

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." 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) herewith 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 Zúñiga, 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 acquiescence 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 witness, 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 Lt. Col. Alexander Hernández and Lt. Marco Tulio Regalado Hernández. The Court also heard the testimony of Col. 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, Comayagua, 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 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 deadlines 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 Secretariat 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 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 of 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 Augusts 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 possibilities --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 them 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. Lt. 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 a 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 years 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 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 and 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 group called "the fourteen" under the command of Major Adolfo Díaz, attached to 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 (testimony 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 kidnapers 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 kidnapers 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 has 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 de 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 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, notwithstanding 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 the 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 compelled 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 proceeding 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 disappearance 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 Velásquez, César Augusto Murillo and press clippings). In addition, the victims had usually been under surveillance for long period 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 especially 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* 140-41) 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* 128-30).

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 (XVI-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. 46-67; Annual Report, 1985-1986, pp. 37-40; Annual Report, 1986-1987, pp. 277-284 and in many of its Country Reports, such as OEA/Ser. L/V/II.49, doc. 19, 1980 (Argentina); OEA/Ser. L/V/II.66, doc. 17, 1985 (Chile) and OEA/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 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, and 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 and 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 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 of 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 has 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 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, constitutes 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. **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.

Rafael Nieto-Navia
President

Rodolfo E. Piza E.

Thomas Buergenthal

Pedro Nikken

Héctor Fix-Zamudio

Rigoberto Espinal-Irías

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.