoke the Court for an emergency meeting "for taking the appropriate measures, if that abnormal situation continues." By communications of November 11 and 18, 1987, the Agent of the Government informed the Court that the Honduran government would guarantee Ramón Custodio and Milton Jiménez "the respect of their physical and moral integrity... and the faithful compliance with the Convention."

63. By note of January 11, 1988, the Commission informed the Court of the death of José Isaías Vilorio, which occurred on January 5, 1988 at 7:15 a.m. The Court had summoned him to appear as a witness on January 18, 1988. He was killed "on a public thoroughfare in Colonia San Miguel, Comayagüela, Tegucigalpa, by a group of armed men who placed the insignia of a Honduran guerrilla movement known as Cinchonero on his body and fled in a vehicle at high speed."

64. On January 15, 1988, the Court was informed of the assassinations of Moisés Landaverde and Miguel Angel Pavón which had occurred the previous evening in San Pedro Sula. Mr. Pavón had testified before the Court on September 30, 1987 as a witness in this case. Also on January 15, the Court adopted the following provisional measures under Article 63(2) of the Convention:

> 1. That the Government of Honduras adopt, without delay, such measures as are necessary to prevent further infringements on the basic rights of those who have appeared or have been summoned to do so before this Court in the "Velásquez Rodríguez," "Fairén Garbi and Solís Corrales" and "Godínez Cruz" cases, in strict compliance with the obligation of respect for and observance of human rights, under the terms of Article 1(1) of the Convention.
>
> 2. That the Government of Honduras also employ all means within its power to investigate these reprehensible crimes, to identify the perpetrators and to impose the punishment provided for by the domestic law of Honduras.

65. After it had adopted the above Order of January 15, the Court received a request from the Commission, dated the same day, that the Court take the necessary measures to protect the integrity and security of those persons who had appeared or would appear before the Court.

66. On January 18, 1988, the Commission asked the Court to adopt the following complementary provisional measures:

> 1. That the Government of Honduras inform the Court, within 15 days, of the specific measures it has adopted to protect the physical integrity of witnesses who testified before the Court as well as those persons in any way involved in these proceedings, such as representatives of human rights organizations.
>
> 2. That the Government of Honduras report, within that same period, on the judicial investigations of the assassinations of José Isaías Vilorio, Miguel Angel Pavón and Moisés Landaverde.
>
> 3. That the Government of Honduras provide the Court, within that same period, the public statements made regarding the aforementioned assassinations and indicate where those statements appeared.
>
> 4. That the Government of Honduras inform the Court, within the same period, on the criminal investigations of threats against Ramón Custodio and Milton Jiménez, who are witnesses in this case.
>
> 5. That it inform the Court whether it has ordered police protection to ensure the personal integrity of the witnesses who have testified and the protection of the property of CODEH.
>
> 6. That the Court request the Government of Honduras to send it immediately a copy of the autopsies and ballistic tests carried out regarding the assassinations of Messrs. Vilorio, Pavón and Landaverde.

67. That same day the Government submitted a copy of the death certificate and the autopsy report of José Isaías Vilorio, both dated January 5, 1988.

68. On January 18, 1988, the Court decided, by a vote of six to one, to hear the parties in a public session the following day regarding the measures requested by the Commission. After the hearing, taking into account "Articles 63(2), 33 and 62(3) of the American Convention on Human Rights, Articles 1 and 2 of the Statute of the Court and Article 23 of its Rules of Procedure and its character as a judicial body and the powers which derive therefrom," the Court unanimously decided, by Order of January 19, 1988, on the following additional provisional measures:

1. That the Government of Honduras, within a period of two weeks, inform this Court on the following points:

a. the measures that have been adopted or will be adopted to protect the physical integrity of, and to avoid irreparable harm to, those witnesses who have testified or have been summoned to do so in these cases.

b. the judicial investigations that have been or will be undertaken with respect to threats against the aforementioned individuals.

c. the investigations of the assassinations, including forensic reports, and the actions that are proposed to be taken within the judicial system of Honduras to punish those responsible.

2. That the Government of Honduras adopt concrete measures to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention.

This decision was delivered to the parties in Court.

69. Pursuant to the Court's decision of January 19, 1988, the Government submitted the following documents on February 3, 1988:

1. A copy of the autopsy report on the death of Professor Miguel Angel Pavón Salazar, certified by the Third Criminal Court of San Pedro Sula, Department of Cortés, on January 27, 1988 and prepared by forensic specialist Rolando Tábora, of that same Court.

2. A copy of the autopsy report on the death of Professor Moisés Landaverde Recarte, certified by the above Court on the same date and prepared by the same forensic specialist.

3. A copy of a statement made by Dr. Rolando Tábora, forensic specialist, as part of the inquiry undertaken by the above Court into the deaths of Miguel Angel Pavón and Moisés Landaverde Recarte, and certified by that Court on January 27, 1988.

...

4. A copy of the inquiry into threats against the lives of Ramón Custodio and Milton Jiménez, conducted by the First Criminal Court

> of Tegucigalpa, Central District, and certified by that Court on February second nineteen eighty eight.

In the same submission, the Government stated that:

> The content of the above documents shows that the Government of Honduras has initiated a judicial inquiry into the assassinations of Miguel Angel Pavón Salazar and Moisés Landaverde Recarte, under the procedures provided for by Honduran law.
>
> Those same documents show, moreover, that the projectiles were not removed from the bodies for ballistic study because of the opposition of family members, which is why no ballistic report was submitted as requested.

70. The Government also requested an extension of the deadline ordered above "because, for justifiable reasons, it has been impossible to obtain some of the information." Upon instructions from the President, the Secretariat informed the Government on the following day that it was not possible to extend the deadline because it had been set by the full Court.

71. By communication of March 10, 1988, the Inter-Institutional Commission of Human Rights of Honduras, a governmental body, made several observations regarding the Court's decision of January 15, 1988. "On the threats that have been made against some witnesses," it reported that Ramón Custodio "refused to bring a complaint before the proper courts and that the First Criminal Court of Tegucigalpa, Department of Morazán, had initiated an inquiry to determine whether there were threats, intimidations, conspiracies, etc. against the lives of Dr. Custodio and Milton Jiménez, and had duly summoned them to testify and to submit any evidence," but they failed to appear. It added that no Honduran official "has attempted to intimidate, threaten or restrict the liberty of any of the persons who testified before the Court... who enjoy the same guarantees as other citizens."

72. On March 23, 1988 the Government submitted the following documents:

> 1. Copies of the autopsies performed on the bodies of Miguel Angel Pavón Salazar and Moisés Landaverde, certified by the Secretary of the Third Criminal Court of the Judicial District of San Pedro Sula.
>
> 2. The ballistic report on the shrapnel removed from the bodies of those persons, signed by the Director of the Medical-Legal Department of the Supreme Court of Justice.

73. On October 25, 1988, the Agent submitted newspaper articles published in Honduras on October 20 containing statements of Héctor Orlando Vásquez, former President of the San Pedro Sula branch of the Committee for the

Defense of Human Rights in Honduras (CODEH), according to which the Government had no responsibility in the deaths of Miguel Angel Pavón Salazar, Moisés Landaverde Recarte and others. The Inter-Institutional Commission of Human Rights of Honduras, in a document of the same date, asserted that this confirmed the "well-founded suspicions that these murders and alleged disappearances are only an escalation in the attempts of anti-democratic sectors to destabilize the legally constituted system of our country."

74. On January 24, 1989, the President repeated the request to the Government that it inform the Court as soon as possible regarding

> 1. The current state of the judicial inquiry into the assassinations of witnesses, José Isaías Vilorio, which took place on January 5, 1988, and of Miguel Angel Pavón Salazar, which occured on January 14, 1988, "so that those responsible may be punished" (decisions of January 15 and 19, 1988).
>
> 2. The specific measures taken by the Government of Honduras "to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention" (Decision of January 19, 1988).

No answer to this communication has been received.

V

75. The Government raised several preliminary objections that the Court ruled upon in its Judgment of June 26, 1987 (**supra** 15-22). There the Court ordered the joining of the merits and the preliminary objection regarding the failure to exhaust domestic remedies, and gave the Government and the Commission another opportunity to "substantiate their contentions" on the matter (**Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra** 22, para. 89).

76. The Court will first rule upon this preliminary objection. In so doing, it will make use of all the evidence before it, including that presented during the proceedings on the merits.

77. The Commission presented witnesses and documentary evidence on this point. The Government, in turn, submitted some documentary evidence, including examples of writs of habeas corpus successfully brought on behalf of some individuals (**infra** 123.d). The Government also stated that this remedy requires identification of the place of detention and of the authority under which the person is detained.

78. In addition to the writ of habeas corpus, the Government mentioned various remedies that might possibly be invoked, such as appeal, cassation, extraordinary writ of amparo, **ad effectum videndi**, criminal complaints against those ultimately responsible and a presumptive finding of death.

79. The Commission argued that the remedies mentioned by the Government were ineffective because of the internal conditions in the country during that period. It presented documentation of three writs of habeas corpus brought on behalf of Francisco Fairén Garbi and Yolanda Solís Corrales did not produce results. It also cited a criminal complaint that failed to lead to the identification and punishment of those responsible. In the Commission's opinion, those legal proceedings exhausted domestic remedies as required by Article 46(1)(a) of the Convention.

80. The Court will first consider the legal arguments relevant to the question of exhaustion of domestic remedies and then apply them to the case.

81. Article 46(1)(a) of the Convention provides that, in order for a petition or communication lodged with the Commission in accordance with Articles 44 or 45 to be admissible, it is necessary

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

82. The same article, in the second paragraph, provides that this requirement 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.

83. In its Judgment of June 26, 1987, the Court decided, **inter alia**, that "the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective" (**Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra** 22, para. 87).

84. Concerning the burden of proof, the Court did not go beyond the conclusion cited in the preceding paragraph. The Court now affirms that if a State which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of

showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2). It must not be rashly presumed that a State Party to the Convention has failed to comply with its obligation to provide effective domestic remedies.

85. The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction (American Convention, Preamble).

86. It is a legal duty of the States to provide such remedies, as this Court indicated in its Judgment of June 26, 1987, when it stated:

> The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1) (**Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra** 22, para. 90).

87. Article 46(1)(a) of the Convention speaks of "generally recognized principles of international law." Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2).

88. Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty.

89. Likewise, the Government alleged on various opportunities that the interested parties must request the exhumation of the cadaver found at La Montañita before the First Criminal Court of Tegucigalpa, which is in charge of the proceedings arising from the discovery of several bodies at that location. In this regard, the Court believes that a timely exhumation could have rendered important evidence, but it is not a remedy which, under Article 46(1)(a) of the Convention, guarantees the human rights of a person

presumably disappeared.

90. Of the remedies cited by the Government, habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty. The other remedies cited by the Government are either for reviewing a decision within an inchoate proceeding (such as those of appeal or cassation) or are addressed to other objectives. If, however, as the Government has stated, the writ of habeas corpus requires the identification of the place of detention and the authority ordering the detention, it would not be adequate for finding a person clandestinely held by State officials, since in such cases there is only hearsay evidence of the detention, and the whereabouts of the victim is unknown.

91. A remedy must also be effective --that is, capable of producing the result for which it was designed. Procedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied.

92. On the other hand, contrary to the Commission's argument, the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion.

93. It is a different matter, however, when it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality. The exceptions of Article 46(2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case.

94. In the Government's opinion, a writ of habeas corpus does not exhaust the remedies of the Honduran legal system because there are other remedies, both ordinary and extraordinary, such as appeal, cassation, and extraordinary writ of amparo, as well as the civil remedy of a presumptive finding of death. In addition, in criminal procedures parties may use whatever evidence they choose. With respect to the cases of disappearances mentioned by the Commission, the Government stated that it had initiated some investigations and had opened others on the basis of complaints, and that the proceedings remain pending until those presumed responsible, either as principals or accomplices, are identified or apprehended.

95. In its conclusions, the Government stated that some writs of habeas corpus were granted from 1981 to 1984, which would prove that this remedy

was not ineffective during that period. It submitted various documents to support its argument.

96. In response, the Commission argued that the practice of disappearances made exhaustion of domestic remedies impossible because such remedies were ineffective in correcting abuses imputed to the authorities or in causing kidnapped persons to reappear.

97. The Commission maintained that, in cases of disappearances, the fact that a writ of habeas corpus or amparo has been brought without success is sufficient to support a finding of exhaustion of domestic remedies as long as the person does not appear, because that is the most appropriate remedy in such a situation. It emphasized that neither writs of habeas corpus nor a criminal complaint were effective in the case of Francisco Fairén Garbi and Yolanda Solís Corrales. The Commission maintained that exhaustion should not be understood to require mechanical attempts at formal procedures; but rather to require a case-by-case analysis of the reasonable possibility of obtaining a remedy.

98. The record contains testimony of members of the Legislative Assembly of Honduras, Honduran lawyers, persons who were at one time disappeared, and relatives of disappeared persons, which purports to show that in the period in which the events took place, the legal remedies in Honduras were ineffective in obtaining the liberty of victims of a practice of enforced or involuntary disappearances (hereinafter "disappearance" or "disappearances"), ordered or tolerated by the Government. The record also contains dozens of newspaper clippings which allude to the same practice. According to that evidence, from 1981 to 1984 more than one hundred persons were illegally detained, many of whom never reappeared, and, in general, the legal remedies which the Government claimed were available to the victims were ineffective.

99. That evidence also shows that some individuals were captured and detained without due process and subsequently reappeared. However, in some of those cases, the reappearances were not the result of any of the legal remedies which, according to the Government, would have been effective, but rather the result of other circumstances, such as the intervention of diplomatic missions or actions of human rights organizations.

100. The evidence offered shows that certain lawyers who filed writs of habeas corpus were intimidated, that those who were responsible for executing the writs were frequently prevented from entering or inspecting the places of detention, and that occasional criminal complaints against military or police officials were ineffective, either because certain procedural steps were not taken or because the complaints were dismissed without further proceedings.

101. The Government had the opportunity to call its own witnesses to refute the evidence presented by the Commission, but failed to do so. Although the

Government's attorneys contested some of the points urged by the Commission, they did not offer convincing evidence to support their arguments. The Court summoned as witnesses some members of the armed forces mentioned during the proceeding, but their testimony was insufficient to overcome the weight of the evidence offered by the Commission to show that the judicial and governmental authorities did not act with due diligence in cases of disappearances. The instant case is such an example.

102. The testimony and other evidence received and not refuted leads to the conclusion that, during the period under consideration, although there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities.

103. According to testimony given by Licentiate Linda Rivera de Toro before a notary public on January 7, 1987, "in the last months of 1981 and the first of the following year," a writ of habeas corpus was brought in behalf of Francisco Fairén Garbi and Yolanda Solís Corrales, and she was the judge appointed to carry out the investigation. She went to the customs post of Las Manos, on the border with Nicaragua, where she saw from the records that Francisco Fairén Garbi and Yolanda Solís Corrales had entered Honduran territory in a vehicle described in those records. Subsequently, and while preparing a dissertation on habeas corpus, she searched for the record and report on that case in the archives of the Supreme Court and was unable to find them.

104. Francisco Fairén Almengor, father of the person disappeared, testified he did not initiate judicial proceedings because he had been told the writs of habeas corpus were ineffective and had been advised it was better to create "international pressure" (testimony of Francisco Fairén Almengor. Also testimony of Elizabeth Odio Benito).

105. Based upon his knowledge of the conditions in Honduras in that period, the former Consul General of Costa Rica in Honduras testified that the intervention of an ordinary judge would have had very little result in obtaining the freedom of a political detainee in the hands of the military. He also mentioned that the steps to exhume a body could not be taken by the Consulate or the Embassy, but only by the Ministry of Foreign Relations of Costa Rica (testimony of Antonio Carrillo Montes).

106. In its submission of October 31, 1986, the Government alleged that, despite having urged the father of Francisco Fairén Garbi to take advantage of "the ordinary judicial remedies," no steps were taken to exhaust them before presenting the case to the Commission, as the Commission admitted in Resolution 16/84. It added, moreover, that the Commission's allegation in Resolution 23/86, that the petitioner had no access to the domestic remedies

or was impeded from exhausting them, was for the purpose of shifting the burden of proof from the petitioner to Honduras. The Government argued that the Commission deprived it of an important means of defense by admitting the petition without requiring the prior exhaustion of internal remedies.

107. The Government also maintained that the bringing of a writ of habeas corpus in behalf of Francisco Fairén Garbi and Yolanda Solís Corrales did not prove the exhaustion of domestic remedies. According to the Government, the proceeding was atypical in that it was carried out at a border post rather than in a jail or place of detention. Under those circumstances, it concluded, the Commission should not have admitted the petition, and was even less justified in submitting the case to the Court.

108. During the hearings on preliminary objections, the Commission argued that the exceptions to the rule of prior exhaustion found in Article 46(2) of the Convention were applicable because due process did not exist in Honduras at that time. Access to internal remedies in cases of disappearances was impeded, and the remedies invoked in similar cases, without exception, had been unjustifiably delayed.

109. Given the special circumstances of this case, it is not necessary to determine whether steps were taken to exhaust the internal remedies of Honduras. In ruling on this point, the Court notes, first, that the Government did not contest admissibility by objecting to the failure to exhaust internal remedies when it received formal notice of the petition. Neither did it respond to the Commission's request for information. That fact, alone, is sufficient to overrule the objection, for the rule of prior exhaustion is a prerequisite established in favor of the State, which may waive its right, even tacitly, and this occurs, **inter alia**, when it is not timely invoked.

110. On the other hand, it must be kept in mind that, as a norm of international law and the logical correlative of the obligation to exhaust internal remedies, the rule is not applicable when there are no remedies. This principle is especially relevant in the instant case, in light of the repeated official statement that Francisco Fairén Garbi and Yolanda Solís Corrales were not in Honduran territory, either because they had never entered, or having entered, had left for Guatemala after a brief period in transit. Those statements were both formal and official and came from the highest authorities --the Ministry of Foreign Relations and the Embassy in Costa Ric The Court notes that, in this fact situation, when the Government affirms it has carried out a careful investigation, leading to the conclusion that a person allegedly disappeared is not in its territory and has never been in its custody, the Government may be said to have recognized that there are no internal remedies.

111. Therefore, the Court rejects the objection of the Government of Honduras that internal remedies were not exhausted.

VI

112. For oral and documentary evidence offered by the Commission to prove that in Honduras, from 1981 through 1984, there were numerous cases of persons kidnapped and made to disappear, that the Armed Forces were responsible for these actions, and the judicial remedies of Honduras were ineffective in protecting human rights, especially the rights to life and the liberty and integrity of the person of those disappeared, the Court refers to the Velásquez Rodríguez (Judgment of July 29, 1988. Series C No. 4, para. 82 et seq.) and Godínez Cruz judgments (Judgment of January 20, 1989. Series C No. 5, para. 89 et seq.). The Court now considers the specific evidence of the Fairén Garbi and Solís Corrales Case.

113. According to his testimony, Francisco Fairén Almengor, father of the disappeared person, decided to travel to Honduras after a person claiming to be the chauffeur of the Honduran Embassy in San José showed him a photograph from "La Tribuna" newspaper of Honduras of a body found at the place called La Montañita. In the chauffeur's opinion, the body in the photo bore a strong resemblance to the witness' son. At the morgue of Tegucigalpa, Mr. Fairén was told the body had been buried in the city cemetery. Some women from the area of La Montañita told him and Antonio Carrillo Montes, then Consul General of Costa Rica in Honduras, several bodies had been found in that place, and they showed him a ravine of some 70 meters deep where, according to them, the bodies had been tossed (testimony of Francisco Fairén Almengor).

114. The Minister of Justice of Costa Rica at the time of the events reported she had received a group of persons, including the father of Francisco Fairén Garbi and the mother of Yolanda Solís Corrales, who informed her of the disappearance of their children in Honduras and requested her help. The witness said she helped by making inquiries of the Government of Honduras, which proved unfruitful, and by obtaining from Nicaragua the certification and photocopy of the immigration cards (testimony of Elizabeth Odio Benito).

115. A witness who was Consul General of Costa Rica in Honduras at that time told the Court that during the term of his appointment he heard of the disappearance of three Costa Ricans in Honduras: Francisco Fairén Garbi, Yolanda Solís Corrales and Eduardo Blanco. He added that an official of the Office of Immigration told him they were prisoners in El Manchén. The witness said he had accompanied Mr. Francisco Fairén Almengor while the latter was in Honduras (testimony of Antonio Carrillo Montes).

116. The Government of Nicaragua certified that Francisco Fairén Garbi and Yolanda Solís Corrales entered Honduras from Nicaragua by automobile at the Las Manos border post on December 11, 1981. It also sent certified photographs of the immigration cards. Having maintained various points of view, Honduras accepted that fact but pointed out that, because of the hour of entry (4:30 p.m.), it was noted in the immigration statistics as the

following day.

117. The Commission submitted receipt No. 318558, dated in El Florido on December 12, 1981. At the bottom of the receipt appears the signature "Francisco Fairén G." and it shows a temporary tourist entry into Guatemala of a "wine-beige" colored, Opel automobile with Costa Rican license plate 39991. In his opinion of August 12, 1988, the expert appointed by the President concludes that the signature of Francisco Fairén Garbi is genuine.

118. By letter of March 2, 1988, the Ministry of Internal Affairs of Guatemala informed the Court that, in the "opinion" of that government, Francisco Fairén Garbi and Yolanda Solís Corrales "never entered Guatemala," but it points out both names were on the departure lists of the Valle Nuevo border post (Las Chinamas) for December 14, 1981. The Guatemalan government says "that list appears to be signed by Oscar Gonzalo Orellana Chacón, although the signature corresponds to that of José Víctor García Aguilar," but it does not say whether it considers them genuine.

119. The Government of Costa Rica forwarded to the Court certified case file No. 9243 which contains a report signed on June 14, 1982, by Ricardo Granados, Head of the Criminal Section of the Office of Judicial Investigations (OIJ) of Costa Rica. The report is addressed to the Head of the "Ministerio Público" of that country and concerns the investigation requested regarding the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales. According to that report, in a search of the home of Mario Alberto Monge Fernández, who had apparently seen them on the day of their departure, the investigator found documents and other papers which suggested Francisco Fairén Garbi and Yolanda Solís Corrales had probably taken medical supplies to El Salvador and Guatemala, in which case their destination would not have been Mexico. Nevertheless, witnesses Francisco Fairén Almengor, Elizabeth Odio, and Antonio Carrillo affirmed that neither Francisco Fairén Garbi nor Yolanda Solís Corrales were political activists (testimony of Francisco Fairén Almengor, Elizabeth Odio, and Antonio Carrillo). The Commission also maintained that they had no political background which could have aroused the suspicion of the Government of Honduras.

120. Witness Florencio Caballero affirmed, initially, that he had no knowledge of the case of the Costa Rican citizens Francisco Fairén Garbi and Yolanda Solís Corrales, although, later, in another part of his testimony, he said he remembered the name Francisco Fairén Garbi from a Battalion 316 list of persons kidnapped (testimony of Florencio Caballero).

VII

121. The testimony and documentary evidence, corroborated by press clippings, presented by the Commission, tend to show:

a. That there existed in Honduras from 1981 to 1984 a systematic and selective practice of disappearances, carried out with the assistance

or tolerance of the government;

b. That Francisco Fairén Garbi and Yolanda Solís Corrales were presumably victims of that practice;

c. That in the period in which those acts occurred, the legal remedies available in Honduras were not appropriate or effective to guarantee his rights to life, liberty and personal integrity.

122. The Commission offered the testimony of Guatemalan citizens Israel Morales Chinchilla, Jorge Solares Zavala, Mario Méndez Ruiz, and Fernando A. López Santizo to prove that Francisco Fairén Garbi and Yolanda Solís Corrales did not leave Honduras, or to cast doubt upon the veracity of the certificates Guatemala had issued concerning their entry into its territory. According to the Commission, those witnesses did not appear, either because they could not be found or because of personal reasons.

123. The Government, in turn, submitted documents and based its argument on the testimony of three members of the Honduran Armed Forces, two of whom were summoned by the Court because they had been identified in the proceedings as directly involved in the general practice referred to. This evidence may be summarized as follows:

a. The testimony purports to explain the organization and functioning of the security forces accused of carrying out the specific acts and denies any knowledge of or personal involvement in the acts of the officers who testified;

b. Some documents purport to show that no civil suit had been brought to establish a presumption of the death of Francisco Fairén Garbi and Yolanda Solís Corrales;

c. Various certificates, to show that Francisco Fairén Garbi and Yolanda Solís Corrales entered Honduras and left for Guatemala on the following day through the customs post at El Florido, and, subsequently, left Guatemala through the Valle Nuevo border post for El Salvador;

d. Other documents purport to prove that the Supreme Court of Honduras received and acted upon some writs of habeas corpus and that some of those writs resulted in the release of the persons on whose behalf they were brought.

124. At its request, the Court obtained:

a. An expert opinion on the signature "Francisco Fairén G." found on the receipt for the entry of a vehicle into Guatemala, which the Commission submitted to the Court "in order to help to establish the facts" (**supra** 37);

b. A certificate of the Government of El Salvador concerning the prerequisites in December, 1981, for a Costa Rican to enter El Salvador and stating whether Francisco Fairén Garbi and Yolanda Solís Corrales had entered that country in that time period (supra 43 and 44);

c. A statement of October 2, 1987, of the Government of Guatemala, which reiterates that Francisco Fairén Garbi and Yolanda Solís Corrales entered Guatemala from Honduras on December 12, 1981, through the El Florido border post, and left for El Salvador on December 14, 1981, through the Valle Nuevo border post (supra 4.d)).

VIII

125. Before weighing the evidence, the Court must address some questions regarding the burden of proof and the general criteria considered in its evaluation and finding of the facts in the instant proceeding.

126. Because the Commission is accusing the Government of the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales, it, in principle, should bear the burden of proving the facts underlying its petition.

127. The Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove that an individual has been disappeared.

128. The Government did not object to the Commission's approach. Nevertheless, it argued that neither the existence of a practice of disappearances in Honduras nor the participation of Honduran officials in the alleged disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales had been proven.

129. The Court finds no reason to consider the Commission's argument inadmissible. If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this.

130. The Court must determine what the standards of proof should be in the instant case. Neither the Convention, the Statute of the Court nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to weigh the evidence freely, although

it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment (cfr. Corfu Channel, Merits, Judgment, I.C.J. Reports 1949; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, paras. 29-30 and 59-60).

131. The standards of proof are less formal in an international legal proceeding than in a domestic one. The latter recognize different burdens of proof, depending upon the nature, character and seriousness of the case.

132. The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner.

133. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts.

134. Since this Court is an international tribunal, it has its own specialized procedures. All the elements of domestic legal procedures are therefore not automatically applicable.

135. The above principle is generally valid in international proceedings, but is particularly applicable in human rights cases.

136. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.

IX

137. Although the Commission questioned the veracity of the Honduran and Guatemalan certificates and documents submitted to prove the travel of Francisco Fairén Garbi and Yolanda Solís Corrales from Honduras to Guatemala, it did not offer any evidence in support of its position.

138. The expert appointed by the President found the signature "Francisco Fairén G." on the entry receipt of December 12, 1981, to be genuine.

139. During the hearings, the Government objected, under Article 37 of the Rules of Procedure, to the testimony of witnesses called by the Commission. By decision of October 6, 1987, the Court rejected the challenge, holding as follows:

> b. The objection refers to circumstances under which, according to the Government, the testimony of these witnesses might not be objective.
>
> c. It is within the Court's discretion, when rendering judgment, to weigh the evidence.
>
> d. A violation of the human rights set out in the Convention is established by facts found by the Court, not by the method of proof.
>
> f. When testimony is questioned, the challenging party has the burden of refuting that testimony.

140. During cross-examination, the Government's attorneys attempted to show that some witnesses were not impartial because of ideological reasons, origin or nationality, family relations, or a desire to discredit Honduras. They even insinuated that testifying against the State in these proceedings was disloyal to the nation. Likewise, they cited criminal records or pending charges to show that some witnesses were not competent to testify.

141. It is true, of course, that certain factors may clearly influence a witness' truthfulness. However, the Government did not present any concrete evidence to show that the witnesses had not told the truth, but rather limited itself to making general observations regarding their alleged incompetency or lack of impartiality. This is insufficient to rebut testimony which is fundamentally consistent with that of other witnesses. The Court cannot ignore such testimony.

142. Moreover, some of the Government's arguments are unfounded within the context of human rights law. The insinuation that persons who, for any reason, resort to the inter-American system for the protection of human rights are disloyal to their country is unacceptable and cannot constitute a basis for any penalty or negative consequence. Human rights are higher values that "are not derived from the fact that (an individual) is a national of a certain state, but are based upon attributes of his human personality" (American Declaration of the Rights and Duties of Man, Whereas clauses, and American Convention, Preamble). Contrary to the above insinuations, international systems for the protection of human rights are based on the premise that the State is at the service of the community and not the reverse. It is violations of human rights that are subject to punishment: this can never be true for resorting to those systems or for contributing to the application of the law by them.

143. Neither is it sustainable that having a criminal record or charges pending is sufficient in and of itself to find that a witness is not competent to testify in Court. As the Court ruled, in its decision of October 6, 1987, in the instant case,

> under the American Convention on Human Rights, it is impermissible to deny a witness, a priori, the possibility of testifying to facts relevant to a matter before the Court, even if he has an interest in that proceeding, because he has been prosecuted or even convicted under internal laws.

144. By communication of March 2, 1988, the Ministry of Internal Affairs of Guatemala corrected a previous answer regarding the immigration records of Francisco Fairén Garbi and Yolanda Solís Corrales. Although it is true that the communication does not come from the Ministry of Foreign Relations, there is no reason not to consider it official. It so happens, however, that the information submitted is contradictory. While it categorically affirms that neither of the Costa Ricans entered Guatemala, it offers no explanation for the two previous certificates which state the contrary; it also recognizes that the names Francisco Fairén Garbi and Yolanda Solís Corrales appear in the list of departures toward El Salvador, and does not explain how such an aberrant event could occur if those persons never entered Guatemala. Although it makes garbled statements about the signatures on those lists, it does not question their authenticity (**supra** 39).

145. Many of the press clippings offered by the Commission cannot be considered as documentary evidence as such. However, many of them contain public and well-known facts which, as such, do not require proof; others are of evidentiary value, as has been recognized in international jurisprudence (**Military and Paramilitary Activities in and against Nicaragua**, **supra** 130, paras. 62-64), insofar as they textually reproduce public statements, especially those of high-ranking members of the Armed Forces, of the Government, or even of the Supreme Court of Honduras, such as some of those made by the President of the latter. Finally, others are important as a whole insofar as they corroborate testimony regarding the responsibility of the Honduran military and police for disappearances.

X

146. In the Velásquez Rodríguez and Godínez Cruz judgments (**supra** 112, paras. 149-158 and 157-167, respectively), the Court defined the legal nature of disappearances and the elements which characterize that phenomenon; it analyzed how international law at the universal and the regional level, has faced the question; and it identified the norms of the Convention violated by the practice of forced or involuntary disappearances. Without repeating those developments **in toto**, the Court will summarize its opinion in that regard.

147. The phenomenon of involuntary disappearances is a complex form of violation of human rights that must be understood and faced as an integral problem. It is a multiple and continuing violation of many rights recognized by the Convention, which the States Parties are obligated to respect and guarantee.

148. The forced disappearance of a person is a case of arbitrary deprivation of liberty which also violates the right of every person to be taken without delay before a judge and to bring the appropriate remedies to ascertain the legality of the measures taken. In this sense, it is a violation of Article 7 of the Convention.

149. Prolonged and coercive isolation is, by nature, cruel and inhuman treatment, harmful to the mental and moral integrity of the person and the right to dignity inherent to the human being. Thus, it also violates Article 5 of the Convention.

150. The practice of forced disappearances has often implied the secret execution of prisoners, without a trial, and the hiding of their bodies. That violation of the right to life infringes on Article 4 of the Convention.

151. This practice is a radical departure from the Pact of San José because it implies the crass abandonment of the values that emanate from human dignity and of the fundamental principles on which the inter-American system and the Convention are based.

152. The existence of this practice presupposes renunciation of the duty to organize the state apparatus in such a manner as to guarantee the rights recognized by the Convention. Actions calculated to bring about involuntary disappearances, to tolerate them, to avoid adequate investigation, or the punishment, as the case may be, of those responsible, constitute the violation of the duty to respect the rights recognized by the Convention and to guarantee their free and full exercise (Art. 1(1)). The Court refers, in this regard, to the two judgments previously cited (**Velásquez Rodríguez Case, supra** 112, paras. 159-181, **Godínez Cruz Case, supra** 112, paras. 168-191).

XI

153. The Court now turns to the relevant facts that it finds to have been proven. They are as follows:

a. During the period 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras, and many were never heard from again (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

b. Those disappearances followed a similar pattern. The victims were first followed and kept under surveillance and then kidnapped by force, often in broad daylight and in public places, by armed men in civilian clothes and disguises, who acted with apparent impunity and who used vehicles without any official identification, with tinted windows and with false license plates or no plates (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

c. It was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

d. The disappearances were carried out in a systematic manner, regarding which the Court considers the following circumstances particularly relevant:

i. The victims were usually persons whom Honduran officials considered dangerous to State security (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Inés Consuelo Murillo, José Gonzalo Flores Trejo, Zenaida Velásquez, César Augusto Murillo and press clippings). In addition, the victims had usually been under surveillance for long periods of time (testimony of Ramón Custodio López and Florencio Caballero);

ii. The arms employed were reserved for the official use of the military and police, and the vehicles used had tinted glass, which requires special official authorization. In some cases, Government agents carried out the detentions openly and without any pretense or disguise; in others, government agents had cleared the areas where the kidnappings were to take place and, on at least one occasion, when government agents stopped the kidnappers they were allowed to continue freely on their way after showing their identification (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Florencio Caballero);

iii. The kidnappers blindfolded the victims, took them to secret, unofficial detention centers and moved them from one center to another. They interrogated the victims and subjected them to cruel and humiliating treatment and torture. Some were ultimately murdered and their bodies were buried in clandestine cemeteries (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Florencio Caballero, René Velásquez Díaz, Inés Consuelo Murillo and José Gonzalo Flores Trejo);

iv. When queried by relatives, lawyers and persons or entities interested in the protection of human rights, or by judges charged with executing writs of habeas corpus, the authorities systematically denied any knowledge of the detentions or the whereabouts or fate of the victims. That attitude was seen even in the cases of persons who later reappeared in the hands of the same authorities who had systematically denied holding them or knowing their fate (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings);

v. Military and police officials as well as those from the Executive and Judicial Branches either denied the disappearances or were incapable of preventing or investigating them, punishing those responsible, or helping those interested discover the whereabouts and fate of the victims or the location of their remains. The investigative committees created by the Government and the Armed Forces did not produce any results. The judicial proceedings brought were processed slowly with a clear lack of interest and some were ultimately dismissed (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings).

154. Francisco Fairén Garbi and Yolanda Solís Corrales entered Honduran territory at the Las Manos border post, in the Department of El Paraíso, on December 11, 1981. That is the last reliable information on their whereabouts. Despite initial contradictions, Honduran authorities subsequently admitted that the two disappeared persons had entered their territory. (Report of the Government of March 8, 1982, on the certificate of the Secretary General of Immigration of Honduras, February 11, 1982).

155. There are many contradictions regarding the presence of Francisco Fairén Garbi and Yolanda Solís Corrales in Honduras and their departure from Honduran territory. Initially, the Governments of Honduras and Guatemala denied those persons had crossed the border between the two countries. Then they affirmed they had entered Guatemala on December 12, 1981, and Guatemalan authorities added that they had left for El Salvador on December 14 of the same year. The Government of Guatemala ratified the latter version on October 6, 1987, but was later contradicted in part by its Ministry of Internal Affairs in a communication of March 2, 1988. The Ministry denied they had entered Guatemala, but admitted their names appeared in the immigration lists of departures for El Salvador on December 14, 1981. It also made garbled statements concerning the signatures on those lists. Considered together, those facts are equivocal, but their investigation and clarification are hindered by the fact, among others, that Guatemala and El Salvador are not

parties to the case.

156. On the other hand, the Court notes that some evidence tends to show that the two Costa Ricans may have continued their trip from Honduras to Guatemala, and possibly, to El Salvador. That evidence is the following:

a. According to information furnished by a Costa Rican official to the "Ministerio Público" of his country, the destination of the travelers could have been Guatemala.

b. Within the contradictions already emphasized, the version most insistently maintained by the Guatemalan authorities has been to recognize the Costa Ricans' entry into that country. That was so certified over a period of years and by two successive governments. The recent denial, on the other hand, does not explain the reason for the earlier position, nor how they could have left Guatemala for El Salvador when they allegedly did not enter Guatemala.

c. There is an automobile entry receipt, from Honduras to Guatemala, with the signature of Francisco Fairén Garbi, submitted to the Court by the Commission who is the plaintiff, declared genuine in the handwriting expert's report of August 12, 1988.

157. There are many insurmountable difficulties of proof in establishing whether these disappearances occurred in Honduras and whether that State is legally responsible. As the Court has already said, it has been fully shown that, in Honduras in the period in which those events occurred, there was a repressive practice of forced disappearances for political motives. That practice is a violation of the Convention and could serve as a principal element, together with other corroborative evidence, to create a legal presumption that certain persons were the victims of that practice. However, in the absence of other evidence, whether circumstantial or indirect, the practice of disappearances is insufficient to prove that a person whose whereabouts is unknown was the victim of that practice.

158. There is insufficient evidence to relate the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales to the governmental practice of disappearances. There is no evidence that Honduran authorities had them under surveillance or suspicion of being dangerous persons, nor that were arrested or kidnapped in Honduran territory. That one of them --Francisco Fairén Garbi-- could have been in a secret detention center, is mentioned in the deposition of a witness who first affirmed he had no knowledge of the case. When questioned again, he appeared to recall having seen the name of Francisco Fairén on a list of disappeared persons under detention (testimony of Florencio Caballero). Other similar information was a mere reference and

very circumstantial (testimony of Antonio Carrillo Montes).

159. Although the Government of Honduras has incurred in many contradictions, the failure to investigate this case, which it explains by virtue of the Guatemalan certificate that those disappeared had entered its territory, is insufficient --in the absence of other evidence-- to create a legal presumption that the Honduran Government is responsible for those disappearances.

160. The lack of diligence, approaching obstructionism, in not responding to repeated requests from the Government of Costa Rica, from the father of one of the victims, the Commission or the Court, regarding the location and exhumation of the "cadaver of La Montañita," made the discovery of that body impossible and could support a presumption of government responsibility (Order of January 20, 1989). Nevertheless, in view of the other evidence, that presumption alone does not authorize, and even less requires, a finding that Honduras is responsible for the disappearance of Francisco Fairén Garbi. The Court recognizes, of course, that had the body been found and identified as that of Francisco Fairén Garbi, it would have been a significant contribution to the establishment of the truth. The Government's action deprived the Court of that possibility. It must, however, be recognized that had the cadaver been exhumed and shown not to be that of Francisco Fairén Garbi, that alone would not have been sufficient to absolve Honduras of all responsibility in his disappearance. Because that presumption would not resolve the many contradictions arising from probative elements which point in a different direction, the Court cannot rest its decision solely upon the presumption.

161. Article 1(1) of the Convention obligates the States Parties 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...." The Court does not now consider it necessary to analyze the meaning of the expression "subject to their jurisdiction." That is unnecessary to decide the instant case because it has not been proven that the State of Honduras used its power to violate the rights of Francisco Fairén Garbi or Yolanda Solís Corrales. Although this proceeding has proven the existence of a practice of disappearances carried out or tolerated by Honduran authorities between the years 1981 and 1984, it has not been proven that the disappearances in the instant case occurred within the framework of that practice, or is otherwise imputable to the State of Honduras.

XII

162. With no pleading to support an award of costs, it is not proper for the Court to rule on them (Art. 45(1), Rules of Procedure).

XIII

163. **THEREFORE,**

THE COURT,

unanimously

1. Rejects the preliminary objection interposed by the Government of Honduras alleging the inadmisibility of the case for the failure to exhaust domestic legal remedies.

unanimously

2. Declares that in the instant case it has not been proven that Honduras is responsible for the disappearances of Francisco Fairén Garbi and Yolanda Solís Corrales.

unanimously

3. Does not find it necessary to render a decision concerning costs.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this fifteenth day of March, 1989.

(s) Rafael Nieto-Navia
President

(s) Héctor Gros-Espiell

(s) Rodolfo E. Piza E.

(s) Thomas Buergenthal

(s) Pedro Nikken

(s) Héctor Fix-Zamudio

(s) Rigoberto Espinal-Irías

(s) Charles Moyer
Secretary

APPENDIX IV

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-10/89
OF JULY 14, 1989

INTERPRETATION OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN WITHIN THE FRAMEWORK OF ARTICLE 64 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

REQUESTED BY THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA

Present:

Héctor Gros-Espiell, President
Héctor Fix-Zamudio, Vice-President
Thomas Buergenthal, Judge
Rafael Nieto-Navia, Judge
Policarpo Callejas-Bonilla, Judge
Orlando Tovar-Tamayo, Judge
Sonia Picado-Sotela, Judge

Also present:

Manuel E. Ventura-Robles, interim Secretary

THE COURT,

composed as above,

renders the following Advisory Opinion:

1. By note of February 17, 1988, the Government of the Republic of Colombia (hereinafter "the Government") submitted to the Inter-American Court of Human Rights (hereinafter "the Court") a request for an advisory opinion on the interpretation of Article 64 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in relation to the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration" or "the American Declaration").

2. The Government requests a reply to the following question:

> Does Article 64 authorize the Inter-American Court of Human Rights to render advisory opinions at the request of a member state or one of the organs of the OAS, regarding the interpretation of the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States in Bogotá in 1948?

The Government adds:

> The Government of Colombia understands, of course, that the Declaration is not a treaty. But this conclusion does not automatically answer the question. It is perfectly reasonable to assume that the interpretation of the human rights provisions contained in the Charter of the OAS, as revised by the Protocol of Buenos Aires, involves, in principle, an analysis of the rights and duties of man proclaimed by the Declaration, and thus requires the determination of the normative status of the Declaration within the legal framework of the inter-American system for the protection of human rights.

The applicant Government points out that

> for the appropriate functioning of the inter-American system for the protection of human rights, it is of great importance to know what the juridical status of the Declaration is, whether the Court has jurisdiction to interpret the Declaration, and if so, what the scope of its jurisdiction is within the framework of Article 64 of the Convention.

3. By note of February 29, 1988, the Colombian Ambassador in Costa Rica, Dr. Jaime Pinzón, informed the Court that he had been designated as Agent in this request. Subsequently, by note of June 2, 1989, the Minister of Foreign Relations of Colombia informed the Court that it had named as Agent Mrs. María Cristina Zuleta de Patiño, the new Colombian Ambassador to Costa Rica.

4. By note of March 2, 1988, pursuant to Article 52 of the Court's Rules of Procedure, the Secretariat requested written observations on the question from all the member states of the Organization of American States (hereinafter "the OAS" or "the Organization"), and through the Secretary General, from the organs listed in Article 51 of the Charter of the OAS, or Article 52 of the Charter as revised by the Protocol of Cartagena de Indias, after its entry into force for the ratifying states.

5. The President of the Court ordered that the written observations and relevant documents be submitted to the Secretariat before June 15, 1988.

6. The governments of Costa Rica, the United States, Perú, Uruguay and Venezuela responded to the Secretariat's request.

7. The International Human Rights Law Group submitted an **amicus curiae** brief.

8. On July 20, 1988, the Court held a public hearing in order to receive the oral arguments of the member states and the organs of the OAS.

9. Present at the hearing:

In representation of the Government of Colombia:

Dr. Jaime Pinzón, Agent and Ambassador to Costa Rica,

In representation of the Government of Costa Rica,

Lic. Carlos Vargas, Agent and Legal Counsel of the Ministry of Foreign Relations,

In representation of the Government of the United States,

Mr. Deane Hinton, Ambassador to Costa Rica,

Mr. Jeffrey Kovar, Attorney-Adviser, Office of the Legal Adviser, United States Department of State, and

Ms. Xenia Wilkinson, Senior Political Adviser, United States Mission to the OAS.

Although it was notified opportunely, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") was

not represented. Because the Commission did not submit any written observations, the Court will have to decide the instant request without its valuable assistance.

10. By communication of August 3, 1988, the Government of the United States of America replied to questions posed by the Court during the public hearing on July 20, 1988, and made additional observations. On July 3, 1989, it submitted supplementary observations.

I

11. In its written observations, the Government of Costa Rica

believes that notwithstanding its great success and nobility, the American Declaration of the Rights and Duties of Man is not a treaty as defined by international law, so Article 64 of the American Convention does not authorize the Inter-American Court to interpret the Declaration. Nevertheless, that could not in any way limit the Court's possible use of the Declaration and its precepts to interpret other, related juridical instruments or a finding that many of the rights recognized therein have become international customary law.

12. The Government of the United States of America believes

The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States.

Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member states, not as a binding set of obligations.

The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking --by which sovereign states voluntarily undertake specified legal obligations-- to impose legal obligations on states through a process of "reinterpretation" or "inference" from a non binding statement of principles.

13. For its part, the Government of Perú said that

although the Declaration could have been considered an instrument without legal effect before the American Convention on Human Rights entered into force, the Convention has recognized its

special nature by virtue of Article 29, which prohibits any interpretation "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have" and has thus given the Declaration a hierarchy similar to that of the Convention with regard to the States Parties, thereby contributing to the promotion of human rights in our Continent.

14. The Government of Uruguay affirmed that

i) The Inter-American Court of Human Rights is competent to render advisory opinions on any aspect of the American Declaration of the Rights and Duties of Man in relation to the revised Charter of the Organization of American States and the American Convention on Human Rights, within the scope of Article 64 of the latter.

ii) The juridical nature of the Declaration is that of binding, multilateral instrument that enunciates, defines and specifies fundamental principles recognized by the American States and which crystallizes norms of customary law generally accepted by those States.

15. The Government of Venezuela asserted that

as a general principle recognized by international law, a declaration is not a treaty in the true sense because it does not create juridical norms, and it is limited to a statement of desires or exhortations. A declaration creates political or moral obligations for the subjects of international law, and its enforceability is thus limited in contrast to a treaty, whose legal obligations are enforceable before a jurisdictional body.

...

The Government recognizes that the Declaration is not a treaty in the strict sense. The Court will surely ratify this position, and it should also decide that it is not competent to interpret the American Declaration of the Rights and Duties of Man adopted in Bogotá in 1948, given that the Declaration is not a treaty "concerning the protection of human rights in the American states," as required by Article 64 of the American Convention on Human Rights.

II

16. At the public hearing, the Agent of the Government of Colombia said that

the objective of the advisory opinion request is to hear the Court's opinion whether it can, in concrete terms, interpret the

American Declaration of the Rights and Duties of Man. That is, whether Article 64 authorizes the Inter-American Court of Human Rights to render advisory opinions at the request of a member state of the OAS or one of the organs of the Organization, regarding the interpretation of the American Declaration of the Rights and Duties of Man adopted at the Ninth International Conference of American States at Bogotá in 1948.

...

As a member state of the Organization, Colombia has a direct interest in the adequate functioning of the American system of human rights and in the reply to this request for an advisory opinion.

17. The representatives of the United States of America said that

It is the position of the United States that the American Declaration is not a treaty, and that therefore the Court does not have jurisdiction under Article 64 to interpret it or determine its normative status within the inter-American human rights system.

...

Because the Declaration is not and never has been a treaty, the United States believes that the Court has no jurisdiction to consider the present request, and should therefore dismiss it.

...

In the event that the Court does reach the issues of the normative status of the Declaration, the United States' view is that the Declaration remains for all member states of the O.A.S. what it was when it was adopted: an agreed statement of non-binding general human rights principles.

...

The United States must state, with all due respect, that it would seriously undermine the established international law of treaties to say that the Declaration is legally binding.

18. The Agent of the Government of Costa Rica was of the opinion that

if the Declaration was not conceived by its authors as a treaty, it cannot then be interpreted by advisory opinions rendered by this Court.

> But that does not mean, under any circumstance, that the Declaration has no juridical value, nor that the Inter-American Court of Human Rights cannot use it as evidence for the interpretation and application of other legal instruments related to the protection of human rights in the inter-American system.
>
> ...
>
> The development of international law for the protection of human rights has incorporated many of the rights enunciated in the Declaration of the Rights and Duties of Man into obligatory international customary law.

III

19. The Court will first examine the admissibility of the instant advisory opinion request.

20. Article 64(1) of the Convention provides:

> The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

21. Colombia, which is a member state of the OAS, has requested the advisory opinion. The request, therefore, has been made by an entity authorized to do so under Article 64(1) of the Convention.

22. In the observations submitted to the Court, some governments contend that the request is inadmissible because it calls for an interpretation of the American Declaration. In their view, the Declaration cannot be considered to be a treaty under Article 64(1) and, therefore, is not a proper subject matter for an advisory opinion.

23. Even if the Court were to accept the proposition that the Declaration is not a treaty, this conclusion would not necessarily make the request of the Government of Colombia inadmissible.

24. What the Government requests is an interpretation of Article 64(1) of the Convention. In fact, the Government asks whether Article 64 "authorizes" the Court "to render advisory opinions... on the interpretation of the American Declaration of the Rights and Duties of Man." Given that Article 64(1) authorizes the Court to render advisory opinions "regarding the interpretation of this Convention," a request which seeks an interpretation of any provision of the Convention, including Article 64, fulfills the requirements

of admissibility.

25. It is clear that in dealing with this request for an advisory opinion, the Court might have to pass on the legal status of the American Declaration. The mere fact, however, that the interpretation of the Convention or other treaties concerning human rights might require the Court to analyze international instruments which may or may not be treaties strictu sensu does not mean that the request for an advisory opinion is inadmissible, provided that the context is the interpretation of the instruments mentioned in Article 64(1) of the Convention. It follows therefrom that even if the Court should find it necessary to deal with the American Declaration when considering the merits of the instant request, that examination, given the manner in which Colombia has formulated its question, would involve the interpretation of an article of the Convention.

26. The question concerning the legal status of the Declaration bears on the merits of the request and not on its admissibility, for even if the Court were to conclude that the Declaration has no normative force within the inter-American system, that decision would not make the request inadmissible because it would have been reached in the context of an intepretation of Article 64(1).

27. In the instant case, the Court finds no good reason to make use of the discretionary powers it has repeatedly asserted that it posseses and which authorizes it to decline to render an advisory opinion, even when the request meets the formal admissibility requirements (**"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)**, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, paras. 30 and 31; **Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)**, Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 10 and **Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)**, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16).

28. The Court holds that it has the competence to render the present request for an advisory opinion and therefore rules it to be admissible.

IV

29. The Court will now address the merits of the question before it.

30. Article 64(1) of the Convention authorizes the Court to render advisory opinions "regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." That is, the object of the advisory opinions of the Court are treaties (see, in general, **"Other treaties," supra** 27).

31. According to the Vienna Convention on the Law of Treaties of 1969

> "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Art. 2(1)(a)).

32. The Vienna Convention of 1986 on the Law of Treaties among States and International Organizations or among International Organizations provides as follows in Article 2(1)(a):

> "treaty" means an international agreement governed by international law and concluded in written form:
>
> (i) between one or more States and one or more international organizations; or
>
> (ii) between international organizations,
>
> wether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation.

33. In attempting to define the word "treaty" as the term is employed in Article 64(1), it is sufficient for now to say that a "treaty" is, at the very least, an international instrument of the type that is governed by the two Vienna Conventions. Whether the term includes other international instruments of a conventional nature whose existence is also recognized by those Conventions (Art. 3, Vienna Convention of 1969; Art. 3, Vienna Convention of 1986), need not be decided at this time. What is clear, however, is that the Declaration is not a treaty as defined by the Vienna Conventions because it was not approved as such, and that, consequently, it is also not a treaty within the meaning of Article 64(1).

34. Here it must be recalled that the American Declaration was adopted by the Ninth International Conference of American States (Bogotá, 1948) through a resolution adopted by the Conference itself. It was neither conceived nor drafted as a treaty. Resolution XL of the Inter-American Conference on the Problems of War and Peace (Chapultepec, 1945) expressed the belief that in order to achieve the international protection of human rights, the latter should be listed and defined "in a Declaration adopted as a Convention by the States." In the subsequent phase of preparation of the draft Declaration by the Inter-American Juridical Committee and the Ninth Conference, this initial approach was abandoned and the Declaration was adopted as a declaration, without provision for any procedure by which it might become a treaty (Novena Conferencia Internacional Americana, **Actas y Documentos**. Bogotá: Ministerio de Relaciones Exteriores de Colombia, 1953, vol. I, pp. 235-236). Despite profound differences, in the Sixth Committee of the Conference the position prevailed that the text to be approved should be a declaration and

not a treaty (see the report of the Rapporteur of the Sixth Committee, Novena Conferencia Internacional Americana, 1948, **Actas y Documentos**. Bogotá: Ministerio de Relaciones Exteriores de Colombia, 1953, vol. V, p. 512).

In order to obtain a consensus, the Declaration was conceived as

> the initial system of protection considered by the American states as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable (American Declaration, Fourth Considerandum).

This same principle was confirmed on September 26, 1949, by the Inter-American Committee of Jurisconsults, when it said:

> It is evident that the Declaration of Bogotá does not create a contractual juridical obligation, but it is also clear that it demonstrates a well defined orientation toward the international protection of the fundamental rights of the human person (C.J.I., **Recomendaciones e informes, 1949-1953** (1955), p. 107. See also U. S. Department of State, **Report of the Delegation of the United States to the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948**, at 35-36 (Publ. No. 3263, 1948)).

35. The mere fact that the Declaration is not a treaty does not necessarily compel the conclusion that the Court lacks the power to render an advisory opinion containing an interpretation of the American Declaration.

36. In fact, the American Convention refers to the Declaration in paragraph three of its Preamble which reads as follows:

> Considering that these principles have been set forth in the Charter of the Organization of the American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.

And in Article 29(d) which indicates:

> **Restrictions Regarding Interpretation**
>
> No provision of this convention shall be interpreted as:
>
> ...
>
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

From the foregoing, it follows that, in interpreting the Convention in the exercise of its advisory jurisdiction, the Court may have to interpret the Declaration.

37. The American Declaration has its basis in the idea that "the international protection of the rights of man should be the principal guide of an evolving American law" (Third Considerandum). This American law has evolved from 1948 to the present; international protective measures, subsidiary and complementary to national ones, have been shaped by new instruments. As the International Court of Justice said: "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation" (**Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)**, Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31). That is why the Court finds it necessary to point out that to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.

38. The evolution of the here relevant "inter-American law" mirrors on the regional level the developments in contemporary international law and especially in human rights law, which distinguished that law from classical international law to a significant extent. That is the case, for example, with the duty to respect certain essential human rights, which is today considered to be an **erga omnes** obligation (**Barcelona Traction, Light and Power Company, Limited**, Second Phase, Judgment, I.C.J. Reports 1970, p. 3. For an analysis following the same line of thought see also **Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)** supra 37, p. 16 ad 57; cfr. **United States Diplomatic and Consular Staff in Tehran**, I.C.J. Reports 1980, p. 3 ad 42).

39. The Charter of the Organization refers to the fundamental rights of man in its Preamble ((paragraph three) and in Arts. 3.j), 16, 43, 47, 51, 112 and 150, Preamble (paragraph four), Arts. 3.k), 16, 44, 48, 52, 111 and 150 of the Charter revised by the Protocol of Cartagena de Indias), but it does not list or define them. The member states of the Organization have, through its diverse organs, giving specificity to the human rights mentioned in the Charter and to which the Declaration refers.

40. This is the case of Article 112 of the Charter (Art. 111 of the Charter as amended by the Protocol of Cartagena de Indias) which reads as follows:

> There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.

> An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

Article 150 of the Charter provides as follows:

> Until the inter-American convention on human rights, referred to in Chapter XVIII (Chapter XVI of the Charter as amended by the Protocol of Cartagena de Indias), enters into force, the present Inter-American Comission on Human Rights shall keep vigilance over the observance of human rights.

41. These norms authorize the Inter-American Commission to protect human rights. These rights are none other than those enunciated and defined in the American Declaration. That conclusion results from Article 1 of the Commission's Statute, which was approved by Resolution No. 447, adopted by the General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979. That Article reads as follows:

> 1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
>
> 2. For the purposes of the present Statute, human rights are understood to be:
>
> a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
>
> b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Articles 18, 19 and 20 of the Statute enumerate these functions.

42. The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS. For example, in Resolution 314 (VII-O/77) of June 22, 1977, it charged the Inter-American Commission with the preparation of a study to "set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man." In Resolution 371 (VIII-O/78) of July 1, 1978, the General Assembly reaffirmed "its commitment to promote the observance of the American Declaration of the Rights and Duties of Man," and in Resolution 370 (VIII-O/78) of July 1, 1978, it referred to the "international commitments" of a member state of the Organization to respect the rights of man "recognized in the American Declaration of the Rights and Duties of Man." The Preamble of the American Convention to Prevent and Punish Torture, adopted and signed at the Fifteenth Regular Session of the General Assembly in Cartagena de Indias (December, 1985),

reads as follows:

> Reaffirming that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights.

43. Hence it may be said that by means of an authorative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

44. In view of the fact that the Charter of the Organization and the American Convention are treaties with respect to which the Court has advisory jurisdiction by virtue of Article 64(1), it follows that the Court is authorized, within the framework and limits of its competence, to interpret the American Declaration and to render an advisory opinion relating to it whenever it is necessary to do so in interpreting those instruments.

45. For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

46. For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered however that, given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto.

47. That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above.

48. For those reasons,

THE COURT,

unanimously

DECIDES

That it is competent to render the present advisory opinion.

unanimously

IS OF THE OPINION

That Article 64(1) of the American Convention authorizes the Court, at the request of the member state of the OAS or any duly qualified OAS organ, to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of the human rights in the American states.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this forteenth day of July, 1989.

(s) Héctor Gros-Espiell
President

(s) Héctor Fix-Zamudio

(s) Thomas Buergenthal

(s) Rafael Nieto-Navia

(s) Policarpo Callejas-Bonilla

(s) Orlando Tovar-Tamayo

(s) Sonia Picado-Sotela

(s) Manuel E. Ventura-Robles
interim Secretary

APPENDIX V

INTER-AMERICAN COURT OF HUMAN RIGHTS

VELASQUEZ RODRIGUEZ CASE

COMPENSATORY DAMAGES

JUDGMENT OF JULY 21, 1989
(ARTICLE 63(1)
AMERICAN CONVENTION ON HUMAN RIGHTS)

In the Velásquez Rodríguez,

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

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

Also present:

Manuel E. Ventura-Robles, interim Secretary

pursuant to Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), Article 44(1) of the Court's Rules, and in accord with the judgment on the merits of July 29, 1988, the Court enters the following judgment in the instant case brought by the Inter-American Commission on Human Rights against the State of Honduras.

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted this case to the Inter-American Court of Human Rights (hereinafter "the Court") on April 24, 1986. It originated in a complaint (No. 7920), against the State of Honduras (hereinafter "Honduras" or "the Government"), lodged with the Secretariat of the Commission on October 7, 1981.

2. In its Judgment on the Merits of July 29, 1988, the Court

> 5. Decides that Honduras is hereby required to pay fair compensation to the next of kin of the victim.
>
> 6. Decides that the form and amount of such compensation, failing agreement between Honduras and the Commission within six months of the date of this judgment, shall be settle by the Court and, for that purpose, retains jurisdiction of the case.
>
> (**Velásquez Rodríguez Case**, Judgment of July 29, 1988. Series C No. 4, para. 194).

I

3. The Court has jurisdiction to order the payment of fair compensation to the injured party in the instant case. Honduras ratified the Convention on September 8, 1977, and recognized the contentious jurisdiction of the Court on September 9, 1981, by depositing the instrument referred to in Article 62 of the Convention. The Commission submitted the case to the Court pursuant to Articles 61 of the Convention and 50(1) and 50(2) of their Regulations, and the Court decided the case on July 29, 1988.

II

4. By Resolution of January 20, 1989, the Court decided:

> 1. To authorize the President, should the State and the Commission fail to submit an agreement within the allotted time period, to consult with the Permanent Commission of the Court, to initiate whatever studies and name whatever experts might be convenient, so the Court will have the elements of judgment necessary to set the means and quantity of compensation.
>
> 2. To authorize the President, should it be necessary, to obtain the opinion of the victim's family, the Inter-American Commission on Human Rights, and the Government of Honduras.
>
> 3. To authorize the President, should it be necessary, and following consultation with the Permanent Commission of the Court,

to set a hearing in this matter.

5. On January 24, 1989, the Agent gave the Secretariat a copy of the agreement signed by the Government and the Commission on the previous day in Honduras, and according to which:

FIRST: The Government of Honduras reiterates its decision to implement fully the judgment entered by the Illustrious Inter-American Court of Human Rights, in conformity with the terms of that judgment.

SECOND: The Government of Honduras and the Commission recognize that the only beneficiaries of the compensation fixed by the Court are the wife of Manfredo Velásquez, Mrs. Emma Guzmán Urbina, and the children of the marriage, Héctor Ricardo Velásquez Guzmán, Nadia Waleska Velásquez Guzmán, and Herling Lizzett Velásquez Guzmán. The children shall be recognized as beneficiaries as soon as they fulfill the prerequisites of Honduran law to be considered the legal heirs of Manfredo Velásquez.

THIRD: The Government of Honduras believes that the best way to carry out the Court's "order to pay just compensation to the next of kin of the victim" is by granting them the most favorable benefits that Honduran legislation provides for Hondurans in the case of accidental death.

FOURTH: The Commission recognizes the Government's offer as an important step toward the just compensation of the victim's family, but believes that it should also create for the benefit of the heirs a fund whose amount and form of payment should be determined by the Inter-American Court of Human Rights, taking into account the requirements of international law and those of Honduran legislation.

6. The attorneys recognized as counselors or advisers to the Commission (hereinafter "the attorneys") asked the Court for a public hearing to listen a psychiatric report on the moral damages suffered by the victim's family and the testimony of one of the experts on the methods and conclusions of the report.

7. Citing paragraph 2 of the Resolution of January 20, 1989, Mrs. Emma Guzmán de Velásquez, the wife of Angel Manfredo Velásquez Rodríguez (also known as Manfredo Velásquez), submitted a pleading of February 26, 1989, in which she asked the Court to order the Government to comply with the following points:

1) An end to forced disappearances in Honduras.

2) An investigation of each of the 150 cases.

3) A complete and truthful public report on what happened to the disappeared persons.

4) The trial and punishment of those responsible for this practice.

5) A public undertaking to respect human rights, especially the rights to life, liberty, and integrity of the person.

6) A public act to honor and dignify the memory of the disappeared. A street, park, school, high school, or hospital could be named for the victims of disappearances.

7) The demobilization and disbanding of the repressive bodies especially created to kidnap, torture, make disappear and assassinate.

8) Guarantees to respect the work of humanitarian and family organizations and public recognition of their social function.

9) An end to all forms of overt or indirect aggression or pressure against the family of the disappeared and public recognition of their honor.

10) The establishment of a fund for the primary, secondary, and university education of the children of the disappeared.

11) Guaranteed employment for the children of the disappeared who are of working age.

12) The establishment of a retirement fund for the parents of the disappeared.

8. As required by the Resolution of January 20, 1989, the Commission submitted its opinion on March 1, 1989. It asserted that the just compensation to be paid by Honduras to the family of Manfredo Velásquez should include the following:

1. The adoption of measures by the State of Honduras which express its emphatic condemnation of the facts that gave rise to the Court's judgment. In particular, it should be established that the Government has an obligation to carry out an exhaustive investigation of the circumstances of the disappearance of Manfredo Velásquez and bring charges against anyone responsible for the disappearance.

2. The granting to the wife and children of Manfredo Velásquez of the following benefits:

   a) Payment to the wife of Manfredo Velásquez, Mrs. Emma Guzmán Urbina, of the highest pension recognized by Honduran law.

   b) Payment to the children of Manfredo Velásquez, Héctor Ricardo, Nadia Waleska and Herling Lizzett Velásquez Guzmán, of a pension or subsidy until they complete their university education, and

   c) Title to an adequate house, equivalent to the house of a middle class professional family.

3. Payment to the wife and children of Manfredo Velásquez of a cash amount corresponding to the resultant damages, loss of earnings, and emotional harm suffered by the family of Manfredo Velásquez, to be determined by that Illustrious Court based upon the expert opinion offered by the victim's family.

9. On March 10, 1989, the attorneys submitted a pleading in which they assert that, in conformity with Article 63 of the Convention, reparation should be moral as well as monetary.

The measures they request as moral reparation are the following:

- A public condemnation of the practice of involuntary disappearances carried out between 1981 and 1984;

- An expression of solidarity with the victims of that practice, including Manfredo Velásquez. Public homage to those victims by naming a street, thoroughfare, school or other public places after them;

- An exhaustive investigation of the phenomenon of involuntary disappearances in Honduras, with special attention to the fate of each of the disappeared. The resulting information should be made known to the family and the public;

- Prosecution and appropriate punishment of those responsible of inciting, planning, implementing or covering up disappearances, in accord with the laws and procedures of Honduras.

In their opinion, the cash indemnity paid to the family of Manfredo Velásquez should include the following: damages, two hundred thousand lempiras; loss of earnings, two million four hundred and twenty-two thousand four hundred and twenty lempiras; emotional damages, four million eight hundred

and forty-five thousand lempiras; and punitive damages, two million four hundred and twenty-two thousand lempiras.

They especially request,

> that Emma Guzmán de Velásquez and her minor children, Héctor Ricardo, Nadia and Herling Velásquez Guzmán, they recognized as the beneficiaries, and that the Government of Honduras be ordered to adopt special legislation making that determination, in order to facilitate the payment of indemnity without the need for judicial proceedings for a declaration of absence, presumed death or declaration of heirship. For that purpose, we formally state on behalf of those persons that there are no other persons with a superior claim to inherit from Manfredo Velásquez.

Moreover, they ask the Court to establish deadlines within which the Government should make moral reparation, and to reserve the right to see that they are met. Regarding the monetary reparation, they ask the Court to set "a deadline of 90 days for the execution of the judgment, and that a lump sum payment be made prior to that date to Emma Guzmán de Velásquez."

10. On March 10, 1989, the Delegate of the Commission submitted a clinical report prepared by a team of psychiatrists on the state of health of the family of Manfredo Velásquez.

11. The Agent informed the Court on March 14, 1989, that in payment of the indemnity, his Government was willing to apply the Honduran law of the National Social Security Institute for Teachers (Instituto Nacional de Previsión del Magisterio), which it considered the most favorable law in this case because it establishes the right to payment of thirty-seven thousand and eighty lempiras in life insurance, and four thousand one hundred and twenty lempiras as a severance benefit. In addition, the Government offered a voluntary contribution toward the indemnity to bring the total to one hundred and fifty thousand lempiras.

12. On March 15, 1989, the Court held a public audience to hear the parties regarding the indemnity to be awarded.

The following persons were present:

a) in representation of the Government of Honduras,

Ambassador Edgardo Sevilla Idiáquez, Agent

b) in representation of the Inter-American Commission on Human Rights,

Dr. Edmundo Vargas Carreño, Delegate
Dr. Claudio Grossman, Adviser

c) Called by the Commission, Dr. Federico Allodi, a psychiatrist, testified to the emotional harm suffered by the family of the victim.

13. As instructed by its President, the Secretariat of the Court addressed the Government on April 3, 1989, to request the following information to be duly certified by the appropriate officials:

1. The dates of birth of Manfredo Velásquez Rodríguez and Saúl Godínez Cruz, with their civil status at the time of disappearance as established by Honduran law;

2. The position or positions they held and the salaries or other income they received, either from the government, government entities or private institutions, together with their social security status or equivalent, and their income tax statements, if any;

3. Academic or professional degrees or special qualifications relevant to their financial and social situation at the time of disappearance, and the title to any property in their name;

4. The names and status of their wives; and those of any concubines recognized in any official document; the age of the former and the latter at the time of the disappearances; any property in their name or other sources of income, and the conjugal property rights of the wives (joint property and others);

5. The names and civil status of their children, those of the marriage and any outside the marriage; their ages at the time of the disappearances; whether they were students, and whether any is physically or mentally handicapped;

6. The names and civil status of their parents, their ages at the time of the disappearances; whether they had or have property or income of their own, and whether they were or are dependents of the disappeared;

7. The names, civil status, ages and situation of any other possible claimants under Honduran law at the time of the disappearances, or any other person recognized as a dependent in social security documents, tax statements or other documents which might contain that information;

8. Whether the disappeared had life insurance or other personal insurance, in what amount, the period of coverage, and the names of the beneficiaries;

9. Mortuary tables for men and women and commutation schedules (the latter are used for future tax discounts in return for prompt

payment) effective in Honduras at the time of the disappearances;

10. Certified copies of Honduran legislation regarding: a) legal heirs as defined by civil and labor law; b) spousal property rights (joint property or other); c) beneficiaries with rights to support payments, showing the criteria used to determine support; d) beneficiaries of any government pensions based upon death or permanent disability; e) Honduran legislative and jurisprudential criteria for indemnification for death, accidental or non-accidental.

14. On April 26, 1989, the Government submitted its response to the Commission's submission of March 1, 1989 (supra 8). The pleading also refers to matters that, in its opinion, should be taken into account in the indemnification of the family of Manfredo Velásquez. Regarding measures to express its condemnation of the facts that gave rise to the judgment and its obligation to investigate the disappearance of Manfredo Velásquez and prosecute those responsible, the Government believes the Court's judgment of July 29, 1988, "is very clear and precise regarding the obligation of Honduras to pay damages, which is to pay just compensation to the family of the victim, and nothing more" (underlined in the original). Insofar as the benefits the Commission believes should be paid to the wife of Manfredo Velásquez, the Government believes that such payment "is only admissible insofar as whatever may be provided for by the system to which Mr. VELASQUEZ RODRIGUEZ may have been affiliated." It asserts that damages, loss of earnings, and emotional harm are inadmissible because their purpose "is not merely to compensate the VELASQUEZ RODRIGUEZ family, but... to pay the expenses of the intense media campaign waged against Honduras within and without the country by national and foreign associations, and to pay the fees of lawyers and other professionals who cooperated with the Commission in this case."

15. In reply to point 2 of the Court's communication of April 3, 1989 (supra 13), the Government submitted on May 19, 1989, various documents and resolutions containing the information requested.

16. In response to points 2 and 9, the Government submitted the following information on May 26, 1989:

a) Certification by the Secretary of the General Tax Office (Dirección General de Tributación) according to which Mssrs. MANFREDO VELASQUEZ RODRIGUEZ and SAUL GODINEZ CRUZ did not file tax returns in 1979, 1980 and 1981.

b) Mortuary Tables CSO 1958 commutation values at 7%, used by the Superintendent of Banks and Insurance (Superintendencia de Bancos y Seguros).

17. On that same date, in compliance with point 10, the Government submitted the following documentation:

1. Provisions on inheritance upon death and inter vivos gifts, contained in Book III of the 1906 Civil Code of Honduras.

2. Regulatory provisions of the Social Security Law applicable in Honduras when an insured person dies (Resolution No. 193, December 17, 1971).

3. Provisions of the Family Code: Duties and Rights arising from Marriage, Informal Unions, Economic Relationship, Family Patrimony, Paternity and Parent-Child Relationship (Decree No. 76-84).

4. Provisions of the Law of Military Social Security (Decree No. 905).

5. Retirement Law for the Judicial Branch (Decree No. 114 of the National Congress, May 5, 1954).

6. Law of Retirement and Pensions for Employees and Officials of the Executive Branch.

7. Law of the National Institute of Social Security for Teachers.

18. In reference to information requested but not yet submitted, the Government stated on June 13, 1989 that it

> ... has sent notes to various institutions and only a few have replied; nevertheless, despite the difficulties, the documents we have requested will be sent opportunely as they arrive.
>
> Likewise, I also inform you that in regard to numbers 4, 5, and 6 of the note of the Honorable Court, my Government believes it will be impossible to send certain documents which are very personal, and, therefore, suggests that this information should be presented by the Inter-American Commission or by the legal representatives of the plaintiffs against the State of Honduras.

19. **Amici curiae** pleadings were submitted by the Central American Association of Relatives of the Detained-Disappeared (Asociación Centroamericana de Familiares de Detenidos-Desaparecidos) and the following twelve jurists: Jean-Denis Archambault, Alejandro Artucio, Alfredo Etcheberry, Gustavo Gallón Giraldo, Diego García Sayán, Alejandro M. Garro, Robert K. Goldman, Jorge Mera, Denis Racicot, Joaquín Ruiz Giménez, Arturo Valencia Zea and Eugenio Raúl Zaffaroni.

III

20. The first question the Court must resolve is related to the implementation of resolutory point number 6 of the judgment on the merits, according to which it gave Honduras and the Commission six months from the date of the judgment of July 29, 1988, to reach an agreement on the form and amount of just compensation to be paid to the family of Manfredo Velásquez (**Velásquez Rodríguez Case, supra** 2).

21. In its pleading of March 1, 1989, the Commission reported on its attempts to reach an agreement with the Government. According to the Commission, only at the end of the six months period was it possible to meet in the city of Tegucigalpa with a Commission named by the President of the Republic of Honduras "to negotiate and determine the amount and form of payment of the compensation awarded in the Inter-American Court's judgment of July 29, 1988."

22. According to the record of that meeting (**supra** 5), the parties agreed only on the recognition of the beneficiaries of the compensation. The remaining points are simple declarations which establish no criteria for fixing the amount of the compensation and, even less, for payment. Therefore, resolutory point number 6 of the judgment on the merits of July 29, 1988, was not carried out.

IV

23. The written and oral arguments made to the Court show substantial differences of opinion insofar as the scope, bases and amount of the compensation. Some arguments refer to the need to rely upon the internal law of Honduras, or part of it, in determining or paying the indemnity.

24. Because of those disagreements and in order to implement the judgment on the merits of July 29, 1988, the Court must now define the scope and content of the just compensation to be paid by the Government to the family of Manfredo Velásquez.

25. It is a principle of international law, which jurisprudence has considered "even a general concept of law," that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so (**Factory at Chorzów**, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21, and **Factory at Chorzów**, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; **Reparation for Injuries Suffered in the Service of the United Nations**, Advisory Opinion, I.C.J. Reports 1949, p. 184).

26. Reparation of harm brought about by the violation of an international obligation consists in full restitution (**restitutio in integrum**), which

includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.

27. As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity.

28. Indemnification for human rights violations is supported by international instruments of a universal and regional character. The Human Rights Committee, created by the International Covenant of Civil and Political Rights of the United Nations, has repeatedly called for, based on the Optional Protocol, indemnification for the violation of human rights recognized in the Covenant (see, for example, communications 4/1977; 6/1977; 11/1977; 138/1983; 147/1983; 132/1982; 161/1983; 188/1984; 194/1985; etc., Reports of the Human Rights Committee, United Nations). The European Court of Human Rights has reached the same conclusion based upon Article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

29. Article 63(1) of the American Convention provides as follows:

> 1. If 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.

30. This article does not refer to or limit the ability to ensure the effectiveness of the means of reparation available under the internal law of the State Party responsible for the violation, so it is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it.

31. This implies that, in order to fix the corresponding indemnity, the Court must rely upon the American Convention and the applicable principles of international law.

V

32. The Commission and the attorneys maintain that, in implementing the judgment, the Court should order the Government to take some measures, such as the investigation of the facts related to the involuntary disappearance of Manfredo Velásquez; the punishment of those responsible; a public statement condemning that practice; the revindication of the victim, and other similar measures.

33. Measures of this type would constitute a part of the reparation of the consequences of the violation of rights or freedoms and not a part of the

indemnity, in accordance with Article 63(1) of the Convention.

34. However, in its judgment on the merits (Velásquez Rodríguez Case, supra 2, para. 181), the Court has already pointed out the Government's continuing duty to investigate so long as the fate of a disappeared person is known (supra 32). The duty to investigate is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible (Velásquez Rodríguez Case, supra 2, para. 174).

35. Although these obligations were not expressly incorporated into the resolutory part of the judgment on the merits, it is a principle of procedural law that the bases of a judicial decision are a part of the same. Consequently, the Court declares that those obligations on the part of Honduras continue until they are fully carried out.

36. Otherwise, the Court understands that the judgment on the merits of July 29, 1988, is in itself a type of reparation and moral satisfaction of significance and importance for the families of the victims.

37. The attorneys also request the payment of punitive damages as part of the indemnity, because this case involved extremely serious violations of human rights.

38. The expression "fair compensation," used in Article 63(1) of the Convention to refer to a part of the reparation and to the "injured party," is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.

39. Because of the foregoing, the Court believes, then, that the fair compensation, described as "compensatory" in the judgment on the merits of July 29, 1988, includes reparation to the family of the victim of the material and moral damages they suffered because of the involuntary disappearance of Manfredo Velásquez.

VI

40. Having defined the scope and limitations of the fair compensation referred to in resolutory point number 6 of the judgment on the merits, the Court now turns to the bases for the payment of the same.

41. In this regard, the attorneys ask for compensation for patrimonial damages within the concept of damages and include in the latter the expenses of the family related to the investigation of the whereabouts of Manfredo Velásquez.

42. The Court cannot grant that request in the present case. Though it is theoretically correct that those expenses come within the definition of

damages, they cannot be awarded in the instant case because they were not plead or proven up opportunely. No estimate or proof of expenses related to the investigation of the whereabouts of the victim was submitted during the trial. Likewise, with regard to litigation expenses in bringing the matter before the Court, the judgment on the merits already denied an award of costs because there was no pleading to support the request (Velásquez Rodríguez Case, supra 2, para. 193).

43. The Government argues that the compensation should be on the basis of the most favorable treatment possible for the family of Manfredo Velásquez under Honduran law, which is that provided by the Law of the National Institute of Social Security for Teachers in the case of accidental death. According to the Government, the family would be entitled to a total of forty-one thousand two hundred lempiras, to which it would contribute an additional amount to bring the compensation to one hundred and fifty thousand lempiras.

44. The Commission does not propose an amount, but rather asserts that the compensation should include two elements: a) the greatest benefits that Honduran legislation allows nationals in cases of this type and which, according to the Commission, are those granted by the Institute of Military Pensions and b) a cash amount which should be set according to what is provided for by Honduran and international law.

45. The attorneys believe that the basis should be the loss of earnings, calculated according to the income that Manfredo Velásquez received at the time of his kidnapping, at the age of 35, his studies toward a degree as an economist, which would have allowed him to work as a professional, and the possible promotions, Christmas bonuses, allowances and other benefits he would have been entitled to at retirement. They calculate an amount which in thirty years would be one million six hundred and fifty-one thousand six hundred and fifty lempiras. They add to that the retirement benefits for ten years, according to life expectancy in Honduras for a person of that social class, calculated at seven hundred and seventy thousand seven hundred and sixty lempiras, which gives a total amount of two million four hundred and twenty-two thousand four hundred and twenty lempiras.

46. The Court notes that the disappearance of Manfredo Velásquez cannot be considered an accidental death for the purposes of compensation, given that it is the result of serious acts imputable to Honduras. The amount of compensation cannot, therefore, be based upon guidelines such as life insurance, but must be calculated as a loss of earnings based upon the income the victim would have received up to the time of his possible natural death. In that sense, one can take as a point of departure the salary that, according to the certification of the Honduran Vice-Minister of Planning on October 19, 1988, Manfredo Velásquez was receiving at the time of his disappearance (1,030 lempiras per month) and calculate the amount he would have received at the time of his obligatory retirement at the age of sixty, as provided by Article 69 of the Law of the National Institute of Social Security for

Teachers and which the Government itself considers the most favorable. At retirement, he would have been entitled to a pension until his death.

47. However, the calculation of the loss of earnings must consider two distinct situations. When the beneficiary of the indemnity is a victim who is totally and permanently disabled, the compensation should include all he failed to receive, together with appropriate adjustments based upon his probable life expectancy. In that circumstance, the only income for the victim is what he would have received, but will not receive as earnings.

48. If the beneficiaries of the compensation are the family members, the situation is another. In principle, the family has an actual or future possibility of working or receiving income on their own. The children, who should be guaranteed the possibility of an education which might extend to the age of twenty five, could, for example, begin to work at that time. It is not correct, then, in these cases, to adhere to rigid criteria, more appropriate to the situation described in the above paragraph, but rather to arrive at a prudent estimate of the damages, given the circumstances of each case.

49. Based upon a prudent estimate of the possible income of the victim for the rest of his probable life and on the fact that, in this case, the compensation is for the exclusive benefit of the family of Manfredo Velásquez identified at trial, the Court sets the loss of earnings in the amount of five hundred thousand lempiras to be paid to the wife and to the children of Manfredo Velásquez as set out below.

50. The Court must now consider the question of the indemnification of the moral damages (supra 27), which is primarily the result of the psychological impact suffered by the family of Manfredo Velásquez because of the violation of the rights and freedoms guaranteed by the American Convention, especially by the dramatic characteristics of the involuntary disappearance of persons.

51. The moral damages are demonstrated by expert documentary evidence and the testimony of Dr. Federico Allodi (supra 12), psychiatrist and Professor of Psychology at the University of Toronto, Canada. According to his testimony, the above doctor examined the wife of Manfredo Velásquez, Mrs. Emma Guzmán Urbina de Velásquez and his children, Héctor Ricardo, Herling Lizzett and Nadia Waleska Velásquez. According to those examinations, they had symptoms of fright, anguish, depression and withdrawal, all because of the disappearance of the head of the family. The Government could not disprove the existence of psychological problems that affect the family of the victim. The Court finds that the disappearance of Manfredo Velásquez produced harmful psychological impacts among his immediate family which should be indemnified as moral damages.

52. The Court believes the Government should pay compensation for moral damages in the amount of two hundred and fifty thousand lempiras, to be paid to

the wife and children of Manfredo Velásquez as specified below.

VII

53. With regard to entitlement to receive the compensation, the representative of the Government and of the Commission, in the document they signed on January 23, 1989, recognized as the sole beneficiaries of that compensation the wife of Manfredo Velásquez, Mrs. Emma Guzmán Urbina and the children of that marriage, Héctor Ricardo, Nadia Waleska and Herling Lizzett Velásquez Guzmán. They added that their right could only be enforced once they had fulfilled the requirements of Honduran law to be recognized as heirs of the victim.

54. As previously stated, the obligation to indemnify is not derived from internal law, but from violation of the American Convention. It is the result of an international obligation. To demand indemnification, the family members of Manfredo Velásquez need only show their family relationship. They are not required to follow the procedure of Honduran inheritance law.

55. At the hearing of October 2, 1987, Zenaida Velásquez Rodríguez, referred to four children of her brother, Manfredo Velásquez, but in the document signed by the Commission and the Government on January 23, 1989, only three children are mentioned. Nor was any proof of the existence of a fourth child found in the Government's reply to point 5 of the request made by the Secretariat of the Court on April 3, 1989 (**supra** 13). Should there be a fourth child, he would be entitled to a proportionate share of the indemnity the Court has awarded to the children of the victim.

VIII

56. The Court now determines how the Government is to pay compensation to the family of Manfredo Velásquez.

57. Payment of the seven hundred and fifty thousand lempiras awarded by the Court must be carried out within ninety days from the date of notification of the judgment, free from any tax that might eventually be considered applicable. Nevertheless, the Government may pay in six equal monthly installments, the first being payable within ninety days and the reminder in successive months. In this case, the balance shall be incremented by the appropriate interest, which shall be at the interest rates current at that moment in Honduras.

58. One-fourth of the indemnity is awarded to the wife who shall receive that sum directly. The remaining three-fourths shall be distributed among the children. With the funds from the award to the children, a trust fund shall be set up in the Central Bank of Honduras under the most favorable

conditions permitted by Honduran banking practice. The children shall receive monthly payments from this trust fund, and at the age of twenty-five shall receive their proportionate part.

59. The Court shall supervise the implementation of the compensatory damages at all of its stages. The case shall be closed when the Government has fully complied with the instant judgment.

IX

60. **THEREFORE,**

THE COURT,

Unanimously

1. Awards seven hundred and fifty thousand lempiras in compensatory damages to be paid to the family of Angel Manfredo Velásquez Rodríguez by the State of Honduras.

Unanimously

2. Decides that the amount of the award corresponding to the wife of Angel Manfredo Velásquez Rodríguez shall be one hundred and eighty-seven thousand five hundred lempiras.

Unanimously

3. Decides that the amount of the award corresponding to the children of Angel Manfredo Velásquez Rodríguez shall be five hundred and sixty two thousand five hundred lempiras.

Unanimously

4. Orders that the form and means of payment of the indemnity shall be those specified in paragraphs 57 and 58 of this judgment.

Unanimously

5. Decides that the Court shall supervise the indemnification ordered and shall close the file only when the compensation has been paid.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this twenty-first day of July, 1989.

(s) Héctor Gros-Espiell
President

(s) Héctor Fix-Zamudio

(s) Rodolfo E. Piza E.

(s) Pedro Nikken

(s) Rafael Nieto-Navia

(s) Rigoberto Espinal-Irías

(s) Manuel E. Ventura-Robles
interim Secretary

Judge Thomas Buergenthal was unable to participate in the preparation and signing of the judgment because of reasons of health.

APPENDIX VI

INTER-AMERICAN COURT OF HUMAN RIGHTS

GODINEZ CRUZ CASE

COMPENSATORY DAMAGES

JUDGMENT OF JULY 21, 1989
(ARTICLE 63(1)
AMERICAN CONVENTION ON HUMAN RIGHTS)

In the Godínez Cruz case,

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

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

Also present:

Manuel E. Ventura-Robles, interim Secretary

pursuant to Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), Article 44(1) of the Court's Rules, and in accord with the judgment on the merits of January 20, 1989, the Court enters the following judgment in the instant case brought by the Inter-American Commission on Human Rights against the State of Honduras.

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted this case to the Inter-American Court of Human Rights (hereinafter "the Court") on April 24, 1986. It originated in a complaint (No. 8097), against the State of Honduras (hereinafter "Honduras" or "the Government"), lodged with the Secretariat of the Commission on October 9, 1982.

2. In its Judgment on the Merits of January 20, 1989, the Court

> 5. Decides that Honduras is hereby required to pay fair compensation to the next of kin of the victim.
>
> 6. Decides that the form and amount of such compensation shall be fixed by the Court and, for this purpose, retains jurisdiction in the case.
>
> (**Godínez Cruz Case**, Judgment of January 20, 1989. Series C No. 5, para. 203)

I

3. The Court has jurisdiction to order the payment of fair compensation to the injured party in the instant case. Honduras ratified the Convention on September 8, 1977, and recognized the contentious jurisdiction of the Court on September 9, 1981, by depositing the instrument referred to in Article 62 of the Convention. The Commission submitted the case to the Court pursuant to Articles 61 of the Convention and 50(1) and 50(2) of their Regulations, and the Court decided the case on January 20, 1989.

II

4. By Resolution of January 20, 1989, the Court decided:

> 1. To authorize the President, to consult with the Permanent Commission of the Court, to initiate whatever studies and name whatever experts might be convenient, so the Court will have the elements of judgment necessary to set the means and quantity of compensation.
>
> 2. To authorize the President to obtain the opinion of the victim's family, the Inter-American Commission on Human Rights, and the Government of Honduras.

3. To authorize the President, should it be necessary, and following consultation with the Permanent Commission of the Court, to set a hearing in this matter.

5. The attorneys recognized as counselors or advisers to the Commission (hereinafter "the attorneys") asked the Court for a public hearing to listen a psychiatric report on the moral damages suffered by the victim's family and the testimony of one of the experts on the methods and conclusions of the report.

6. Citing paragraph 2 of the Resolution of January 20, 1989, Mrs. Enmidida Escoto de Godínez, the wife of Saúl Godínez Cruz, submitted a pleading of February 26, 1989, in which she asked the Court to order the Government to comply with the following points:

1) An end to forced disappearances in Honduras.

2) An investigation of each of the 150 cases.

3) A complete and truthful public report on what happened to the disappeared persons.

4) The trial and punishment of those responsible for this practice.

5) A public undertaking to respect human rights, especially the rights to life, liberty, and integrity of the person.

6) A public act to honor and dignify the memory of the disappeared. A street, park, school, high school, or hospital could be named for the victims of disappearances.

7) The demobilization and disbanding of the repressive bodies especially created to kidnap, torture, make disappear and assassinate.

8) Guarantees to respect the work of humanitarian and family organizations and public recognition of their social function.

9) An end to all forms of overt or indirect aggression or pressure against the family of the disappeared and public recognition of their honor.

10) The establishment of a fund for the primary, secondary, and university education of the children of the disappeared.

11) Guaranteed employment for the children of the disappeared who are of working age.

12) The establishment of a retirement fund for the parents of the disappeared.

7. As required by the Resolution of January 20, 1989, the Commission submitted its opinion on March 1, 1989. It asserted that the just compensation to be paid by Honduras to the family of Saúl Godínez Cruz should include the following:

1. The adoption of measures by the State of Honduras which express its emphatic condemnation of the facts that gave rise to the Court's judgment. In particular, it should be established that the Government has an obligation to carry out an exhaustive investigation of the circumstances of the disappearance of Saúl Godínez and to bring charges against anyone responsible for the disappearance.

2. The granting to the wife and daughter of Saúl Godínez of the following benefits:

   a) Payment to the wife of Saúl Godínez, Mrs. Enmidida Escoto de Godínez, of the highest pension recognized by Honduran law.

   b) Payment to the daughter of Saúl Godínez, Emma Patricia Godínez Escoto, of a pension or subsidy until she completes her university education, and

   c) Title to an adequate house, equivalent to the house of a middle class professional family.

3. Payment to the wife and daughter of Saúl Godínez of a cash amount corresponding to the resultant damages, loss of earnings, and emotional harm suffered by the family of Saúl Godínez, to be determined by that Illustrious Court based upon the expert opinion offered by the victim's family.

8. On March 10, 1989, the attorneys submitted a pleading in which they assert that, in conformity with Article 63 of the Convention, reparation should be moral as well as monetary.

The measures they request as moral reparation are the following:

- A public condemnation of the practice of involuntary disappearances carried out between 1981 and 1984;

- An expression of solidarity with the victims of that practice, including Saúl Godínez. Public homage to those victims by naming a street, thoroughfare, school or other public places after them;

- An exhaustive investigation of the phenomenon of involuntary disappearances in Honduras, with special attention to the fate of each of the disappeared. The resulting information should be made known to the family and the public;

- Prosecution and appropriate punishment of those responsible of inciting, planning, implementing or covering up disappearances, in accord with the laws and procedures of Honduras.

In their opinion, the cash indemnity paid to the family of Saúl Godínez Cruz should include the following: damages, two hundred thousand lempiras; loss of earnings, two million eighty three thousand three hundred and eight lempiras; emotional damages, four million five hundred sixty seven thousand lempiras; and punitive damages, two million two hundred eighty three thousand lempiras.

They especially request,

> that Enmidida Escoto de Godínez and her minor daughter, Emma Patricia Godínez Escoto, they recognized as the beneficiaries, and that the Government of Honduras be ordered to adopt special legislation making that determination, in order to facilitate the payment of indemnity without the need for judicial proceedings for a declaration of absence, presumed death or declaration of heirship. For that purpose, we formally state on behalf of those persons that there are no other persons with a superior claim to inherit from Saúl Godínez.

Moreover, they ask the Court to establish deadlines within which the Government should make moral reparation, and to reserve the right to see that they are met. Regarding the monetary reparation, they ask the Court to set "a deadline of 90 days for the execution of the judgment, and that a lump sum payment be made prior to that date to Enmidida Escoto de Godínez."

9. On March 10, 1989, the Delegate of the Commission submitted a clinical report prepared by a team of psychiatrists on the state of health of the family of Saúl Godínez Cruz.

10. The Agent informed the Court on March 14, 1989, that in payment of the indemnity, his Government was willing to apply the Honduran law of the National Social Security Institute for Teachers (Instituto Nacional de Previsión del Magisterio), which it considered the most favorable in this case because it establishes the right to payment of fourteen thousand eight hundred and sixty-three lempiras and fifty cents which includes 36 monthly paychecks plus 70 per cent in severance pay. Moreover, the Government offered as a gesture to pay an additional amount for a total of sixty thousand lempiras "in accordance with the Law of Retirement and Pensions for Teachers, because 'GODINEZ CRUZ' was a member of that system."

11. On March 15, 1989, the Court held a public audience to hear the parties regarding the indemnity to be awarded.

The following persons were present:

a) in representation of the Government of Honduras,

Ambassador Edgardo Sevilla Idiáquez, Agent

b) in representation of the Inter-American Commission on Human Rights,

Dr. Edmundo Vargas Carreño, Delegate
Dr. Claudio Grossman, Adviser

c) Called by the Commission, Dr. Federico Allodi, a psychiatrist, testified to the emotional harm suffered by the family of the victim.

12. As instructed by its President, the Secretariat of the Court addressed the Government on April 3, 1989, to request the following information to be duly certified by the appropriate officials:

1. The dates of birth of Manfredo Velásquez Rodríguez and Saúl Godínez Cruz, with their civil status at the time of disappearance as established by Honduran law;

2. The position or positions they held and the salaries or other income they received, either from the government, government entities or private institutions, together with their social security status or equivalent, and their income tax statements, if any;

3. Academic or professional degrees or special qualifications relevant to their financial and social situation at the time of disappearance, and the title to any property in their name;

4. The names and status of their wives; and those of any concubines recognized in any official document; the age of the former and the latter at the time of the disappearances; any property in their name or other sources of income, and the conjugal property rights of the wives (joint property and others);

5. The names and civil status of their children, those of the marriage and any outside the marriage; their ages at the time of the disappearances; whether they were students, and whether any is physically or mentally handicapped;

6. The names and civil status of their parents, their ages at the time of the disappearances; whether they had or have property or income of their own, and whether they were or are dependents of the disappeared;

7. The names, civil status, ages and situation of any other possible claimants under Honduran law at the time of the disappearances, or any other person recognized as a dependent in social security documents, tax statements or other documents which might contain that information;

8. Whether the disappeared had life insurance or other personal insurance, in what amount, the period of coverage, and the names of the beneficiaries;

9. Mortuary tables for men and women and commutation schedules (the latter are used for future tax discounts in return for prompt payment) effective in Honduras at the time of the disappearances;

10. Certified copies of Honduran legislation regarding: a) legal heirs as defined by civil and labor law; b) spousal property rights (joint property or other); c) beneficiaries with rights to support payments, showing the criteria used to determine support; d) beneficiaries of any government pensions based upon death or permanent disability; e) Honduran legislative and jurisprudential criteria for indemnification for death, accidental or non-accidental.

13. On April 26, 1989, the Government submitted its response to the Commission's submission of March 1, 1989 (**supra** 7). The pleading also refers to matters that, in its opinion, should be taken into account in the indemnification of the family of Saúl Godínez Cruz. Regarding measures to express its condemnation of the facts that gave rise to the judgment and its obligation to investigate the disappearance of Saúl Godínez Cruz and prosecute those responsible, the Government believes the Court's judgment of January 20, 1989, "is very clear and precise regarding the obligation of Honduras to pay damages, which is to pay <u>just compensation to the family of the victim, and nothing more</u>" (underlined in the original). Insofar as the benefits the Commission believes should be paid to the wife of Saúl Godínez Cruz, the Government believes that such payment "is only admissible insofar as whatever may be provided for by the system to which Mr. GODINEZ CRUZ may have been affiliated." It asserts damages, loss of earnings, and emotional harm are inadmissible because their purpose "is not merely to compensate the GODINEZ CRUZ family, but... to pay the expenses of the intense media campaign waged against Honduras within and without the country by national and foreign associations, and to pay the fees of lawyers and other professionals who cooperated with the Commission in this case."

14. In reply to point 2 of the Court's communication of April 3, 1989 (**supra** 12), the Government submitted on May 19, 1989, various documents and resolutions containing the information requested.

15. On that same date, in response to point 1 of that communication (**supra** 12), the Government submitted a copy of the birth certificate of Saúl Godínez Cruz.

16. In response to points 2 and 9, the Government submitted the following information on May 26, 1989:

a) Certification by the Secretary of the General Tax Office (Dirección General de Tributación) according to which Mssrs. MANFREDO VELASQUEZ RODRIGUEZ and SAUL GODINEZ CRUZ did not file tax returns in 1979, 1980 and 1981.

b) Mortuary Tables CSO 1958 commutation values at 7%, used by the Superintendent of Banks and Insurance (Superintendencia de Bancos y Seguros).

17. On that same date, in compliance with point 10, the Government submitted the following documentation:

1. Provisions on inheritance upon death and **inter vivos** gifts, contained in Book III of the 1906 Civil Code of Honduras.

2. Regulatory provisions of the Social Security Law applicable in Honduras when an insured person dies (Resolution No. 193, December 17, 1971).

3. Provisions of the Family Code: Duties and Rights arising from Marriage, Informal Unions, Economic Relationship, Family Patrimony, Paternity and Parent-Child Relationship (Decree No. 76-84).

4. Provisions of the Law of Military Social Security (Decree No. 905).

5. Retirement Law for the Judicial Branch (Decree No. 114 of the National Congress, May 5, 1954).

6. Law of Retirement and Pensions for Employees and Officials of the Executive Branch.

7. Law of the National Institute of Social Security for Teachers.

18. In reference to information requested but not yet submitted, the Government stated on June 13, 1989 that it

> ... has sent notes to various institutions and only a few have replied; nevertheless, despite the difficulties, the documents we have requested will be sent opportunely as they arrive.
>
> Likewise, I also inform you that in regard to numbers 4, 5, and 6 of the note of the Honorable Court, my Government believes it will

be impossible to send certain documents which are very personal, and, therefore, suggests that this information should be presented by the Inter-American Commission or by the legal representatives of the plaintiffs against the State of Honduras.

19. **Amici curiae** pleadings were submitted by the Central American Association of Relatives of the Detained-Disappeared (Asociación Centroamericana de Familiares de Detenidos-Desaparecidos) and the following twelve jurists: Jean-Denis Archambault, Alejandro Artucio, Alfredo Etcheberry, Gustavo Gallón Giraldo, Diego García Sayán, Alejandro M. Garro, Robert K. Goldman, Jorge Mera, Denis Racicot, Joaquín Ruiz Giménez, Arturo Valencia Zea and Eugenio Raúl Zaffaroni.

III

20. In accordance with resolutory point number 6 of the judgment on the merits entered on January 20, 1989, the Court must rule upon the form and amount of the compensatory damages the Government is obligated to pay to the family of Saúl Godínez Cruz (**Godínez Cruz Case, supra** 2).

IV

21. The written and oral arguments made to the Court show substantial differences of opinion insofar as the scope, bases and amount of the compensation. Some arguments refer to the need to rely upon the internal law of Honduras, or part of it, in determining or paying the indemnity.

22. Because of those disagreements and in order to implement the judgment on the merits of January 20, 1989, the Court must now define the scope and content of the just compensation to be paid by the Government to the family of Saúl Godínez Cruz.

23. It is a principle of international law, which jurisprudence has considered "even a general concept of law," that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so (**Factory at Chorzów**, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21, and **Factory at Chorzów**, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; **Reparation for Injuries Suffered in the Service of the United Nations**, Advisory Opinion, I.C.J. Reports 1949, p. 184).

24. Reparation of harm brought about by the violation of an international obligation consists in full restitution (**restitutio in integrum**), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.

25. As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity.

26. Indemnification for human rights violations is supported by international instruments of a universal and regional character. The Human Rights Committee, created by the International Covenant of Civil and Political Rights of the United Nations, has repeatedly called for, based on the Optional Protocol, indemnification for the violation of human rights recognized in the Covenant (see, for example, communications 4/1977; 6/1977; 11/1977; 138/1983; 147/1983; 132/1982; 161/1983; 188/1984; 194/1985; etc., Reports of the Human Rights Committee, United Nations). The European Court of Human Rights has reached the same conclusion based upon Article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

27. Article 63(1) of the American Convention provides as follows:

> 1. If 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.

28. This Article does not refer to or limit the ability to ensure the effectiveness of the means of reparation available under the internal law of the State Party responsible for the violation, so it is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it.

29. This implies that, in order to fix the corresponding indemnity, the Court must rely upon the American Convention and the applicable principles of international law.

V

30. The Commission and the attorneys maintain that, in implementing the judgment, the Court should order the Government to take some measures, such as the investigation of the facts related to the involuntary disappearance of Saúl Godínez Cruz; the punishment of those responsible; a public statement condemning that practice; the revindication of the victim, and other similar measures.

31. Measures of this type would constitute a part of the reparation of the consequences of the violation of rights or freedoms and not a part of the indemnity, in accordance with Article 63(1) of the Convention.

32. However, in its judgment on the merits (Godínez Cruz Case, supra 2, para. 191), the Court has already pointed out the Government's continuing duty to investigate so long as the fate of a disappeared person is known (supra 30). The duty to investigate is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible (Godínez Cruz Case, supra 2, para. 184).

33. Although these obligations were not expressly incorporated into the resolutory part of the judgment on the merits, it is a principle of procedural law that the bases of a judicial decision are a part of the same. Consequently, the Court declares that those obligations on the part of Honduras continue until they are fully carried out.

34. Otherwise, the Court understands that the judgment on the merits of January 20, 1989, is in itself a type of reparation and moral satisfaction of significance and importance for the families of the victims.

35. The attorneys also request the payment of punitive damages as part of the indemnity, because this case involved extremely serious violations of human rights.

36. The expression "fair compensation," used in Article 63(1) of the Convention to refer to a part of the reparation and to the "injured party," is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.

37. Because of the foregoing, the Court believes, then, that the fair compensation, described as "compensatory" in the judgment on the merits of January 20, 1989, includes reparation to the family of the victim of the material and moral damages they suffered because of the involuntary disappearance of Saúl Godínez Cruz.

VI

38. Having defined the scope and limitations of the fair compensation referred to in resolutory point number 6 of the judgment on the merits, the Court now turns to the bases for the payment of the same.

39. In this regard, the attorneys ask for compensation for patrimonial damages within the concept of damages and include in the latter the expenses of the family related to the investigation of the whereabouts of Saúl Godínez Cruz.

40. The Court cannot grant that request in the present case. Though it is theoretically correct that those expenses come within the definition of damages, they cannot be awarded in the instant case because they were not plead

or proven up opportunely. No estimate or proof of expenses related to the investigation of the whereabouts of the victim was submitted during the trial. Likewise, with regard to litigation expenses in bringing the matter before the Court, the judgment on the merits already denied an award of costs because there was no pleading to support the request (Godínez Cruz Case, supra 2, para. 202).

41. The Government argues that the compensation should be on the basis of the most favorable treatment possible for the family of Saúl Godínez Cruz under Honduran law, which is that provided by the Law of the National Institute of Social Security for Teachers in the case of accidental death. According to the Government, the family would be entitled to a total of fourteen thousand eight hundred sixty three lempiras and fifty cents, to which it would contribute an additional amount to bring the compensation to sixty thousand lempiras.

42. The Commission does not propose an amount, but rather asserts that the compensation should include two elements: a) the greatest benefits that Honduran legislation allows nationals in cases of this type and which, according to the Commission, are those granted by the Institute of Military Pensions and b) a cash amount which should be set according to what is provided for by Honduran and international law.

43. The attorneys believe that the basis should be the loss of earnings, calculated according to the income that Saúl Godínez Cruz received at the time of his kidnapping, at the age of 32, and the possible promotions, Christmas bonuses, allowances and other benefits he would have been entitled to at retirement. They calculate an amount which would be one million three hundred eighty eight thousand eight hundred and eighty-seven lempiras. They add to that the retirement benefits for ten years, according to life expectancy in Honduras for a person of that social class, calculated at six hundred ninety four thousand four hundred twenty one lempiras, which gives a total amount of two million eighty three thousand three hundred and eight lempiras.

44. The Court notes that the disappearance of Saúl Godínez Cruz cannot be considered an accidental death for the purposes of compensation, given that it is the result of serious acts imputable to Honduras. The amount of compensation cannot, therefore, be based upon guidelines such as life insurance, but must be calculated as a loss of earnings based upon the income the victim would have received up to the time of his possible natural death. In that sense, one can take as a point of departure the salary that, according to the certification of the Executive Director of the Personnel and Scales Office of the Magistery, dependancy of the Ministry of Education of Honduras on March 13, 1989, Saúl Godínez Cruz was receiving at the time of his disappearance (405 lempiras per month) and calculate the amount he would have received at the time of his obligatory retirement at the age of sixty, as provided by Article 69 of the Law of the National Institute of Social Secur-

ity for Teachers and which the Government itself considers the most favorable. At retirement, he would have been entitled to a pension until his death.

45. However, the calculation of the loss of earnings must consider two distinct situations. When the beneficiary of the indemnity is a victim who is totally and permanently disabled, the compensation should include all he failed to receive, together with appropriate adjustments based upon his probable life expectancy. In that circumstance, the only income for the victim is what he would have received, but will not receive as earnings.

46. If the beneficiaries of the compensation are the family members, the situation is another. In principle, the family has an actual or future possibility of working or receiving income on their own. The children, who should be guaranteed the possibility of an education which might extend to the age of twenty five, could, for example, begin to work at that time. It is not correct, then, in these cases, to adhere to rigid criteria, more appropriate to the situation described in the above paragraph, but rather to arrive at a prudent estimate of the damages, given the circumstances of each case.

47. Based upon a prudent estimate of the possible income of the victim for the rest of his probable life and on the fact that, in this case, the compensation is for the exclusive benefit of the family of Saúl Godínez Cruz identified at trial, the Court sets the loss of earnings in the amount of four hundred thousand lempiras to be paid to the wife and to the daughter of Saúl Godínez Cruz as set out below.

48. The Court must now consider the question of the indemnification of the moral damages (supra 25), which is primarily the result of the psychological impact suffered by the family of Saúl Godínez Cruz because of the violation of the rights and freedoms guaranteed by the American Convention, especially by the dramatic characteristics of the involuntary disappearance of persons.

49. The moral damages are demonstrated by expert documentary evidence and the testimony of Dr. Federico Allodi (supra 11), psychiatrist and Professor of Psychology at the University of Toronto, Canada. According to his testimony, the above doctor examined the wife of Saúl Godínez Cruz, Mrs. Enmidida Escoto de Godínez and his daughter, Emma Patricia Godínez Escoto. According to those examinations, they had symptoms of fright, anguish, depression and withdrawal, all because of the disappearance of the head of the family. The Government could not disprove the existence of psychological problems that affect the family of the victim. The Court finds that the disappearance of Saúl Godínez Cruz produced harmful psychological impacts among his immediate family which should be indemnified as moral damages.

50. The Court believes the Government should pay compensation for moral damages in the amount of two hundred and fifty thousand lempiras, to be paid to the wife and daughter of Saúl Godínez Cruz as specified below.

VII

51. The Court now determines how the Government is to pay compensation to the family of Saúl Godínez Cruz.

52. Payment of the six hundred and fifty thousand lempiras awarded by the Court must be carried out within ninety days from the date of notification of the judgment, free from any tax that might eventually be considered applicable. Nevertheless, the Government may pay in six equal monthly installments, the first being payable within ninety days and the reminder in successive months. In this case, the balance shall be incremented by the appropriate interest, which shall be at the interest rates current at that moment in Honduras.

53. One-fourth of the indemnity is awarded to the wife who shall receive that sum directly. The remaining three-fourths shall be for the daughter. With the funds from the award to the daughter, a trust fund shall be set up in the Central Bank of Honduras under the most favorable conditions permitted by Honduran banking practice. The daughter shall receive monthly payments from this trust fund, and at the age of twenty-five shall receive the totallity of the capital.

54. The Court shall supervise the implementation of the compensatory damages at all of its stages. The case shall be closed when the Government has fully complied with the instant judgment.

VIII

55. **THEREFORE,**

THE COURT,

Unanimously

1. Awards six hundred and fifty thousand lempiras in compensatory damages to be paid to the family of Saúl Godínez Cruz by the State of Honduras.

Unanimously

2. Decides that the amount of the award corresponding to the wife of Saúl Godínez Cruz shall be one hundred and sixty-two thousand and five hundred lempiras.

Unanimously

3. Decides that the amount of the award corresponding to the daughter of Saúl Godínez Cruz shall be four hundred and eighty seven thousand five hundred lempiras.

Unanimously

4. Orders that the form and means of payment of the indemnity shall be those specified in paragraphs 52 and 53 of this judgment.

Unanimously

5. Decides that the Court shall supervise the indemnification ordered and shall close the file only when the compensation has been paid.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this twenty-first day of July, 1989.

(s) Héctor Gros-Espiell
President

(s) Héctor Fix-Zamudio

(s) Rodolfo E. Piza E.

(s) Pedro Nikken

(s) Rafael Nieto-Navia

(s) Rigoberto Espinal-Irías

(s) Manuel E. Ventura-Robles
interim Secretary

Judge Thomas Buergenthal was unable to participate in the preparation and signing of the judgment because of reasons of health.

APPENDIX VII

PRESENT STATUS OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

AMERICAN CONVENTION ON HUMAN RIGHTS
"PACT OF SAN JOSE, COSTA RICA"

Concluded at San José, Costa Rica on November 22, 1969, at the Inter-American Specialized Conference on Human Rights

Entered into force on July 18, 1978

SIGNATORY COUNTRIES	DATE OF SIGNATURE	DATE OF DEPOSIT OF INSTRUMENT OF RATIFICATION OF ADHERENCE	DATE OF ACCEPTANCE OF JURISDICTION OF THE COURT
Argentina	02/II/84	05/IX/84	05/IX/84
Barbados	20/VI/78	05/XI/81	
Bolivia		19/VII/79	
Chile	22/XI/69		
Colombia	22/XI/69	31/VII/73	21/VI/85
Costa Rica	22/XI/69	08/IV/70	02/VII/80
Dominican Rep.	07/IX/77	19/IV/78	
Ecuador	22/XI/69	28/XII/77	24/VII/84
El Salvador	22/XI/69	23/VI/78	
Grenada	14/VII/78	18/VII/78	
Guatemala	22/XI/69	25/V/78	09/III/87
Haití		27/IX/77	
Honduras	22/XI/69	08/IX/77	09/XI/81
Jamaica	16/IX/77	07/VIII/78	
México		24/III/81	
Nicaragua	22/XI/69	25/IX/79	
Panamá	22/XI/69	22/VI/78	
Paraguay	22/XI/69	24/VIII/89	
Perú	27/VII/77	28/VII/78	21/I/81
Suriname	12/XI/87	12/XI/87	12/XI/87
United States	01/VI/77		
Uruguay	22/XI/69	19/IV/85	19/IV/85
Venezuela	22/XI/69	09/VIII/77	24/VI/81

ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA OF ECONOMIC SOCIAL AND CULTURAL RIGHTS "PROTOCOL OF SAN SALVADOR"

Signed at San Salvador, El Salvador, on November 17, 1988 at the Eighteenth Regular Session of the General Assembly

ENTRY INTO FORCE: When eleven States have deposited their respective instruments of ratification or accession.

DEPOSITORY: OAS General Secretariat (Original instrument and ratifications).

TEXT: OAS Treaty Series, No. 69.

UN REGISTRATION:

SIGNATORY COUNTRIES	DEPOSIT OF RATIFICATION
Argentina.....	
Bolivia.....	
Costa Rica.....	
Dominican Republic.....	
Ecuador.....	
El Salvador.....	
Guatemala.....	
Haití.....	
México.....	
Nicaragua.....	
Panamá.....	
Paraguay.....	
Perú.....	
Uruguay.....	
1/ Venezuela.....	

All of the States on the above list signed the Protocol on November 17, 1988, with the exception of the ones pointed out by notes.

1/ Venezuela:
Signed on January 27, 1989, at the General Secretariat of the OAS.