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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 30/96; Case 10.897
Session:	Ninty-Third Regular Session (30 September – 18 October 1996)
Title/Style of Cause:	Arnoldo Juventino Cruz Soza v. Guatemala
Doc. Type:	Report
Decided by:	Chairman: Professor Claudio Grossman; First Vice Chairman: Ambassador John S. Donaldson; Second Vice Chairman: Professor Carlos Ayala Corao; Members: Dr. Oscar Lujan Fappiano, Professor Robert Kogod Goldman, Dr. Jean Joseph Exume, Ambassador Alvaro Tirado Mejia.
Dated:	16 October 1996
Citation:	Cruz Soza v. Guatemala, Case 10.897, Inter-Am. C.H.R., Report No. 30/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996)
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I. BACKGROUND

1. On June 11, 1991, the Inter-American Commission on Human Rights opened a case relating to the following complaint:
2. Arnoldo Juventino Cruz Soza (the petitioner's brother) was "disappeared" on February 11, 1990, in the community of La Palma, municipality of Río Hondo, department of Zacapa, at approximately 2:00 p.m. This act was perpetrated by persons collaborating with the G-2 (intelligence unit of the Guatemalan Army) Military Zone 705, located in the city of Zacapa. The complaint named eight persons as the suspected perpetrators of the disappearance.
3. The petitioner sought assistance in learning about the whereabouts of the victim from the General Directorate of the National Police, the Human Rights Ombudsman, the Human Rights Commission, the Congress, and the Judicial Organism, with no success.

II. DOMESTIC PROCEEDINGS

4. The facts provided immediately hereafter are based on information provided by the petitioner and by the Government.
 - A. Criminal proceedings
5. On March 22, 1990, the Public Ministry intervened in the criminal proceedings which had been initiated in relation to the disappearance. The Public Ministry called for the Police to carry out an exhaustive investigation into the case so as to determine the victim's whereabouts.

6. The first complaint from Juventino Cruz Morales (the victim's father) was made July 16, 1990, in Río Hondo, Zacapa. The judge of Río Hondo subpoenaed complainant Juventino Cruz Morales to ratify the complaint and to provide further evidence, but he did not come forward.

7. On August 17, 1993, Mr. Juventino Cruz Morales for the second time denounced to the Sub-Station of the National Police that his son Arnaldo Juventino Cruz Soza had disappeared. Based on this complaint new criminal proceedings were brought for the same act, originally before the Justice of the Peace of the municipality of Río Hondo. The proceedings were later removed to the Criminal Court of First Instance of the department of Zacapa.

8. In due course, the First Criminal Court of First Instance of Zacapa, at the request of the Public Ministry, joined the first proceeding, No. 314-90 carried out by the First Official, to the second case, C-1095-93 entrusted to the Second Official, since both concern the same events.

9. The Public Ministry asked the judge in the case to reiterate the order to the complainant to ratify his complaint and provide more evidence. The Public Ministry also asked the judge to take the statement of various persons accused of participating as the intellectual and material authors of the crime, including various Army collaborators and the ex-Governor of the department of Zacapa. These persons did not come forward to make a statement.

B. Habeas Corpus

10. In March 1991 the relatives of the victim brought a motion for habeas corpus (known in Guatemala as "recurso de exhibición personal") before the Court of First Instance of Zacapa. The result of the action, according to the petitioner, was negative, for it was not possible to discover the victim's whereabouts. He was not registered in any prison in the country, nor in the military prisons.

III. PROCEEDINGS BEFORE THE COMMISSION

11. The Commission opened the case on June 11, 1991, based on the complaint brought by the petitioner. The Commission forwarded the pertinent parts to the Government of Guatemala on that date, asking the Government to send information on the events denounced.

12. On November 5, 1991, a letter was received from petitioner Eddy Cruz Soza asking that the investigation be expedited and asking the current Government to clear up the victim's disappearance, since the previous government provided no response whatsoever. The petitioner also noted that he had been forced to leave the country due to the threats and persecution by members of the military directed at him.

13. On January 24 and March 5, 1992, the Commission reiterated to the Government its request for information on the case.

14. On March 10 and 11, 1992, additional information was received from the petitioner making reference to the persons allegedly responsible for the disappearance of Arnaldo

Juventino Cruz. The petitioner identified members of the G-2 of Military Zone 705 of Zacapa as material authors and the former Governor of Zacapa and another Army collaborator as intellectual authors.

15. On May 5, 1993, the Commission forwarded to the Government the additional information received from the petitioner, for the Government's observations.

16. In a note dated July 8, 1993, the Commission gave the Government the 30 days it had requested on June 29 to respond.

17. On March 9, 1994, the Commission reiterated its request for information from the Government with notice that Article 42 of the Regulations, regarding the presumption that the facts alleged are true, might be applied.

18. On May 11, 1994, the Government of Guatemala answered, reporting that on August 17, 1993, Juventino Cruz lodged a complaint with the Police regarding the disappearance of his son; that he had not done so previously out of fear of reprisals by the persons whom he accuses of responsibility for the disappearance; that the case is before the First Criminal Court of First Instance of the department of Zacapa; and that the Public Ministry intervened in the proceedings on March 22, 1990, and asked that the investigation into the whereabouts of the perpetrators of this disappearance be carried out. The judge subpoenaed the petitioner to bring forth evidence, but he did not come forward. The Government further informed that there exists no formal complaint and that the persons alleged to be responsible for the disappearance were subpoenaed to provide statements, but they did not come forward.

19. On June 7, 1994, the information from the Government was forwarded to the petitioner for his observations.

20. On September 7, 1994, the Commission reiterated its request for information to the petitioner. On February 24, 1995, the petitioner's answer was received. It again included the names of alleged material authors of the disappearance, all supported by the G-2 of Military Zone 705 of Zacapa.

21. On February 24, 1995, additional information was received from the petitioner in which he states that the disappearance occurred at kilometer 138 of the road to the Atlantic, in the community already noted in the initial complaint.

22. On March 21, 1995, the Commission forwarded the information received from the petitioner to the Government. In addition, the Commission requested specific information related to the criminal proceedings under domestic law.

23. On June 5, 1995, the Government answered the Commission, reporting that the Presidential Coordinating Commission for Executive Policy on Human Rights (COPREDEH) had requested information from the Public Ministry as to the status of the proceedings. The answer received by COPREDEH was that, despite the subpoenas issued by the Court to the persons involved in the events, said persons had not been located.

24. On March 27, 1996, the Commission sent to the parties a communication announcing that it would make itself available to the parties to assist in seeking friendly settlement of the case. The Commission requested a response to the offer within a period of 30 days. The Government of Guatemala responded in a note dated May 13, 1996, indicating that the Government was of the opinion that friendly settlement negotiations were not appropriate in this case.

IV. POSITION OF THE PARTIES

A. The petitioner's position

25. The petitioner alleges that the victim was disappeared by Government agents and that there was no effective investigation to determine his whereabouts; that the alleged perpetrators are known, that they are persons tied to the Guatemalan Army, but that were not put on trial; that proceedings were brought under domestic law, but those proceedings came to a standstill; that a motion was filed for habeas corpus, but with no positive result; that the whereabouts and status of the victim are still unknown; and that the Government of Guatemala did not cooperate or carry out an effective investigation into the disappearance.

B. Government's position

26. The Government of Guatemala answered by reporting on the proceedings under domestic law, stating that the criminal proceedings were based on the complaint lodged by Juventino Cruz, but that the investigation was not carried out due to the lack of a formal complaint against an individual; that the petitioner was asked to provide further evidence, but he did not do so; that the persons alleged to be responsible were subpoenaed to provide statements, but were not located. Finally, the Government expressly states that "to date no one has been questioned, consequently, there are no positive results."

V. ADMISSIBILITY

A. Formal requirements

27. The complaint meets the formal requirements of admissibility provided for in Article 46(1)(d) of the American Convention, and is not manifestly groundless or out of order. (American Convention on Human Rights, Article 47(c)).

28. The Inter-American Commission on Human Rights is authorized to take cognizance of this case as it involves alleged violations of the rights to life (Article 4(1)), to humane treatment (Article 5), to personal liberty (Article 7), to a fair trial (Article 8), and to judicial protection (Article 25), all as set forth in the American Convention on Human Rights and in relation to its Article 1(1). This case is within the Commission's jurisdiction pursuant to Article 44 of the Convention.

29. The requirements of Articles 46(b) and 47(d) of the Convention are met, because the complaint is not a substantial reproduction of another complaint already examined nor does it concern a matter pending in another international forum.

30. The Government has not alleged failure to abide by the time period requirement provided for in Article 46(1)(b) of the Convention.

31. In accordance with Article 48(1)(f) of the Convention, the Commission placed itself at the disposal of the parties for the purpose of arriving at a friendly settlement of the case. The Government responded indicating that it did not wish to enter into friendly settlement negotiations. The Commission considers that the friendly settlement stage of the proceedings has concluded.

B. Exhaustion of domestic remedies

32. The Inter-American Court of Human Rights has determined, as regards the exhaustion of domestic remedies, that "in keeping with the object and purpose of the Convention and in accordance with an interpretation of Article 46(1)(a) of the Convention, the proper remedy in the case of the forced disappearance of persons would ordinarily be habeas corpus, since those cases require urgent action by the authorities . . . [and] `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.'" (I/A Court H.R., Caballero Delgado and Santana Case. Preliminary Objections. Judgment of January 21, 1994, paragraph 64, citing I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 65.)

33. Applying the Court's holding, in cases of "disappeared persons", such as the present case, merely bringing a motion for habeas corpus which has a negative result since the victim is not found, suffices to conclude that domestic remedies have been exhausted. There is no need to analyze the processing of the case under domestic law, because although that issue is also important, it becomes part of the analysis of the merits. (I/A Court H.R., Caballero Delgado and Santana Case. Preliminary Objections. Judgment of January 21, 1994, paragraph 67.)

34. In addition, domestic remedies, according to the jurisprudence of the Court, must be effective. In other words, they must address the purpose for which they were designed. (I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, paragraphs 63, 64.) In the case before us, the victim disappeared on February 11, 1990. This fact was denounced under domestic law on July 16, 1990. More than four years have elapsed and there is no information regarding his status, and the criminal proceedings reached only the initial phase. No investigation has been conducted, which would have allowed the gathering of the relevant evidence, and the case has been gathered, and the statements of the accused have not been taken. The motion for habeas corpus also yielded no result. The criminal case is at a standstill, because the whereabouts of the persons alleged to be responsible were not determined, and there has been no progress in clarifying the facts. The lack of results in both proceedings (the habeas corpus and criminal proceedings) constitute a sufficient showing of the ineffectiveness and inadequacy of those remedies. Neither led to the recovery of the victim nor punishment of the persons who carried out the criminal act.

35. If the Government does not show the existence and efficacy of a remedy, it cannot allege non-exhaustion. In addition, in this case the Government did not argue before the Commission the issue of failure to exhaust domestic remedies and so a tacit waiver of the objection of non-exhaustion of domestic remedies is presumed. (See I/A Court H.R., Velásquez Rodríguez Case. Preliminary Objections. Judgment of June 26, 1987, paragraph 88.) Therefore, as regards exhaustion of domestic remedies, the Commission finds the exception of Article 46(2) of the Convention applicable, thereby providing an exemption to the exhaustion requirement.

VI. ANALYSIS OF THE MERITS

A. Presumption regarding the facts alleged

36. The petitioner lodged a complaint with the Commission as to the disappearance of Arnaldo Juventino Cruz Soza and reported on the names of the persons alleged to be guilty of the criminal act.

37. The facts alleged by the petitioner were at no time called into question or denied by the Government, which answered the complaint referring only to the criminal proceedings under domestic law.

38. The jurisprudence of the Court holds that "the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgement 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." (I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, paragraph 138.)

39. In this case the Commission has sufficient information to establish the victim's disappearance and the truth of the allegations, and the record includes no evidence or information that would require the Commission to arrive at a contrary conclusion.

B. Violation of the victim's rights

40. Arnaldo Juventino Cruz was "disappeared" on February 11, 1990. It is not known what has become of him. It is not known whether he was detained or whether he is still alive. The Government, despite having begun criminal proceedings to investigate and resolve the case, provided no indication whatsoever that might yield a clue as to the victim's whereabouts. No investigation has been conducted which would allow those responsible to be charged with the crime, even though the petitioner provided information as to the identity of the persons alleged to be involved, presumably personnel working with the Army. To date those persons have not been tried.

41. The general picture that emerges from the facts alleged: the disappearance of the victim, the lack of information as to his status, the failure to try the accused, and the failure of public officers and the Government to investigate an act carried out against a national within the jurisdiction of the Guatemalan State--fits within the definition of "forced disappearance"

developed by the jurisprudence of the Court and the Commission and incorporated into the Inter-American Convention on the Forced Disappearance of Persons. (See Annual Report of the Inter-American Commission on Human Rights 1985-86, p. 40-41; Annual Report of the Inter-American Commission on Human Rights 1982-83, p. 48-50; Annual Report of the Inter-American Commission on Human Rights 1980-81, p. 113-14; I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, paragraph 147; Inter-American Convention on Forced Disappearance of Persons, Art. III.)

42. A forced disappearance is considered to be a continuing or permanent offense until the victim's fate or whereabouts are determined. (I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraphs 155, 181). A disappearance involves multiple violations of fundamental human rights. (I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 155.) As this is a case of forced disappearance, all of those rights are found to have been violated in this case.

1. Right to juridical personality

43. The disappearance of Mr. Arnaldo Juventino Cruz Soza constitutes a violation of his right to recognition as a person before the law protected by Article 3 of the American Convention on Human Rights. When Mr. Cruz was disappeared by agents of the Government, he was necessarily placed outside of and excluded from the juridical and institutional order of the State. This exclusion had the effect of denying recognition of the very existence of Mr. Cruz as a human being entitled to be recognized as such before the law. (See Declaration on the Protection of All Persons from Enforced Disappearance, Art. 1.2 (characterizing forced disappearance as "a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law.") United Nations General Assembly Resolution 47/133, December 18, 1992).

2. Right to life

44. The Court has stated, with respect to the right to life: "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...." (I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 157.)

45. Arnaldo Juventino Cruz Soza is still disappeared and his status is not known. Given the time elapsed, it is presumed that his life was taken by State agents. (See I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 188.)

46. Therefore, the Commission considers that the right to life, a fundamental right protected by the Convention in Article 4, has been violated.

3. Right to humane treatment

47. In this multiple violation arising from the disappearance, violation of Arnaldo Juventino Cruz Soza's right to humane treatment is implicit.

48. In this regard, the Court holds that "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...." (I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 156.)

49. Based on the foregoing, the Commission finds that Article 5 of the Convention has been violated.

4. Right to personal liberty

50. The Court has stated in connection with the right to personal liberty: "The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty...." (I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, paragraph 155.)

51. The disappearance of Arnaldo Juventino Soza also involves a violation of this right, recognized by the Convention in Article 7.

5. Right to a fair trial and to judicial protection

52. Based on the information provided by the parties, it has been shown that the Government of Guatemala has not provided the fair trial nor the judicial protection due.

53. The Court states that the principles of international law: "refer not only to the formal existence of . . . remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2)." (I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 63.)

54. The Court has also clarified that a failure to meet the requirement for effective and not merely formal proceedings implies not only an exception to the exhaustion of domestic remedies but also a violation of Articles 8 and 25 of the Convention. (I/A Court H.R., Velásquez Rodríguez Case. Preliminary Objections. Sentence of June 26, 1987, paragraph 91.)

55. The criminal proceedings under domestic law became a merely formal and insubstantial procedure, and the investigation provided not the slightest indication of the victim's whereabouts. In addition, the motion for habeas corpus on the victim's behalf did not prevail; in practice it turned out to be absolutely ineffective. After six years his status continues to be unknown. A procedure in which, although an individual is able to use the remedies, there is no clarification of

the truth of the facts alleged, and the victim continues "disappeared," cannot be considered effective or adequate.

56. One of the Government's arguments to justify the standstill in the criminal case is the fact that no formal complaint was lodged and pursued on the victim's behalf. This argument has no support or legal basis, for the domestic law applicable in this case establishes that in all cases of crimes of public order, the Public Ministry assumes the representation of the State and the victim, and proceedings cannot be halted on the grounds that the victim (civil party) has not formally joined the proceedings. The Public Ministry has the obligation to assume the defense of the victim and the state. As a result, it should promote and undertake all procedures that the case merits (offer of proof, inspections, and any other investigation). Along these same lines, the trial judge is responsible for ensuring that all actions needed to clarify the facts are taken. (See Code of Criminal Procedure of Guatemala, Law Number 52-73, arts. 16 (Public Ministry) and 68 (Public Action); Constitution of the Republic of Guatemala, Art. 264 (applicable in disappearance cases)).

57. The jurisprudence of the Court confirms what is provided for under domestic law when referring to the obligation of states. In relation to the previous paragraph, it says: "The State has a legal duty 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." (I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, paragraph 174.)

58. In other words, the state cannot recur to any argument to elude its duty to investigate a case that involves the violation of fundamental human rights. The Court so states when it says that the investigation "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 on the initiative of the victim or his family, or upon their offer of proof, without an effective search for the truth by the government." (I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, paragraph 177.) The State had the non-delegable and irrevocable duty to carry out the necessary investigations which would result in a determination of responsibility for the disappearance and to question and prosecute the persons responsible under the law, always complying with the requirements of due process.

59. The characteristics set forth on the fate of the criminal proceedings and the habeas corpus motion under domestic law constitute a violation of Articles 8 and 25 of the Convention by the Guatemalan State.

C. On the obligation of states to guarantee and respect human rights

60. In this case it has been shown that the Guatemalan State has not abided by the Article 1(1) provision "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." Therefore the violations of the rights set forth in Articles 3, 4, 5, 7, 8, and 25 of the Convention are imputed to the State.

61. The first obligation of states that emerges from Article 1(1) is to respect the rights and freedoms of all individuals under their jurisdiction. In relation to this obligation, the Court said that "under international law a State is responsible for the acts of its agents ... and for their omissions, even when those agents act outside the sphere of their authority or violate internal law." In addition, it establishes that "any violation of rights recognized by the Convention carried out by the act of public authority or by persons who use their position of authority is imputable to the State." (I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, paragraphs 170 and 172.)

62. The Commission concludes that the "disappearance" of Arnaldo Juventino Cruz Soza and the consequent denial of justice were committed by Army collaborators and public officials and thus are public acts perpetrated by Government agents. The Guatemalan State thereby violated the rights of the victim established in Article 1(1) in relation to violations of Articles 3, 4, 5, 7, 8, and 25 of the Convention.

63. The second obligation set forth in Article 1(1) is to guarantee the free and full exercise of the rights and freedoms recognized in the Convention. In this regard, the jurisprudence of the Court establishes: "This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention...." (I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, paragraph 166.)

64. The second obligation referred to just above implies that in the case of a "forced disappearance" the state has the duty to determine the fate and status of the victim, punish the persons guilty, and indemnify the victim's family members.

65. In the case before us, these obligations have not been met, and thus the Commission concludes by determining that the Guatemalan State has violated Article

1(1) because it did not guarantee Arnaldo Juventino Cruz Soza and his family the exercise of their rights and guarantees.

VII. RESPONSE TO THE COMMISSION'S ARTICLE 50 REPORT

66. Pursuant to Article 50 of the Convention, the Commission, during its 92^o Special Session, approved Report 21/96 concerning the present case. That report and the recommendations contained therein were transmitted to the Government of Guatemala by communication of May 15, 1996 with a request that the Government inform the Commission of the measures which it had adopted to comply with the recommendations of the Commission and to remedy the situation examined within a period of 60 days.

67. On July 23, 1996, the Commission received a note from the Government of Guatemala in which the Government requested an extension of time to respond to the Article 50 report. An

extension of 30 days was granted by the Commission on August 1, 1996. By note of September 19, 1996, the Government of Guatemala responded to Report 21/96.

68. The Commission finds that the State's response does not establish that the State has complied with the recommendations of the Commission for the resolution of the situation under examination. The State does not report any advances in the investigation of the case and, in fact, notes that possible witnesses to the facts subject of this case were not cited to testify until September of 1995, more than five years after the disappearance occurred. Nor does the State's response include information about any action taken to provide compensation to the family members of the victim.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

Based on the foregoing,

CONCLUDES:

69. In light of the information and observations provided in this report and taking into consideration the observations submitted by the State of Guatemala in relation to Report 21/96, that the Guatemalan State has not met its obligation to respect and guarantee the observance of the right to juridical personality, to life, to humane treatment, to liberty, to a fair trial, and to judicial protection, thereby violating Articles 3, 4, 5, 7, 8, and 25 of the American Convention on Human Rights in relation to Article 1(1) of the Convention, to which Guatemala is a State Party, and is therefore liable for the disappearance of Arnaldo Juventino Cruz Soza and for denial of justice.

RECOMMENDS:

70. The Commission recommends to the State of Guatemala that it:

- a. Re-open the investigation into this case in order to establish the whereabouts of Juventino Cruz Soza and that it investigate and sanction those responsible for his disappearance.
- b. Pay the family members due compensation.

71. To publish this report, pursuant to Article 48 of the Commission's Regulations and Article 51.3 of the Convention, because the Government of Guatemala did not adopt measures to correct the situation denounced within the time period.