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Decided by: Chairman: Carlos Ayala Corao;
First Vice Chairman: Robert K. Goldman;
Second Vice Chairman: Jean Joseph Exume.
Dated: 2 March 1998
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I. BACKGROUND

The Facts Alleged

1. On January 18, 1995, the Inter-American Commission on Human Rights (hereinafter "Commission") received a communication denouncing the October 29, 1994 disappearance of José Sucunú Panjoj. At the time of his disappearance, Mr. Sucunú was 59 years old, married, and the father of 11 children. Since 1988, he had been a member of the Counsel of Ethnic Communities Runujel Junam (CERJ), and active in its programs concerning human rights and popular education. The petitioners alleged that, as a consequence of his activities with the CERJ, he had been repeatedly intimidated and criticized by members of the Civil Self-Defense Patrols (PAC's) and by local military commissioners. This intimidation allegedly included false accusations that he was a member of the guerilla.
2. At the time of his disappearance, Mr. Sucunú worked as a loader in the bus terminal in Zone 4 of Guatemala City, travelling back and forth from his home in the Canton of Quiejel, Municipality of Chichicastenango, Department of El Quiché. On October 29, 1994, at 17:00 hours, Mr. Sucunú bid farewell to some family members at the terminal in Zone 4, and set out by bus for his home in Chichicastenango. He never reached his destination, and has neither been seen nor heard from since that date.
3. The petitioners reported that the Sucunú family and the CERJ took various steps to search for him. They filed two writs of habeas corpus ("exhibición personal") in favor of the victim on November 3, 1994, one before the Seventh Court of First Criminal Instance (assigned cause number 1990-94), and another before the Second Court of First Criminal Instance. The writs having failed to produce any results, the Sucunú family went to the Judicial Morgue in Zone 3 of Guatemala City to review photographic archives of persons killed between September 30 and

November 4, 1994, but found nothing related to Mr. Sucunú. Consequently, the petitioners alleged that the remedy appropriate in the case of a disappearance, namely habeas corpus, had been invoked without having provided an available or effective remedy.

4. The petition alleged that the State of the Republic of Guatemala (hereinafter "the State" or "Guatemala") is responsible for violations of the following rights protected under the American Convention on Human Rights (hereinafter American Convention): the right to life (Article 4), physical integrity (Article 5), personal liberty (Article 7), and judicial protection (Article 25), all in contravention to the undertakings set forth in Article 1.

II. PROCESSING BEFORE THE COMMISSION

5. The Commission opened Case 11.435 on March 1, 1995, and transmitted the pertinent parts of the petition to the Government of Guatemala by means of a note of that date, with a response requested within 90 days.

6. The Government responded with a note dated June 27, 1995, reporting that inquiries from the executive to the judiciary indicated that neither the local Prosecutor nor the Department of the National Police in El Quiché had any information about the facts denounced. The authorities had requested that the Attorney General's Office report on the status of the two habeas corpus writs that had been filed. Having noted that the law required those writs to remain pending until the situation of the person concerned had been resolved, the Government asserted that domestic remedies had apparently been invoked, but not exhausted. The Government indicated that the results of their investigations would be provided to the Commission. This information was transmitted to the petitioners, with observations requested within 45 days.

7. In a note dated July 23, 1995, the petitioners indicated that the writ of habeas corpus filed before the Seventh Court had been dormant since December of 1994. They produced a copy of the writ signed by a member of the CERJ on November 3, 1994, and a copy of a letter dated December 12, 1994, from the Seventh Judge of First Criminal Instance to the Secretary of the Supreme Court of Justice of Guatemala indicating that the writ of habeas corpus remained pending, because some Justices of the Peace had yet to remit reports on the procedure they were to have carried out. The petitioners reported that the writ filed before the Second Court of First Criminal Instance had been rejected on December 14, 1994. They asserted that the relevant authorities had failed to undertake a serious search for the victim.

8. The petitioners further reported that, on February 2, 1995, the victim's spouse had filed a formal complaint with the District Attorney, accusing former PAC member Sebastián Macario Ventura of responsibility for the disappearance of her husband and the death of their son. That son, Sebastián Sucunú, had reportedly been hit by a car on October 27, 1994, and died of his injuries. The complainant alleged that, on October 20, 1994, the accused had been heard by four witnesses to say "I have already eliminated his son, I am only missing the father" ("ya eliminé a su hijo, sólo me falta el papá"). According to the petitioners, these violent events may have been linked in part to an earlier incident. Sebastián Macario Ventura, then a teacher, had allegedly raped a woman in the presence of approximately 100 students on May 10, 1993. The parents of the students, led by José Sucunú, had then pressed to have Macario dismissed. This submission

was transmitted to the Government of Guatemala by means of a note dated August 3, 1995, with receipt of all pertinent information requested within 60 days.

9. On October 6, 1995, the Government provided observations in response to the petitioners' July 23, 1995 communication. They reported that, on November 8, 1994, the Attorney General's Office had filed a writ of habeas corpus in favor of José Sucunú before the First Court of Peace on Duty. The writ was processed and carried out that same day, at 23:00 hours, when the respective judge visited different detention centers and police corps of Guatemala City without finding any evidence of José Sucunú. The following day, that judge remitted an action to all Justices of the Peace in the country to carry out habeas corpus proceedings in favor of Mr. Sucunú in various detention centers. The Seventh Court of First Criminal Instance, Narcoactivity and Crimes against the Environment (hereinafter "Seventh Court of First Criminal Instance") received the action on November 10, 1994, and assigned it cause number 2008-94.

10. The Government further reported that the Court of First Criminal Instance, Narcoactivity and Crimes against the Environment was processing a criminal action against Sebastián Macario Ventura for the kidnapping of José Sucunú Panjoj, and the killing of his son. The Government reported that the following measures had been taken: On July 21, 1995, pursuant to the District Attorney's request, the presiding judge had issued an arrest warrant against the accused, who was apprehended that day and ordered preventively detained. On August 2 and 3, 1995, six witnesses for the accused provided declarations to the District Attorney. On August 9, the court received a report that the accused had no criminal record. On August 31, 1995, the judge reviewed the preventive detention order against the accused, and determined that he should remain detained. On September 13, 1995, the District Attorney received the testimony of two witnesses for the complainant. Four additional declarations for the defense were taken on September 19 and 20, 1995. On September 25, 1995, the complainant filed a motion requesting that certain witnesses against the accused be heard. The Government concluded that judicial mechanisms were indeed seized of the disappearance of Mr. Sucunú, as well as the criminal complaint filed in the matter, and requested that, as domestic remedies had not been exhausted, the case be declared inadmissible. This information was transmitted to the petitioners on October 13, 1995, with any observations in response requested within 45 days.

11. The petitioners filed observations in the case on May 28, 1996. With respect to the writs of habeas corpus, the petitioners indicated that a number of Courts of Peace had failed to remit reports, and that the authorities had failed to notify the interested parties and the Ombudsman for Human Rights of the results of the investigations, as required by law. With respect to the Government's assertion that the writs of habeas corpus had been filed by the Attorney General's Office, the petitioners indicated that the files of the Public Ministry in Santa Cruz del Quiché contained no evidence to that effect, referring only to those writs filed by the CERJ.

12. The petitioners further reported that the accused had been at liberty since October 26, 1995, when the Second Judge of First Instance of El Quiché authorized his release on bail. The petitioners asserted that the Prosecutor in El Quiché had halted his investigation, notwithstanding that certain measures had not been completed -- including obtaining a forensic report on the death of José Sucunú's son. They stated that the Seventh Court of First Criminal Instance had told them the case file was "lost," so the case was paralyzed. The petitioners also maintained that

a writ of habeas corpus filed by the CERJ on November 3, 1994, had yet to be carried out. They had consequently requested that the file be transferred to a court that would carry out the writ, and that the file itself be traced. They reported that neither action had been taken, and that file C-1990-94 remained missing. They concluded that domestic remedies had been exhausted to the extent possible. This information was transmitted to the Government on June 12, 1996, with any observations or information in response requested within 45 days.

13. The Government's response, dated August 1, 1996, reported that the criminal matter remained pending in the investigation stage. The accused had been freed on bail by order of the Second Court of First Criminal Instance of El Quiché. The complainant had filed an appeal challenging that order, which was dismissed on October 23, 1995. The file included declarations of witnesses, both for and against the accused, and the death certificate for José Sucunú's son (listing the date of death as September 27, 1994, and the cause: "Cerebral Edema, Cerebral Hemorrhage, Cranial-Encephalic Contusion"). On May 24, 1996, a doctor from the Medical Forensic Department had reviewed the files from September to November of 1994, and found no reference to a death under the name José Sucunú Panjoj. The Government further reported that an employee of the executive branch had travelled to the Seventh Court of First Criminal Instance, and reviewed case file 1990-94 (which was to be accumulated to case file 2008-94). Finally, the Government reported that, as the Courts of Peace had been unable to establish the whereabouts of José Sucunú through the habeas corpus procedures carried out, the writ had been denied on July 22, 1996. That information was transmitted to the petitioners on August 6, 1996, with any response requested within 45 days. This request was reiterated on January 21, 1997.

14. On November 4, 1997, the petitioners presented additional observations. They recounted that Mr. Sucunú had been persecuted in connection with his CERJ activities, including having been falsely accused of belonging to the guerilla. They asserted that he and his family had received death threats from Sebastián Macario, a former member of the PAC's. José Sucunú had then been disappeared, just after his son had been hit by a car and killed. The petitioners concluded that none of the recourses invoked by the victim's family had led to a serious effort to investigate the threats against and disappearance of Mr. Sucunú. With respect to the two writs of habeas corpus filed by family members and the CERJ, the first had been dismissed by the Second Court of First Criminal Instance on December 14, 1994, and the second, before the Seventh Court of First Criminal Instance, had never been resolved. The criminal complaint, initiated pursuant to the complaint filed by Mr. Sucunú's wife -- who had acted as a private accuser since May 31, 1995 -- had produced no results. They reported that the presiding judge had ordered the process closed on January 15, 1996. This information was transmitted to the Government on December 12, 1997, with any response requested within 30 days.

15. The Government reported on the status of the case by means of a note dated January 12, 1998, indicating that processes 1620-94 Of. 2o., 1120-95 and 555-95 against Sebastián Macario Ventura for the crimes of homicide, kidnapping, rape and illegal detention committed against presumed victims Sebastián Sucunú Macario, José Sucunú Panjoj and Martina Tax Nix had been dismissed as of July 12, 1996 for lack of evidence, pursuant to the motion of the Public Ministry. The Government reported that, notwithstanding the dismissal, it had requested the Attorney General to undertake an exhaustive investigation to uncover the whereabouts of José Sucunú Panjoj. They had directed the Regional Office of the Presidential Coordinating Commission of

Executive Policy in Human Rights Matters (COPREDEH) to intensify its efforts to locate the victim's family to inform them of the actions taken, and request their collaboration in identifying those responsible. In conclusion, they reiterated that, given the pendency of the ongoing investigation, domestic remedies had not been exhausted. They also noted that no State involvement in the crimes at issue had been demonstrated. This information was transmitted to the petitioners by means of a note dated January 30, 1998, with any response requested within 30 days.

III. THE POSITIONS OF THE PARTIES

The Position of the Petitioners

16. The petitioners maintain the State of Guatemala is responsible for the disappearance of José Sucunú, as well as for its failure to respond with appropriate measures to investigate and establish his whereabouts, and to submit those responsible to the corresponding measures of prosecution and punishment, in violation of Articles 4, 5, 7, 25 and 1.1 of the American Convention. Mr. Sucunú disappeared on October 29, 1994, and his whereabouts and fate remain unknown. The petitioners allege that the forced disappearance of the victim constitutes a violation of articles 4 and 7 of the Convention, and that the death threats to which he was subjected by Sebastián Macario constitute a violation of Articles 4 and 5. They contend that the State failed to provide judicial protection to the victim and his family, as required by Article 25 of the Convention.

17. They contend that, of the two writs of habeas corpus filed by family members and the CERJ on November 3, 1994, the first was dismissed by the Second Court of First Criminal Instance on December 14, 1994, and the second, before the Seventh Court of First Criminal Instance, was never resolved. They maintain that, on three dates between early 1995 and early 1996, lawyers assisting the family sought information from the Seventh Court of First Criminal Instance and from the Central Court Archives on the writ processed as cause number 1990-94. They were unable to obtain any information, and were told that the file was lost. The petitioners also allege that the interested parties were not notified of certain decisions, notwithstanding that this was required by law.

18. The petitioners maintain that the criminal complaint filed by the victim's spouse against Sebastián Macario on February 22, 1995 also failed to produce any substantive result. The presiding judge had questioned the accused on July 21, 1995, and ordered him preventively detained for the crimes of rape, illegal detention and homicide. The allegation on record was that the accused had stated in the presence of witnesses that he had killed the son of José Sucunú, and would now kill the father. The petitioners indicate that the five witnesses in question provided sworn statements in the process between March 28 and June 5, 1995 corroborating the complainant's allegations. The Second Judge of Second Criminal Instance of El Quiché ordered the process closed on January 15, 1996, and the District Attorney reportedly closed its files on the matter on July 18, 1996. The petitioners allege that the process was closed prematurely and arbitrarily.

19. As a consequence, the petitioners maintain that the State failed to undertake a serious investigation to establish the whereabouts or fate of the victim, and that the measures his family invoked failed to produce any meaningful result. The petitioners maintain the administration of justice was incapable of offering effective redress in cases involving PAC members at the time of the facts denounced. They further argue that the administration of justice in general during that period suffered from grave deficiencies.

20. They contend that the case is admissible because the remedy of habeas corpus, the applicable domestic recourse in the case of an alleged disappearance, was invoked on behalf of the victim without producing a meaningful result. They further contend that both the recourse of habeas corpus and the criminal remedy invoked by the victim's family proved ineffective and subject to undue delay.

The Position of the State

21. The State has not disputed that Mr. Sucunú disappeared on October 29, 1994, and that his whereabouts and fate remain unknown. Rather, the State maintains that its authorities have demonstrated their interest in investigating and clarifying the situation.

22. According to the State, a number of measures had been taken to investigate the situation of Mr. Sucunú. On November 8, 1994, the Attorney General's Office filed a writ of habeas corpus in favor of José Sucunú before the First Court of Peace on Duty. That same day, at 23:00 hours, the presiding judge visited different detention centers. The judge next directed a request to all Justices of the Peace in the country to carry out a habeas corpus procedure in favor of Mr. Sucunú. The Courts of Peace investigated, but because they had been unable to establish the whereabouts of José Sucunú through the habeas corpus procedures carried out, that writ had been denied on July 22, 1996.

23. With respect to the criminal action against Sebastián Macario Ventura for the killing of Sebastián Sucunú Macario (the son) and the kidnapping of José Sucunú Panjoj (the father) before the Second Court of First Criminal Instance, the District Attorney had requested, and on July 21, 1995, the presiding judge had issued an arrest warrant against the accused. The accused was promptly apprehended and ordered preventively detained. A series of investigative measures were ordered and carried out in August and September of 1995. The accused had been freed on bail by order of the Second Court of First Criminal Instance, and the appeal of that order dismissed on October 23, 1995.

24. The Government has confirmed that the criminal process opened against Sebastián Macario Ventura pursuant to the complaint filed by the victim's spouse was dismissed at the motion of the Public Ministry. In their last submission, the Government reported that the matter of the disappearance of Mr. Sucunú nonetheless remained pending in the investigation stage. The State contends that its relevant mechanisms remain seized of the disappearance of Mr. Sucunú, and that the case should therefore be declared inadmissible. The State maintains that the petitioners have provided no evidence of State involvement in the disappearance of Mr. Sucunú.

IV. CONSIDERATIONS WITH RESPECT TO ADMISSIBILITY

25. The Commission is competent to examine the subject matter of this complaint, as it concerns alleged violations of Articles 1, 4, 5, 7 and 25 of the American Convention. The Republic of Guatemala deposited its ratification of the American Convention on May 25, 1978, and the Convention entered into force for all Parties on July 18, 1978.

26. The petition includes the information required by Article 32 of the Commission's Regulations, and meets the conditions set forth in Article 46.1.c of the American Convention and Article 39 of the Commission's Regulations, as it is neither pending settlement in another international inter-governmental proceeding, nor essentially duplicative of a petition pending or previously considered by the Commission. The petition was timely filed, as required by Article 46.1.b, given that the victim allegedly disappeared on October 29, 1994, and the case was filed on January 17, 1995.

27. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [shall] have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement exists to ensure the state concerned the opportunity to resolve disputes within its own legal framework.

28. The petitioners contend that the remedy appropriate in the case of a forced disappearance, the writ of habeas corpus, was invoked and exhausted. To date, the Government has maintained the position that domestic remedies were invoked, but had not been exhausted. With respect to the remedy of habeas corpus, the record suggests that up to three different writs were filed on behalf of José Sucunú. According to the petitioners, two writs filed on November 3, 1994, one before the Second Court of First Criminal Instance, the other before the Seventh Court of First Criminal Instance. They allege that the former was rejected on December 14, 1994, and the latter was never resolved. According to the State, the Attorney General filed a writ before the First Court of Peace on Duty on November 8, 1994. They report that it was rejected on July 22, 1996. The only documentary evidence on record before the Commission in this regard consists of: (1) a copy of a writ of habeas corpus in favor of José Sucunú, dated November 3, 1994 and signed by a member of the CERJ, and (2) a copy of a December 12, 1994 letter from the Seventh Judge of First Criminal Instance to the Secretary of the Supreme Court of Justice of Guatemala indicating that a writ of habeas corpus in favor of José Sucunú remained pending because a number of Justices of the Peace had not remitted their reports on the proceedings effectuated. Accordingly, the Commission concludes that this remedy was invoked, and, based on the allegations of the parties, that it was exhausted.

29. A writ of habeas corpus would normally be the effective "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." Caballero Delgado and Santana Case, Preliminary Objections, Judgment of January 21, 1994, Ser. C No. 17, para. 64, citing, Velásquez Rodríguez Case, Judgment of July 29, 1988 (Merits), Ser. C No. 4, para. 65; Godínez Cruz Case, Judgment of January 20, 1989 (Merits), Ser. C. No. 5, para. 68; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989 (Merits), Ser. C No. 6, para. 90. In the present case, the Government argues that the investigation process which remains pending offers an applicable and effective remedy. Given that certain salient aspects of the petitioners' claims about State

responsibility have yet to be clarified, for example, whether the individual allegedly responsible for disappearing the victim was actually a member of the PAC's at the time in question, the Commission will examine the State's contention.

30. The petitioners assert that the judge presiding over the criminal process ordered the investigation closed on January 15, 1996. They allege that the process was archived prematurely, in that certain important measures of proof had not been taken, and arbitrarily, in that the court failed to take into account the available proof. They assert that domestic remedies generally proved ineffective in responding to the facts denounced.

31. Accordingly, when domestic remedies are prima facie unavailable as a matter of fact or law, the requirement that they be exhausted is excused. See Advisory Opinion OC-11/90 of August 10, 1990, Exceptions to the Exhaustion of Domestic Remedies (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Ser. A No. 11, para. 17. Article 46.2 of the Convention specifies that this exception applies: if the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; if the party alleging violation has been hindered in his or her access to domestic remedies; or if there has been unwarranted delay in the issuance of a final judgment through domestic recourses.

32. When a petitioner alleges that he or she is unable to prove exhaustion, Article 37 of the Commission's Regulations establishes that the burden then shifts to the Government to demonstrate which specific domestic remedies remain to be exhausted and offer effective relief for the harm alleged. See, *Velásquez Rodríguez Case*, Judgment of June 26, 1987, para. 88. In the instant case, the Government has confirmed the dismissal of the criminal process instituted at the initiative of the spouse of the victim as of July 12, 1996, on the basis of a lack of evidence against the accused. The Government has not expressly responded to the petitioners' claims that the process was closed prematurely and arbitrarily. Nor has the Government demonstrated what specific domestic judicial remedy the petitioners failed to invoke or exhaust. The Government's request of January 1998 to the Attorney General to carry out an exhaustive investigation does not constitute such a remedy. The State has therefore failed to discharge that burden.

33. Finally, as required by Article 47 of the American Convention, the petitioners have stated facts tending to establish a violation of the rights guaranteed by this Convention. As indicated by the foregoing considerations, the present petition fulfills the requirements for admissibility set forth in the American Convention and the Regulations of the Commission.

34. Taking into account the foregoing analysis and conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

- A. To declare the present case admissible.
- B. To transmit this report to the State of Guatemala and the petitioners.
- C. To place itself at the disposal of the parties for the purpose of reaching a settlement based on respect for the human rights protected in the American Convention; and invite the parties to

indicate their disposition to initiate the procedure of friendly settlement within a period of 30 days, counted as of the date of transmission of the present report.

D. To continue with the analysis of the merits of the case.

E. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.