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Institution: Inter-American Commission on Human Rights  
File Number(s): Report No. 3/98; Case 11.221  
Title/Style of Cause: Tarcisio Medina Charry v. Colombia  
Doc. Type: Report  
Decided by: Chairman: Carlos Ayala Corao;  
First Vice Chairman: Robert K. Goldman;  
Second Vice Chairman: Jean Joseph Exume.  
Commissioner Alvaro Tirado Mejia, a Colombian national, did not participate in the consideration and vote on this report, pursuant to Article 29(2)(a) of the Commission's Regulations.  
Dated: 7 April 1998  
Citation: Medina v. Colombia, Case 11.221, Inter-Am. C.H.R., Report No. 3/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1998)

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## I. SUMMARY OF THE CASE

1. The petitioners in this case, the Comisión Colombiana de Juristas, allege that Tarcisio Medina Charry was "disappeared" by agents of the Republic of Colombia ("Colombia," "the State" or "the Colombian State") on February 19, 1988 in the municipality of Neiva, Department of Huila, Colombia. The petitioners further allege that this disappearance was met with an inadequate investigation and a denial of justice. The petitioners thus allege that the Colombian State is responsible for violations of the American Convention on Human Rights (the "Convention" or the "American Convention"). Based on the information submitted and its investigation and analysis in the case, the Inter-American Commission on Human Rights (the "Commission") concludes that the Colombian State is responsible for violations of Articles 1, 2, 3, 4, 5, 7, 8, 13 and 25 of the Convention.

## II. BACKGROUND

### A. Allegations of the Petitioners

2. The petitioners allege that Tarcisio Medina Charry, a linguistics student at the Southern Colombia University in Neiva, was detained by agents of the National Police at approximately 9:00 p.m. on February 19, 1988. According to the petitioners, several persons witnessed the detention of Mr. Medina and saw the Police place him in a truck with several other persons whom the Police presumably had detained.

3. They allege that the Police took the group of detained persons to the local police station. Once inside the police station, the other persons who had been detained noticed that Mr. Medina

was no longer with them. According to the petitioners, Mr. Medina has not been seen or heard from since that time and his fate has never been learned. They therefore assert that Mr. Medina was disappeared by agents of the National Police who held him under their control when he was last seen.

4. The petitioners further allege that the Colombian State did not carry out timely and adequate investigations into the disappearance of Mr. Medina and did not sanction those responsible for that disappearance. Nor did the State seek diligently to establish the fate of Mr. Medina, according to the petitioners. The petitioners thus assert that the State has failed in its duty to provide for a right to be heard within a reasonable time, access to an effective legal remedy and the proper application of justice in this case.

#### B. Position of the State

5. The State has asserted that the Commission does not have competence to decide this case regarding the disappearance of Mr. Medina, because domestic remedies have not been exhausted. The State has further argued that there has been no denial of justice in relation to the case. The State argues that it has carried out the appropriate investigations and proceedings with due diligence, thereby preventing impunity.

### III. PROCESSING BEFORE THE COMMISSION

6. The Commission received the original petition in this case in September of 1993. The Commission opened case 11.221 on December 16, 1993 and sent the pertinent parts of the petition to the Colombian State for its response. The Commission received the answer of the State on March 2, 1994.

7. The State's answer was transmitted to the petitioners who submitted their rejoinder on April 25, 1994. The Commission forwarded the petitioners' rejoinder to the Colombian State on May 13, 1994. The Commission received the response of the State on June 27, 1994.

8. The petitioners and the State exchanged additional written briefs and information relating to the status of the domestic investigations and judicial proceedings and in relation to disputed questions of law and fact. The Commission thus received written briefing from the petitioners on the following dates: August 30, 1994, February 6, 1995, June 14, 1995, November 29, 1995, April 29, 1996. The Commission received written briefs from the Colombian State on the following dates: December 22, 1994, May 10, 1995, September 15, 1995, March 1, 1996. The Commission transmitted the pertinent parts of each of these communications to the opposing party.

9. The Commission held a hearing in relation to case 11.221 on October 8, 1996. At that time, each of the parties had an opportunity to make oral arguments before the Commission regarding points of fact and law relevant to the case.

10. At the hearing, the State submitted a written brief regarding its position in the case. The petitioners responded to that brief in a communication received by the Commission on December 20, 1996. The State provided its response on March 21, 1997.

11. On May 16, 1997, the Commission received, from the petitioners, additional documentation intended to assist the Commission in its decision on the case. The Commission forwarded a copy of the documentation to the State on May 27, 1997. The State provided its last response in the case on September 9, 1997.

#### IV. ANALYSIS

##### A. Admissibility

###### 1. Procedure for Deciding Admissibility

12. The Commission has not prepared an independent admissibility decision in this case. Rather, the Commission sets forth its analysis of the admissibility of the petition in this report, prepared in accordance with Article 50 of the Convention, which also contains the conclusions of the Commission on the merits of the petition.

13. The Commission has adopted this procedure, because the question of the admissibility of the petition is closely tied to the merits of the case. The Colombian State has invoked Article 46 of the Convention to assert that the Commission should not admit the petition, because domestic remedies have not been exhausted and no exception to the requirement of exhaustion of domestic remedies applies. The petitioners, on the other hand, argue that the requirement of exhaustion of domestic remedies is excused in this case, pursuant to Article 46(2) of the Convention, because the State has provided no effective remedies to be exhausted and because there has been undue delay in the resolution of the domestic proceedings which have been initiated in the case. This line of argumentation of the petitioners is linked directly to the petitioners' claim that the State has failed to provide adequate judicial protection and access to justice in this case.

14. In this connection, the Inter-American Court of Human Rights (the "Court" or the "Inter-American Court") has noted:

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). Thus, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case.[FN1]

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[FN1] I/A Court H.R., Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, par. 91.

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15. Where the applicability of the requirement of exhaustion of domestic remedies is closely linked to the merits and may not be easily separated from that question, it is appropriate to decide the question of the admissibility of a petition together with the merits of the case in order to avoid prejudging the merits of the case in the decision on admissibility.[FN2] Such is the situation presented in this case.

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[FN2] Id. at pars. 95, 96.

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## 2. Exhaustion of Domestic Remedies

### a. The Various Domestic Proceedings Initiated

16. Immediately after Mr. Medina's alleged disappearance, on February 19, 1988, his family members and friends denounced the incident to the authorities and before the public. In this process, the case was denounced criminally and before the Office of the Procurator General of the Nation.[FN3] Subsequently, a contentious-administrative proceeding was initiated.[FN4] The trajectory of these proceedings as presented to the Commission by the petitioners and the State, through written briefs and documentation, is as follows:

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[FN3] The Office of the Procurator General of the Nation has competence to carry out disciplinary proceedings and sanctions against State agents. Constitution of Colombia, arts. 275, 277(6).

[FN4] The contentious-administrative jurisdiction is established by the Colombian Constitution to take jurisdiction over administrative controversies and litigation resulting from the actions of State agents and public entities. It is a legal means by which Colombian citizens may seek compensation for the violation of a right by State agents. Constitution of Colombia, art. 237; Contentious-Administrative Code, art. 82.

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### i. Criminal Proceeding

17. Tarcisio Medina Charry's father, Tarcisio Medina Vargas, filed the criminal complaint on February 21, 1988 before the Seventh Court for Criminal Investigation of Neiva ("Juzgado Séptimo de Instrucción Criminal de Neiva"), asking that his fate be investigated.[FN5] That court took jurisdiction over the case and began to receive statements of witnesses and to gather other evidence.

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[FN5] Complaint presented by Mr. Tarcisio Medina Vargas before the Office of the Seventh Court for Criminal Investigation of Neiva, February 21, 1988.

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18. On April 29, 1988, the criminal investigation was transferred to the 66th Military Court for Criminal Investigation ("Juzgado 66 de Instrucción Penal Militar"). That tribunal carried out investigatory proceedings simultaneously with the Ninth Court of Public Order ("Juzgado Noveno de Orden Público").[FN6] The Ninth Court of Public Order issued an arrest warrant against César Orozco Gómez, the lieutenant responsible for carrying out the specific operation in which Mr. Medina was detained. According to uncontroverted information presented by the petitioners, this order was never carried out. The military tribunal subsequently revoked the arrest warrant.

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[FN6] The "public order" criminal justice system was created in 1987 to handle cases involving particularly serious crimes involving criminal organizations capable of influencing judicial decisions through threats or attacks against judicial personnel. This jurisdiction is now referred to as the "regional" criminal justice system. The regional justice system has jurisdiction over cases involving narcotics, terrorism and other serious offenses. Criminal Procedure Code, art. 71.

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19. A related criminal proceeding was carried out at the same time, outside of the military jurisdiction, before the Second Court of Public Order ("Juzgado Segundo de Orden Público"). The defendant in this proceeding was an individual not related to the State security forces.

20. The Commander General of the Armed Forces named the National Police Commander for the Department of Huila as the trial court judge for the military criminal proceeding on February 23, 1989. The military trial court found that the National Police had arrested Mr. Medina on the night in question. The court nonetheless found that it had not been shown that National Police agents were responsible for his disappearance. That court proceeded to order the termination of proceedings as against all suspects, including Lieutenant César Orozco Gómez, in a decision dated May 29, 1990.

21. On September 10, 1990, the Superior Military Tribunal ("Tribunal Superior Militar"), on consultative appeal, invalidated the decision of the trial court and ordered that the investigation be reopened. When it again took jurisdiction over the case, the military trial court, on June 12, 1991, determined that it was necessary to return the criminal proceeding to the public order justice system. The court based this decision on its conclusion that no members of the National Police were responsible for the facts alleged in the case.

22. The Regional Prosecutor for Bogotá ("Fiscalía Regional de Bogotá")[FN7] took up the case formally on November 11, 1992. The Regional Prosecutor soon after clarified that the case continued in the investigative stage and that Lieutenant César Orozco Gómez and one other individual had been named as suspects to be investigated. The Regional Prosecutor ordered several investigative proceedings.

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[FN7] The Regional Prosecutors are the prosecutorial entities for the regional criminal justice system. Criminal Procedure Code, art. 126.

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23. At the end of 1993, the file in the proceeding was sent to the Office of the Prosecutor to determine what further steps should be taken. During 1994, several new investigatory proceedings were carried out and on November 30, 1994, the file was again sent to the Office of the Prosecutor for a determination as to further action to be taken. Also, on November 1, 1994, a civil party was registered to participate in the criminal proceedings, pursuant to Colombian law.

24. On March 16, 1995, an agent of the Public Ministry ("Ministerio Público")[FN8] petitioned for the closure of the investigative stage, because the applicable time period for that stage had expired. The Office of the Prosecutor General ("Fiscalía General de la Nación")[FN9] granted the request of the Public Ministry and closed the investigation.

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[FN8] The Public Ministry in Colombia is comprised of: 1) the Office of the Procurator General of the Nation; and 2) the Ombudsman for the People. In addition to its disciplinary jurisdiction, the Office of the Procurator General of the Nation has the competence, pursuant to the Colombian Constitution, to intervene in judicial or administrative proceedings when it is necessary to defend the legal order or fundamental rights and guarantees. Constitution of Colombia, arts. 275, 277, 281.

[FN9] The Office of the Prosecutor General is an autonomous entity which forms part of the judicial branch and which is responsible for investigating and prosecuting criminal cases. Constitution of Colombia, arts. 249, 250.

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25. Before the closure of the investigation stage, the civil party to the criminal proceedings had requested that several other suspects be formally named in the case, including other police agents who allegedly had taken part, under Lieutenant César Orozco Gómez's command, in the detention of Mr. Medina and others in the operation carried out on February 19, 1988. The civil party also requested the inclusion in the case of higher-level police officers who had allegedly been responsible for ordering the operation, for knowingly accepting reports regarding the operation which did not include a full accounting of the events and the persons detained and for covering up the disappearance. This request for the inclusion of other persons in the case was made on March 7, 1995. The prosecution decided not to name any additional suspects.

26. On July 18, 1995, the criminal case was placed with the Regional Prosecutor for the decision as to whether formal criminal charges should be made, requiring the opening of a trial proceeding in the case. On October 31, 1995, the Regional Prosecutor issued a resolution formally charging Lieutenant César Orozco Gómez with the crime of kidnapping. The Regional Prosecutor also ordered that an independent investigation continue and that further investigatory proceedings be carried out with the goal of identifying other persons responsible for the incidents of February 19, 1988. The decisions of the Regional Prosecutor were upheld on appeal, in a decision dated February 7, 1996.

27. The case against Lieutenant César Orozco Gómez was submitted to the regional courts in Bogotá for trial. On June 20, 1996, a regional court of Bogotá opened the case for trial. No decision has yet been reached in the case. The defendant Lieutenant César Orozco Gómez is not being held in detention despite the existence of a warrant ordering his arrest.

28. In late 1996, the Office of the Prosecutor General ordered several investigative proceedings in relation to the open investigation which seeks to identify other persons implicated in the case.

ii. Disciplinary Proceeding

29. Mr. Medina's father filed a complaint with the Office of the Regional Procurator on February 22, 1988.[FN10] The Delegate Procurator for the National Police[FN11] formally opened a disciplinary investigation against two National Police lieutenants on March 2, 1988. Agents of the Office of the Procurator General of the Nation took statements from numerous witnesses and otherwise investigated the case. By July 5, 1988, the Delegate Procurator for the National Police had charged Lieutenant César Orozco Gómez and Corporal Ramón Sepúlveda as persons possibly subject to disciplinary sanction. Corporal Sepúlveda was linked to the proceeding as a result of his alleged failure to fulfill his duty of registering all of the persons detained on the night in question.

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[FN10] Complaint presented by Mr. Tarcisio Medina Vargas before the Regional Procurator, February 22, 1988.

[FN11] The Delegate Procurator for the National Police is a unit of the Office of the Procurator General of the Nation.

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30. On June 9, 1989, the Delegate Procurator for the National Police issued a decision sanctioning Lieutenant César Orozco Gómez with permanent separation from service. The Delegate Procurator ordered that Corporal Sepúlveda be punished with a 30-day suspension from service. On appeal, the Delegate Procurator affirmed the sanction imposed against César Orozco Gómez and reversed the sanction which had been imposed as to Corporal Sepúlveda. Corporal Sepúlveda was acquitted of all the charges which had been brought against him.

31. Lieutenant César Orozco Gómez was removed from service by the Ministry of Defense, in compliance with the disciplinary tribunal decision, on December 7, 1989.

iii. Contentious-administrative Proceeding

32. Mr. Medina's family members also filed a complaint with the contentious-administrative jurisdiction in this case. The complaint was admitted for processing and became ripe for decision in February of 1995.

33. On October 3, 1995, the Administrative Tribunal of Huila[FN12] issued a decision declaring the Nation (the Ministry of Defense - National Police) responsible for the detention and disappearance of Mr. Medina. The administrative tribunal ordered payment of emotional damages to the victim's parents. This decision is currently on appeal to the Council of State, Third Chamber ("Consejo de Estado, Sección Tercera"). That tribunal has not yet issued a decision on the appeal.

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[FN12] The administrative tribunals form part of the contentious-administrative jurisdiction.

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b. Analysis of the Law Relating to the Requirement of Exhaustion of Domestic Remedies

34. The Commission decides that, pursuant to Article 46(2) of the American Convention, the requirement of exhaustion of domestic remedies found in Article 46(1)(a) is not applicable in this case. Article 46(1)(a) specifies that admission of a petition requires that "remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

35. However, pursuant to Article 46(2)(a), exhaustion is not required where the domestic legislation does not provide due process of law for the protection of the right allegedly violated. Exhaustion is also excused, pursuant to Article 46(2)(b), where the party alleging violations of his rights has been denied effective access to the available remedies under domestic law. Finally, Article 46(2)(c) provides that exhaustion is excused where "there has been unwarranted delay in rendering a final judgment." The Inter-American Court has made clear that Article 46(2) excuses exhaustion of domestic remedies where those remedies cannot be exhausted "because they are not available either as a matter of law or as a matter of fact." [FN13]

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[FN13] I/A Court H.R., Advisory Opinion OC-11/90 ("Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights"), August 10, 1990, par. 17.

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36. The petitioners have adequately shown that the provisions of Article 46(2) excuse exhaustion in the instant case. Domestic law in Colombia has not provided adequate and timely recourse for the protection of the rights violated, and the domestic remedies which have been pursued have not allowed for effective access to judicial protection of human rights nor a final decision despite the passage of more than nine years after the events which gave rise to this case.

37. The Inter-American Court has suggested that the writ of habeas corpus would normally be the appropriate remedy to be invoked in a disappearance case.[FN14] The Court has thus held that domestic remedies have been sufficiently exhausted, making a petition admissible, where a writ of habeas corpus has been decided by the domestic courts.[FN15] The Court has found that the requirement of exhaustion of domestic remedies is fulfilled in such a case, without any need to analyze other domestic proceedings which have been utilized.



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[FN14] See I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 65.

[FN15] See, e.g., I/A Court H.R., Caballero Delgado and Santana Case, Preliminary Objections, Judgment of January 21, 1994, par. 67.  
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38. In the present case, no writ of habeas corpus was filed on behalf of Mr. Medina. This circumstance does not, however, preclude a finding that the case is admissible. The Court has not held that the filing of a habeas corpus is necessary in a disappearance case to meet the exhaustion requirement. The Court has simply held that the filing of the habeas corpus petition is generally sufficient given that the "habeas corpus would be the normal means of finding a person presumably detained by the authorities." [FN16]

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[FN16] Caballero Delgado and Santana Case, Preliminary Objections, Judgment of January 21, 1994, par. 64 (quoting Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 65).  
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39. The Court has repeatedly emphasized that those remedies which must be exhausted are those which are adequate and effective. Adequate remedies "are those which are suitable to address an infringement of a legal right." [FN17] The Court has emphasized that an adequate remedy should provide protection within a meaningful time frame so as to prevent the consummation or the worsening of a human rights violation. [FN18]

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[FN17] Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 64.

[FN18] See Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, par. 93.  
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40. The Commission concludes that the writ of habeas corpus was not an adequate remedy for the protection of the victim who was allegedly disappeared in the present case and thus was not required to be exhausted. Colombian domestic law applicable at the time of Mr. Medina's disappearance imposed stringent requirements on the writ of habeas corpus which prevented that remedy from providing protection in a case, such as this one, where a disappearance is alleged. The relevant provisions of Colombian law required that a writ of habeas corpus name the place of detention of the person on behalf of whom relief was sought and, where possible, the name of the detaining official. [FN19] The Inter-American Court has expressly held that a writ of habeas corpus would not be an adequate remedy in a disappearance case if it "require[d] the identification of the place of detention and the authority ordering the detention." [FN20]

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[FN19] See Colombian Code of Criminal Procedure (Decree 050 of 1987), art. 459.

[FN20] Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 65.  
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41. Disappearance cases, by definition, involve the failure to disclose the whereabouts of detained persons.[FN21] It is thus impossible to name the place of detention of disappeared persons for the purpose of filing a habeas corpus. In the present case, the evidence shows that requests for information about the whereabouts of Mr. Medina were made at various possible places of detention and to the authorities soon after the disappearance occurred.[FN22] Yet, no information regarding Mr. Medina's whereabouts was obtained. The writ of habeas corpus provided for under domestic Colombian law was not an adequate remedy required to be exhausted in the present case.

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[FN21] For a definition of a forced disappearance, see the Inter-American Convention on Forced Disappearance of Persons, Art. II.

[FN22] See Complaint presented by Mr. Tarcisio Medina Vargas before the Office of the Seventh Court for Criminal Investigation of Neiva, February 21, 1988 [hereinafter Criminal Complaint]; Note of Edgar Machado, Rector at the Southern Colombia University, to the Regional Procurator, February 22, 1988; Declaration of Mario de Jesús Castañeda Castañeda before the Office of the Procurator General of the Nation, February 23, 1988.

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42. Not only was it unnecessary to invoke and exhaust the remedy of habeas corpus in this case, but the exhaustion of domestic remedies was also generally excused pursuant to the provisions of Article 46(2)(a) of the Convention, because there existed no adequate remedy as a matter of law. The State has not named any other remedy, other than habeas corpus, under Colombian law which would have served to protect a person who had allegedly been disappeared by State agents.[FN23]

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[FN23] See Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 59, 60 (affirming that the State claiming non-exhaustion has an obligation to prove that specific domestic remedies remain to be exhausted).

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43. The criminal, disciplinary and administrative possibilities which existed under the law and which were invoked in this case are not effective means of finding a disappeared person quickly so that the enjoyment of his rights may be protected and ensured. Rather, those remedies may serve only to establish individual responsibility and monetary liability after an extended proceeding.

44. The State has mentioned, for example, the contentious-administrative proceeding as a remedy required to be exhausted in this case. Although the family members of the victim did pursue this remedy, the Commission reaffirms its conclusion, reached in other cases, that the contentious-administrative proceeding is "intended only as a means of supervision of the State's administrative activity and to obtain compensation for damages caused by abuse of authority." [FN24] The Commission has previously clarified that the contentious-administrative

proceeding is generally not an adequate "means of redress of human rights violations" and thus need not be exhausted in a case such as this one.[FN25]

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[FN24] See, e.g., I/A Comm. H.R., Report No. 15/95 (Colombia), September 13, 1995, Annual Report of the Inter-American Commission on Human Rights 1995, OEA/Ser.L/V/II.91, Doc. 7 rev., February 28, 1996, at p. 71.

[FN25] Id.

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45. In addition, it is noted that in many member states of the O.A.S., including Colombia, a decision to convict in a criminal proceeding generally includes or precedes an order to pay compensation to those victims or family members who have participated in the proceedings as civil parties. Thus, the criminal proceeding provides for the possibility of obtaining monetary compensation in addition to criminal sanction. The petitioners should not then be required to seek exhaustion of the administrative proceeding, which can provide only monetary compensation, when there exists another proceeding which serves to provide for monetary compensation as well as for the criminal investigation of the case, a more appropriate though not fully adequate remedy in a case such as this one.

46. Despite the lack of a truly adequate remedy under domestic law, the family members of the victim did also attempt to exhaust the domestic remedies provided for under criminal law, although those remedies were inadequate, as a matter of law, for the purpose of protecting Mr. Medina. They filed a criminal complaint to initiate the criminal process as the only remedy which they considered might provide some possibility of locating Mr. Medina and protecting his rights. Thus, in filing the criminal complaint, Mr. Medina's father petitioned the court "to look for the kid, to see what happened to him." [FN26] Through the filing of a criminal complaint, Mr. Medina's family members initiated a process to seek some redress for the violations which Mr. Medina suffered, through the investigation of the case and the sanction of those responsible, jointly with the provision of reparations. [FN27]

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[FN26] Criminal Complaint.

[FN27] Of course, the State would have been obligated to initiate and carry through a criminal proceeding independently of the actions of the family members of the victim. The State has the nonderogable and nondelegable duty to prosecute public action crimes ("delitos de acción pública"), crimes for which the State has the exclusive power to prosecute, in order to preserve public order and ensure the right to justice. It is, therefore, unnecessary to focus on the efforts of the victim and/or his family members towards the exhaustion of the criminal remedies in such a case. The State, through its prosecutorial and judicial bodies, must apply the criminal laws, initiating and moving a case forward through its various procedural stages to completion.

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47. Throughout the processing of this case before the Commission, the State has made reference to the ongoing criminal proceeding as a remedy which remains to be exhausted. However, as noted above, the Commission does not consider this remedy to be

adequate for the protection of rights in this disappearance case so as to make the admissibility of this petition contingent on its exhaustion. The Commission further considers that the exceptions to the requirement of domestic remedies provided for in Article 46(2)(b) and (c) of the Convention would, in any case, apply so as to excuse exhaustion of the criminal proceeding, because of its ineffectiveness and the delay in its resolution.

48. When the petitioners filed the petition in this case, more than five years had elapsed since the alleged disappearance of Mr. Medina. Yet, no criminal charges had even been brought despite the fact that a significant amount of important evidence existed in the criminal file.[FN28]

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[FN28] See Argument on the Merits presented by the First Office of the Prosecutor ("Fiscalía Primera") before the Second Court of Public Order, April 18, 1989 [hereinafter Argument on the Merits of the Prosecutor]; Decision of the Administrative Tribunal of Huila, October 13, 1995, at pp. 11-17 [hereinafter Decision of the Administrative Tribunal].  
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49. The case had already passed through several different judicial systems without any significant movement forward in the proceedings. On several occasions, the courts had issued decisions concluding that State agents had not been responsible for the disappearance and the case had once been formally closed. The case had been initiated at the Seventh Court for Criminal Investigation of Neiva. Subsequently, the Ninth Public Order Court and the 66th Military Criminal Court for Investigation simultaneously held jurisdiction over preliminary investigations. Another related criminal proceeding began to move forward in the Second Court of Public Order. An arrest order issued by the Ninth Court of Public Order was revoked by the military court. When passed to the military court of first instance, the criminal proceeding was terminated in favor of the two persons who had been identified as suspects in the case. After the Superior Military Tribunal reopened the investigation, the military court of first instance again made a determination that there existed no responsibility on the part of National Police agents.

50. As a result, the case was again transferred to the public order justice system on June 12, 1991. However, a civil prosecutor did not take up the case until November 11, 1992. When the petition in this case was received by the Commission nearly a year later, the case remained in the investigative stage in the regional justice system and no formal charges had been issued.

51. At the present, nine years after the alleged disappearance of Mr. Medina and five years after the regional justice system took jurisdiction over the case, the criminal proceeding still has not resulted in any final decision. One person has been formally charged in that proceeding, but the trial proceedings carried out against him have not yet resulted in a decision. An investigation remains open to identify other persons responsible for the disappearance of Mr. Medina, in implicit recognition of the fact that it is likely that more than one person is responsible for the disappearance. However, the State has not informed the Commission of any concrete progress in those investigations and no additional individuals have been charged with responsibility for the violations committed against Mr. Medina.

52. It had become evident, at the time of the filing of the original petition before the Commission in this case, that access to an effective remedy had not been possible in the criminal proceedings and that an undue delay existed in the decision in those proceedings. That situation has not changed at present. The Commission therefore concludes that, even if the criminal proceeding constituted an adequate remedy under law, its exhaustion would be excused, because it has been shown to be ineffective and delayed in its application in this case.

### 3. Other Formal Admissibility Requirements

53. The petition fulfills the formal admissibility requirements contained in the Convention and the Regulations of the Commission. In accordance with Article 47(b) of the Convention, the Commission is competent to examine this case as it adequately alleges violations of multiple articles of the Convention. In accordance with the requirements of Convention Articles 46(1)(c) and 47(d) respectively, the Commission has received no information indicating that the subject of the petition is pending settlement in another international proceeding or that it duplicates a petition previously examined by the Commission.

### 4. Time for Filing the Petition

54. The State has neither alleged nor shown that the petitioners presented their claim to the Commission outside of the relevant time period for the filing of a petition provided for in Article 46(1)(b) of the Convention and Article 38 of the Regulations of the Commission.[FN29] The Commission therefore determines that the case is admissible without reference to the question of the time period in which the application was submitted.

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[FN29] See I/A Court H.R., Neira Alegría et al. Case, Preliminary Objections, Judgment of December 11, 1991, par. 30 (indicating that the Government bears the burden of proof on this question and may waive an objection on these grounds).

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### 5. Friendly Settlement

55. In accordance with Article 48(1)(f) of the Convention, the Commission, in a letter to the parties dated October 10, 1996, offered to place itself at their disposal for the purposes of arriving at a friendly settlement. On November 12, 1996, the petitioners responded to this offer of the Commission indicating their willingness to engage in friendly settlement negotiations if the State agreed to address several issues considered by the petitioners to be crucial to an acceptable friendly settlement.

56. On November 20, 1996, the State responded to the Commission's offer making several observations about the friendly settlement process and stating that it did not consider viable, "at least for the moment, the initiation of a friendly settlement proceeding." A friendly settlement proceeding is thus not possible at this time. The Commission notes, nonetheless, that the parties may at any moment during the processing of a case in the inter-American system decide to enter

into friendly settlement negotiations, notwithstanding an initial decision by either of the parties not to engage in that exercise.

B. Merits

1. Basic Findings of Fact

57. The Commission finds that agents of the Colombian National Police disappeared Tarcisio Medina Charry after his detention on February 19, 1988. The evidence in the record before the Commission establishes that, on February 19, 1988, the National Police of Neiva carried out an operation to locate persons who were not carrying their identification documents, pursuant to the orders of the Commander of the Neiva Police Station, Lieutenant Alvaro Hernando Blanco Cabrera.[FN30] The minutes book of the Huila Police Department and testimonial evidence establish that Lieutenant Alvaro Hernando Blanco Cabrera led one patrol and that Lieutenant Orozco Gómez commanded another patrol.[FN31] According to uncontroverted information provided by the petitioners and information gathered in the domestic proceedings, the patrol commanded by Lieutenant Orozco Gómez carried out the operation in the Cándido Leguízamo neighborhood of Neiva.[FN32]

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[FN30] See Declaration of César Orozco Gómez before the Ninth Court of Public Order, May 18, 1988 [hereinafter Declaration of César Orozco Gómez]. This information was also provided by the petitioners in their briefs before this Commission and was not controverted by the State.

[FN31] See Document reflecting visit of the Regional Procurator to the Department of Police of Huila, February 22, 1988; Declaration of César Orozco Gómez.

[FN32] See Argument on the Merits of the Prosecutor, at p. 7.

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58. Numerous witnesses testified that National Police agents arrived in the Cándido Leguízamo neighborhood on the night of the operation and began asking persons in the area to show their identification documents. These witnesses, whose testimony is found in the record before the Commission, saw fully-uniformed National Police agents detain Mr. Medina along with several others.[FN33] The Colombian State has never denied, in the processing of this case before the Commission, that National Police agents detained Mr. Medina as part of a Police operation in the Cándido Leguízamo neighborhood.

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[FN33] See Declaration of Nelly Beltran Tovar before the Office of the Regional Prosecutor, February 22, 1988; Declaration of Eduar Torres Figueroa before the Visiting Lawyer of the Office of the Procurator General of the Nation, February 23, 1988; Declaration of Mario de Jesús Castañeda Castañeda before the Visiting Lawyer of the Office of the Procurator General of the Nation, February 23, 1988; Declaration of Orlando Farfán before the Visiting Lawyer of the Office of the Procurator General

of the Nation, February 25, 1988; Declaration of Jorge Eduardo Calderón Perdomo before the Office of the Regional Procurator, March 25, 1988; Declaration of Juan Carlos Devia Artunduaga before the Office of the Regional Procurator, March 25, 1988; Declaration of

Guillermo Castro Garzón included in the Decision of the Administrative Tribunal. Several of the persons who witnessed the detention knew Mr. Medina personally.

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59. The testimony of the various witnesses coincides in noting that the National Police agents placed Mr. Medina, who carried a backpack at the time of his arrest, in a truck. Five other persons were also detained and placed in the truck.

60. Two of the persons detained with Mr. Medina testified that the National Police drove the truck carrying the detainees to a police station.[FN34] They noted that the youth with the backup, Mr. Medina, rode in the truck with them to the station. The two witnesses stated that they got out of the truck first upon arrival at the station and that Mr. Medina got out behind them, possibly last. The witnesses stated that they were then taken inside the station to the detention area. At that moment, they noticed that the sixth detainee with the backpack, Mr. Medina, was no longer present.

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[FN34] See Declaration of Eduar Torres Figueroa; Declaration of Jorge Eduardo Calderón Perdomo.

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61. The petitioners have asserted that Mr. Medina has not been seen since that time. The State has never denied that fact in the processing of this case before the Commission. Mr. Medina was thus last seen in detention and under the custody of agents of the National Police. No information has been obtained about his whereabouts or his fate since he was last seen. Given these circumstances, the State bears the burden of proving before the Commission that the National Police agents did not forcibly disappear Mr. Medina.

62. The burden of proof lies with the State, because when the State holds a person in detention and under its exclusive control, the State becomes the guarantor of that person's safety and rights. In addition, the State has exclusive control over information or evidence regarding the fate of the detained person.[FN35] This is particularly true in a disappearance case where, by definition, the family members of the victim or other interested persons are unable to learn about the fate of the victim.

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[FN35] See Neira Alegría et al Case, Judgment of January 19, 1995, pars. 60, 65.

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63. The Colombian State has failed to meet its burden of proving that State agents did not disappear Mr. Medina. The State's defense in this respect was limited to a suggestion that the "causal relation between the alleged detention by the Police and the subsequent disappearance of Tarcisio Medina is not as clear as it might appear at first glance looking at it in a simplistic manner." [FN36] However, the State has failed to provide any legal or factual arguments, and has offered no evidence, to support an assertion that State agents did not disappear Mr. Medina.

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[FN36] State's Brief of October 9, 1996.

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2. Conclusions of Law

a. The Right to Juridical Personality

64. The disappearance of Mr. Medina constitutes a violation of his right to recognition as a person before the law protected by Article 3 of the Convention. When Mr. Medina was disappeared by agents of the State, 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. Medina as a human being entitled to be recognized as such before the law.[FN37]

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[FN37] See Declaration on the Protection of All Persons from Enforced Disappearance, art. 1.2, United Nations General Assembly Resolution 47/133, December 18, 1992 (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").

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b. The Right to Life

65. Mr. Medina is still a disappeared person. As noted above, his whereabouts have not been known since the time of his disappearance after his detention on February 19, 1988. The Inter-American Court has stated that: "[t]he 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." [FN38] Thus, in disappearance cases, particularly where significant time has elapsed without notice regarding the fate or whereabouts of the disappeared person, it is assumed that the disappearance victim has also been killed.[FN39]

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[FN38] Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 157.

[FN39] See id., par. 188; Caballero Delgado and Santana Case, Judgment of December 8, 1995, par. 53(b).

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66. Given the context in which Mr. Medina was disappeared and the fact that nine years later he is still disappeared, the Commission considers that there exist sufficient grounds to reasonably presume that Mr. Medina was killed. This presumption has in no way been rebutted. The Commission thus concludes that Mr. Medina suffered a violation of his right to life, recognized in Article 4 of the Convention.

c. The Right to Humane Treatment



67. Pursuant to Article 5 of the Convention, every person has the right to have his physical, mental and moral integrity respected. The Court has held that the forced disappearance of persons constitutes a violation of the right to humane treatment. The Court has noted that the nature of a forced disappearance which generally involves the "subjection of an individual to prolonged isolation and deprivation of communication" constitutes "in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person." [FN40]

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[FN40] Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 156.

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68. Although the Commission has received no specific information about Mr. Medina's treatment in detention after he was disappeared, the Commission's conclusion that he was disappeared leads to the further conclusion that a violation of Mr. Medina's right to humane treatment occurred. The State has provided no information contradicting this conclusion. The Commission therefore concludes that a violation of Article 5 took place.

d. The Right to Personal Liberty

69. The Inter-American Court has also held that the forced disappearance or kidnapping of a person by State agents is "an arbitrary deprivation of liberty, an infringement of the 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." [FN41]

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[FN41] Id. at par. 155.

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70. The nature of the violation of the right to personal liberty which occurs in a disappearance case is made especially clear by the present case. National Police agents detained Mr. Medina in a police operation which presumably was legitimate. However, because National Police agents disappeared Mr. Medina rather than processing him properly as a detainee, Mr. Medina had no opportunity to appear before a judge or to pursue any other means of challenging his arrest. The National Police agents did not even record his name in the registry of detained persons or the report of the evening's operations, [FN42] thus making it impossible for family members or other persons to learn about the details of his arrest in order to challenge his detention. The elements which transformed the treatment of Mr. Medina into a disappearance -- the failure to treat him as a normal detainee, reporting on and recording his detention and holding him in a regular detention center so that his whereabouts might be known -- allowed the illegal disappearance to be sustained and to become permanent.

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[FN42] This information was provided by the petitioners in their original petition. The Government did not refute this information. In addition, Mr. Medina's name does not appear in

the list of persons detained on February 19, 1988 which was shown to the representative of the Office of the Regional Procurator when that official conducted a visit to the offices of the Police Department of Huila. See Document Reflecting Special Visit Conducted by the Office of the Regional Procurator to the Command of the Police Department of Huila, February 22, 1988.

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71. The Commission concludes that the abduction and disappearance of Mr. Medina, established by the Commission, constitute a violation of the right to personal liberty, recognized in Article 7 of the Convention.

e. Freedom of Thought and Expression

72. Article 13(1) of the Convention establishes that:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either . . . in writing . . . or through any other medium of one's choice.

In the present case, the Commission considers that State agents disappeared Mr. Medina, at least in part, as a consequence of his decision to exercise his right to freedom of thought and expression.

73. One of the individuals who witnessed Mr. Medina's detention testified that, when questioned regarding the detention, the Police agent directing the operation suggested that Mr. Medina was a subversive. The officer commented on the fact that Mr. Medina carried copies of "La Voz," the newspaper of the Communist Party. He stated to the witness: "Observe that he is carrying subversive newspapers." [FN43] Another witness who was detained with Mr. Medina testified that the lieutenant who carried out the detentions opened up Mr. Medina's backpack to see what it contained. According to this witness, when the lieutenant saw the copies of "La Voz," he told Mr. Medina: "Ah, we are going to take you with us" ("Ah, a Ud. sí nos lo llevamos."). [FN44] A third witness also testified that, on the night in question, he observed Police agents chastising Mr. Medina for selling these newspapers. [FN45]

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[FN43] Declaration of Mario de Jesús Castañeda Castañeda before the Visiting Attorney of the Procurator General, February 23, 1988.

[FN44] Declaration of Juan Carlos Devia Artunduaga included in the Decision of the Administrative Tribunal.

[FN45] Declaration of Guillermo Castro Garzón included in the Decision of the Administrative Tribunal.

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74. Mr. Medina was subsequently disappeared, whereas the other detained individuals were released. There appears to exist no element which distinguishes Mr. Medina from the other persons who were detained and then released other than the fact that the Police considered that Mr. Medina carried subversive newspapers. The Commission therefore concludes that Mr.

Medina's fate was at least partially a result of the fact that he carried a Communist newspaper when he was detained.

75. Accordingly, the Commission presumes that the Police officers who detained and disappeared Mr. Medina considered that the fact that he carried Communist newspapers constituted evidence that he was an important danger. These officers considered that they were justified in disappearing Mr. Medina, based simply on his decision to exercise his right to freedom of speech by carrying Communist newspapers.

76. Yet, the Commission has made clear that, "the exercise of the rights protected in the American Convention can never justify attacks or reprisals by State agents." [FN46] Reprisals are necessarily seen as an attempt to chill or halt the exercise of the protected rights. Where State agents nonetheless carry out reprisals for the exercise of a right, a violation of that right occurs. [FN47]

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[FN46] I/A Comm. H.R., Report No. 32/96 (Guatemala), October 16, 1996, Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser.L/V/II.95, Doc. 7 rev., March 14, 1997, par. 62; see also Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 144. [FN47] Report No. 32/96 (Guatemala), October 16, 1996, par. 63.

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77. In carrying a Communist newspaper for distribution or personal consumption, Mr. Medina was exercising his right to seek, receive, and impart information and ideas. When State agents detained and disappeared him as a consequence of his exercise of that right, they engaged in a violation of Article 13(1).

f. Right to Judicial Guarantees and Judicial Protection

78. Articles 8 and 25 of the Convention provide individuals with the right to access to tribunals, the right to pursue and be heard in judicial proceedings within a reasonable time and with due guarantees and the right to a decision by the appropriate legal authority. Article 25(1) of the Convention sets forth that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.

Article 8(1) of the Convention provides that every person has the right to be heard "with due guarantees" and within a reasonable time by a competent and independent tribunal.

79. The right to be heard with due judicial guarantees and to achieve access to judicial recourse is not analyzed in a formalistic manner, requiring simply that a victim be allowed to file a complaint and that a hearing be held. Rather, the judicial proceedings must be complete and impartial and must receive the cooperation of the involved State agents. [FN48]

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[FN48] I/A Comm. H.R., Report No. 10/95 (Ecuador), September 12, 1995, Annual Report of the Inter-American Commission on Human Rights 1995, pars. 42-48; I/A Court H.R., Genie Lacayo Case, Judgment of January 29, 1997, par. 76, 86.  
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80. As was noted above, the question of a State's compliance with its obligations under Articles 8 and 25 is closely linked to the question of the applicability of exceptions to the requirement of exhaustion of domestic remedies. The Commission found that the exceptions to the requirement of exhaustion of domestic remedies applied in this case. This conclusion of the Commission constitutes at least an initial finding that the Colombian State has not fulfilled its obligations under Articles 8 and 25 of the Convention.

81. The Commission here definitively concludes that the Colombian State has failed to ensure a swift and effective legal remedy. Nor have Mr. Medina's family members and their representatives been allowed effective access to justice and an opportunity to be heard within a reasonable time by competent and impartial tribunals in Colombia.

82. Initially, the lack of an effective habeas corpus or other adequate remedy under law for the immediate protection of disappeared persons deprived Mr. Medina of the rapid judicial protection necessary given his special condition as a disappeared person. The criminal proceeding originally initiated in an attempt to locate and protect Mr. Medina, while an opportunity to do still existed, also proved ineffective for that purpose. That proceeding failed to locate Mr. Medina or discover his fate within a time frame which might have allowed for the prevention of the numerous violations of rights which he suffered.

83. The criminal case also failed to provide Mr. Medina's family members with an opportunity to be heard within a reasonable time and an effective legal remedy for the violations suffered by Mr. Medina and, derivatively, by his family. The right to judicial protection and to access to justice, provided for in Articles 8 and 25 of the Convention as read with Article 1.1, establishes, in cases such as this one where the violation of a right may properly be characterized as a criminal offense, the right of victims or their family members to obtain a judicial investigation and a decision by a court of criminal law which determines, where possible, those responsible for the crimes committed and punishes them accordingly.[FN49]

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[FN49] See I/A Comm. H.R., Report No. 28/92 (Argentina), October 2, 1992, pars. 32, 50, Annual Report of the Inter-American Commission on Human Rights 1992-1993, OEA/Ser.L/V/II.83, Doc. 14, corr. 1, March 12, 1993; I/A Comm. H.R., Report No. 10/95 (Ecuador), September 12, 1995, Annual Report of the Inter-American Commission on Human Rights 1995, pars. 42-48.  
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84. Yet, more than nine years after the initiation of the investigation in this case, the criminal proceedings still have not concluded, and no person responsible for the disappearance of Mr. Medina has been convicted. Under any standard, nine years constitutes an excessive period of

time for conducting criminal proceedings in a case involving violations of rights as serious as the forced disappearance of the victim.[FN50]

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[FN50] See I/A Court H.R., Genie Lacayo Case, Judgment of January 29, 1997, par. 81; Eur. Court H.R., Motta judgment of 19 February 1991, Series A no. 195-A, par. 30.

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85. Although significant evidence was gathered in the case, the first formal charges were not formulated until October of 1995, seven years after Mr. Medina's disappearance. More than a year has now passed since the case was opened for trial, and the court currently with jurisdiction over the case still has not issued a decision. The State has not provided information adequately explaining this delay.

86. In addition, the criminal proceedings were not carried out in an effective and efficient manner. Rather, as noted above, the case was transferred repeatedly to different tribunals and was handled in different moments by the three distinct criminal jurisdictions which exist in Colombia.[FN51]

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[FN51] Ordinary jurisdiction, regional or public order jurisdiction and military jurisdiction.

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87. The inefficiency of the proceedings is demonstrated by the fact that the jurisdiction which finally has competence over the case did not receive the case until November of 1992, four years after Mr. Medina was disappeared. By that time, the court with jurisdiction over the case would necessarily have difficulty in obtaining evidence and witness testimony crucial to carrying out adequate criminal proceedings.

88. The ineffectiveness of the criminal proceedings is further demonstrated by the fact that the only individual being tried, César Orozco Gómez, has never been detained. A warrant for his arrest was issued while he still served as a National Police officer. However, that warrant was never carried out and was eventually revoked. Due to the unexplained delay in the subsequent criminal proceedings, the Colombian courts did not issue another arrest warrant against him until long after he was dismissed from police service. As a result, his arrest is now made much more difficult.

89. The State has asserted that it has notified the various security forces of the State of the arrest warrant. However, the State has not informed the Commission of any concrete steps taken by the relevant State entities to carry out the warrant. The Commission concludes that the State has not shown that it has made adequate efforts to carry out the arrest, a measure of extreme importance for the success of the domestic criminal proceedings in this case and for the eventual sanction of those responsible for the violations which occurred.

90. State agents at high levels have failed to cooperate with the criminal proceeding initiated in relation to the disappearance of Mr. Medina in a manner which would allow the proceeding to

move forward properly and to serve as a successful means of legal recourse. At least one high-ranking Police official denied that the National Police had ever detained Mr. Medina, much less caused his disappearance. In a report to the Minister of Defense, the Commander of the National Police for the Department of Huila, Coronel Leonel Buitrago Bonilla, stated that the National Police in Huila "at no time have held as a detained person the citizen student of linguistics and literature at the South Colombia University, as has been suggested by certain rumors offered by those who wish to tear down the image of this institution." [FN52]

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[FN52] According to uncontroverted information presented by the petitioners in their rejoinder of April 25, 1994, Coronel Leonel Buitrago Bonilla, then Commander of the National Police for the Department of Huila, made this statement in a report to then Minister of Defense, General Manuel Guerrero Paz.

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91. This statement contradicted the extensive witness testimony which indicated that the National Police agents had detained Mr. Medina, a fact never denied by the State itself. It also contradicts the finding eventually made by the subsequent Commander of the National Police for the Department of Huila, in his position as judge of first instance in the criminal case in the military justice system. In his decision of May 29, 1990, the Commander of the Department specifically found that National Police had detained Mr. Medina.

92. The statement of Coronel Buitrago may, then, only be understood as an attempt to deny Police responsibility at all costs, regardless of the evidence available. Such acts clearly serve to block effective investigative efforts. The lack of objectivity and impartiality displayed by Coronel Buitrago had further relevance for the criminal proceedings in this case. Coronel Buitrago, as Commander for the Department of Huila, was designated as judge of first instance in the criminal case in the military justice system. Coronel Buitrago eventually did not decide the case in the first instance, because he no longer served as Commander for the Department when the decision was issued. However, the fact that he had jurisdiction over the case at one time demonstrates that State officials and courts did not handle the case seriously and with impartiality.

93. The State has also failed to provide access to effective legal recourse by not making every effort to sanction all those persons responsible for the disappearance in a manner proportionate to and reflective of all of the violations committed.

94. Colombian criminal law does not establish as a crime the forced disappearance of persons. The Colombian State is therefore forced to charge the existing and potential defendants in the case with crimes such as kidnapping, and any eventual convictions will be for those crimes. Those crimes do not reflect the actual extent and nature of the multi-faceted violation of rights committed against Mr. Medina when State agents forcibly disappeared him. The prosecution of individuals for those crimes cannot constitute adequate legal recourse for the violations suffered by Mr. Medina.

95. In addition, the State's decision to charge only one individual demonstrates the incompleteness of the domestic criminal proceedings as a means of legal recourse in this case. It is not the role of the Commission to determine the liability of and to require the punishment of individual state agents for violations of human rights or to require a specific outcome in domestic criminal proceedings.[FN53] However, where there exist indicia of culpability against certain individuals or groups of individuals, the State must carry out a serious investigation of all such persons persons and prosecute them where appropriate. If the State fails to do so, the Commission must conclude that the State has failed to provide access to effective legal recourse.

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[FN53] See Velásquez Rodríguez Case, Judgment of July 29, 1988, pars. 134, 173, 177.

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96. There exist serious indicia implicating other National Police agents, in addition to César Orozco Gómez, in the disappearance of Mr. Medina. The State, acknowledging this fact, has continued to leave open an investigation to identify other persons who might be responsible for the crime. Yet, no other officer has been charged with any crime, much less tried or convicted. Only one other Police officer has ever even been formally named as a suspect in the criminal investigation. This officer was a lower-level agent implicated in the case for allegedly having failed to properly record information about all of the detainees who arrived at the Neiva Police Station on February 19, 1988.

97. Thus, the criminal investigations have never named as a formal suspect the commander of the police forces at the Neiva Police Station who ordered the operation in which Mr. Medina was detained. This commander has not been named, despite the fact that he is the officer directly responsible for the police forces involved and for any detentions they effectuated.[FN54] No other higher-level Police officials, who might be responsible for the disappearance either directly or through the chain of command, have been named.

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[FN54] This uncontroverted information was provided by the petitioners in their brief of April 22, 1994.

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98. Nor have the investigations formally named the other members of the police unit who participated in the original detention of Mr. Medina in the Cándido Leguízamo neighborhood on February 19, 1988. These persons have not been named despite witness testimony indicating that numerous Police agents participated in the arrest and despite the existence of Police records reflecting the operation, which contain the names of the agents involved.[FN55]

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[FN55] See Document sent by the Department of Police of Huila to the Regional Procurator, February 25, 1988 (including a list of personnel who carried out police operations on February 19, 1988); Document sent by the Department of Police of Huila to the Office of the Seventh Court for Criminal Investigation of Neiva, March 17, 1988 (including a list of personnel who participated in the patrol led by Lieutenant César Orozco Gómez on February 19, 1988).

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99. As to possible suspects other than the two persons formally named, the State has simply referred to the existence of an open investigation. The State notes that this investigation seeks to identify other persons responsible for the violations committed against Mr. Medina, more than nine years after his disappearance. Although the decision to continue a separate investigation to identify additional suspects was affirmed on appeal in February of 1996, the first investigative tasks were not carried out in that investigation until September and December of 1996. The State has not clarified or specified what efforts it has made to move forward in that investigation.

100. The civil party to the criminal proceedings, acting in representation of the family members of Mr. Medina, formally petitioned to have additional suspects named before the closure of the investigation which resulted in the charges against César Orozco Gómez. The petitioners charge that the petitions made by the civil party received no response from the prosecutorial authorities.

101. The State has argued that the prosecution considered the arguments of the civil party in making its decision as to the suspects which should be connected to the case. According to the State, the Office of the Prosecutor General simply did not find those arguments sufficiently convincing. However, there exists no indication in the record before the Commission that the prosecution provided a response to the civil party regarding the petition, providing reasons for the decision taken.

102. The Commission has previously found that where a domestic judicial system allows the victim or his family members to act within the proceedings in the role of civil party, that opportunity becomes a fundamental right which is crucial to the criminal process.[FN56] The Commission considers that, in such cases, the right of the civil party to participate must be observed and protected in full. The authorities must consider and respond to the petitions of the civil party. In the present case, the failure of the authorities to respond to the petitions of the civil party constituted an additional breach by the State of the right of the family members to be heard and to obtain access to a remedy through the criminal proceedings.

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[FN56] See I/A Comm. H.R., Report No. 29/92 (Uruguay), October 2, 1992, Annual Report of the Inter-American Commission on Human Rights 1992-1993, par. 41.

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g. State Responsibility - Obligation to Respect and Ensure Rights and to Adopt Domestic Legal Measures

103. The Colombian State has not fulfilled its obligation under Article 1(1) of the American Convention to "respect the rights and freedoms recognized [t]herein and to ensure to all persons subject to [its]jurisdiction the free and full exercise of those rights and freedoms." Nor has the State complied fully with its duty to adopt "such legislative or other measures as may be necessary to give effect" to the rights and freedoms guaranteed in the Convention, as is required by Article 2 of that instrument. The Colombian State is therefore responsible for the violations of



the rights protected in Articles 3, 4, 5, 7, 13, 8 and 25 of the Convention which occurred in the present case, as well as for violations of Articles 1 and 2 of the Convention.

104. The first obligation of any State party to the American Convention is to "respect" the rights and freedoms set forth therein.

Whenever a State organ, official or public entity violates . . . rights [named in the Convention], this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention . . . the State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even if they are acting outside the sphere of their authority or in violation of internal law.[FN57]

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[FN57] Velásquez Rodríguez Case, Judgment of July 29, 1988, pars. 169, 170.

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105. In the instant case, State National Police agents, in full uniform and acting under color of their official authority as law enforcement agents, detained and then disappeared Mr. Medina. Additional State agents, including the prosecutorial and judicial authorities, did not provide adequate judicial protection and access to justice in relation to the disappearance. The disappearance and subsequent denial of justice resulted in the violation of numerous rights guaranteed in the Convention, and the Colombian State is responsible for those violations committed by State agents in conjunction with a violation of Article 1(1).

106. The second obligation of the State is to "ensure" the free and full exercise of the rights recognized in the Convention. In this respect, the Commission reiterates that it is:

the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation of human rights.[FN58]

The Colombian State has not fulfilled its obligations to ensure the human rights of Mr. Medina and his family.

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[FN58] *Id.*, par. 166.

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107. First, the State failed to establish a legal structure which would adequately seek to prevent the disappearance of Mr. Medina and the various violations which derived from that disappearance. As a result, the State has incurred in a violation of Article 2 of the Convention as well as of Article 1(1).

108. Specifically, the fact that Colombian law does not establish the crime of forced disappearance or otherwise address the disappearance problem demonstrates a failure on the part of the State to recognize and deal with a human rights violation of particular gravity. The State, by not criminalizing the forced disappearance of persons, has squandered an opportunity to make a statement condemning and discouraging such heinous activity. The State has also failed to provide tailored criminal sanctions which would match the special characteristics of forced disappearances and provide an effective deterrent against the commission of such a crime. As a result, the State has not established a legal regime which adequately works to prevent forced disappearances such as the one which occurred in this case.[FN59]

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[FN59] At the time of Mr. Medina's disappearance, Colombian law contained no norm prohibiting forced disappearances. The 1991 Colombian Constitution subsequently established, in its Article 12, the fundamental right to be free from forced disappearance: "Nobody will be submitted to forced disappearance." However, that Constitutional provision has not been legislated to establish the crime of force disappearance and would not, in any case, be applicable in the present matter.

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109. The Colombian State has also failed to provide for a writ of habeas corpus or other remedy which would function in a rapid and effective manner to protect disappeared persons as soon as a disappearance becomes known. By providing such a mechanism, a State might prevent some of the violations which occur when disappearances continue unchecked. By not providing for such a mechanism, the State fails to prevent the various violations which generally accompany forced disappearances, such as eventual extrajudicial execution. In the present case, the lack of a rapid means of judicial protection allowed Mr. Medina to be relinquished to his fate as a disappeared person. The State thus did not act adequately to prevent the various violations which the Commission concludes occurred in this case as a result of the disappearance.

110. Second, the State has not complied with its duty to investigate, punish and compensate in relation to the violations which Mr. Medina suffered. The Commission has established, in its conclusions regarding Articles 8 and 25 of the Convention, that the criminal proceedings carried out in this case have not been timely or complete. The Commission has further found that they have not provided an adequate opportunity to be heard and effective access to legal recourse. As a result, the criminal proceedings have not succeeded in bringing to justice the individuals responsible for Mr. Medina's disappearance. Thus, the State has not fulfilled its obligation under Article 1(1) to use all of the means at its disposal to carry out a serious investigation and to punish those responsible for the violations of Mr. Medina's rights.

111. The Commission further found, in its analysis of Articles 8 and 25 of the Convention, that the State has not made every effort to sanction the disappearance in this case in a manner proportionate to and reflective of the nature of the violation committed again through the failure to provide for the crime of forced disappearance under domestic law. The State is thus also responsible for a violation of Article 2 for the failure to adopt domestic legislation or other measures which would allow the State to fulfill its duty to ensure the rights protected in the

Convention through adequate investigation of Mr. Medina's disappearance and the sanction of those responsible.

112. The Commission further emphasizes that, in a disappearance case, the State's duty to investigate includes a minimum obligation "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." [FN60] There is no indication in the record in this case before the Commission that the State has informed Mr. Medina's family members about his fate or that the State has even carried out the investigations necessary to establish the fate of Mr. Medina and the whereabouts of his remains.

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[FN60] Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 181.

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113. The duty to investigate the facts in a disappearance case "continues as long as there is uncertainty about the fate of the person who has disappeared." [FN61] The Colombian State continues to bear the obligation to investigate and fully clarify the circumstances of Mr. Medina's disappearance and to submit to prosecution all of the individuals responsible for the crimes committed against him.

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[FN61] Id. at par. 181.

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114. The Commission observes, as a final matter, that the State has not provided monetary or other compensation to the family members of the victim. The family members of Mr. Medina obtained a decision from the contentious-administrative courts of Colombia which was favorable to them on the issue of monetary compensation. However, that decision is on appeal, and the Counsel of State has not yet issued a decision on the matter. Thus, nine years after Mr. Medina's disappearance, his family members have received no compensation from the State whatsoever.

## V. CONSIDERATIONS IN RESPECT OF THE ACTIONS TAKEN SINCE ADOPTION OF THE ARTICLE 50 REPORT

### A. Procedure after the adoption of the Article 50 Report

115. The Commission examined this case during its 97<sup>o</sup> Regular Session. On October 1, 1997, pursuant to Article 50 of the Convention, it adopted Report 29/97, which concluded that the Colombian State was responsible for violations of the Convention, including violations of the rights to juridical personality (Article 3), life (Article 4), humane treatment (Article 5), personal liberty (Article 7), a fair trial (Article 8), freedom of thought and expression (Article 13) and judicial protection (Article 25). The Commission further found that the Colombian State failed to uphold its obligations established in Articles 1 and 2 of the Convention. The Commission recommended that the State adopt specific measures to resolve the situation.

116. The Commission sent Report 29/97 to the Colombian State on October 28, 1997, with a request to the State to inform the Commission as to the measures taken to remedy the situation, in line with the recommendations made. The State was given a two-month period to respond. The Commission notified the petitioners of the adoption of the report in a note of the same date.

117. On December 30, 1997, the Commission received a note from the State requesting an extension of time for the filing of its response. By note dated December 31, 1997, the Commission granted an extension of time of 30 days. On February 9, 1998, the Commission received the State's response to Report 29/97, which was dated February 4, 1998. The Commission wishes to express its concern regarding the late filing of the State's response. The State failed to respond in a timely manner despite having received from the Commission a total period of three months to provide information regarding compliance with the report adopted in accordance with Article 50 of the Convention.

118. The Commission has carefully considered each of the observations presented by the Colombian State in respect of Report 29/97 adopted in this case. In its response, the State questions the Commission's decision on admissibility, included in Report 29/97. The State also challenges the Commission's application of the law to the facts of the case. Finally, the State presents information regarding compliance with the Commission's recommendations set forth in the report. The Commission will proceed to address these general points.

#### B. The State's Arguments Regarding the Commission's Admissibility Decision

119. The State questions the Commission's decision regarding the admissibility requirement of exhaustion of domestic remedies. The State suggests that the Commission has erroneously disqualified the disciplinary and contentious-administrative proceedings as possible effective domestic remedies which must be exhausted before a case may be admitted by the Commission. The State argues that the Commission has failed to recognize the integrated nature and the effectiveness of those proceedings in Colombia.

120. The Commission clarifies, on this point, that it does not question the integrated nature of the various remedies provided for under Colombian law, including the criminal proceedings, the contentious-administrative proceedings and the disciplinary proceedings. The Commission recognizes that these proceedings, when they are carried out effectively, may provide a joint result which includes the criminal sanction of individuals responsible for human rights violations, the disciplinary sanction of those individuals and a finding of State responsibility, including a duty to compensate the victims.

121. Nonetheless, the Commission held, in this case, that there existed no remedy under Colombian law adequate to address the violation at issue in this case. The Commission noted that none of the ordinary proceedings -- criminal, contentious-administrative and disciplinary -- provided an adequate means of addressing in a rapid and meaningful manner a disappearance committed by State agents. The Commission further found that the writ of habeas corpus established under Colombian law also failed to provide a remedy under such circumstances. The recognition of the interrelated nature of the remedies provided under Colombian law does not change the Commission's conclusion.

122. In the case of a disappeared person, the only domestic remedy which could be considered adequate is one which provides a means of finding the disappeared person, of ascertaining whether he is legally detained and, if necessary, providing for his liberty.[FN62] The Commission need only analyze the exhaustion of those remedies which are "suitable to address [the] infringement of [the] legal right [at issue]."[FN63] The Court has made clear that "[i]f a remedy is not adequate in a specific case, it obviously need not be exhausted." [FN64] The Commission thus was not required to consider the various remedies provided by the criminal, disciplinary and contentious-administrative jurisdictions, which could act together to provide for sanctions and compensation only after all of the grave violations involved in a forced disappearance had been consummated. Those remedies, even analyzed together, could not provide the remedy necessary to guarantee Mr. Medina's rights.

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[FN62] Velásquez Rodríguez Case, Judgment of July 29, 1988, par. 65.

[FN63] *Id.*, par. 64.

[FN64] *Id.*

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### C. The State's Arguments Regarding the Applicable Law

123. In its response to Report 29/97, the State contests the Commission's application of Article 3 (Right to Juridical Personality) and Article 13 (Freedom of Thought and Expression) in this case. The State bases its argument on the fact that the Inter-American Court of Human Rights did not find violations of those rights in its decision in the Velásquez Rodríguez Case, which involved a forced disappearance. The Commission considers that there exists nothing in the decision in the Velásquez Rodríguez Case which precludes the Commission's conclusions regarding the violations of Articles 3 and 13 in this case.

124. First, the facts of the present case are different from the Velásquez Rodríguez case. For example, the facts relating to the disappearance of Mr. Medina establish a causal relation between his disappearance and the fact that he carried Communist newspapers. The violations of the Convention which are found reflect the facts which are established in the case. Not all disappearance cases involve exactly the same facts and the same human rights violations.

125. Second, the Court never held that the rights violated in a disappearance case were only those mentioned in the decision in the Velásquez Rodríguez case. In fact, in the Velásquez Rodríguez decision, the Court noted that:

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.[FN65]

The Court thus noted that it had only named some of the direct violations of the Convention which might be found in disappearance cases and also suggested that disappearances involve violations of other rights not explicitly established in the letter of the Convention.

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[FN65] Id., par. 158.

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126. In this regard, the international jurisprudence regarding the violations involved in forced disappearance cases has evolved since the time of the Court's 1988 decision in the Velásquez Rodríguez Case, its first decision in a contentious case. At least since 1992, the United Nations has characterized forced disappearances as violative of the right to recognition as a person before the law. The Commission has also, in recent years, clarified that it considers that forced disappearances violate the right to juridical personality explicitly set forth in the American Convention.[FN66]

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[FN66] See, e.g., Report No. 53/96, Case 8074 (Guatemala), par. 24; Report No. 54/96, Case 8075 (Guatemala), par. 24; Report No. 55/96, Case 8076 (Guatemala), par. 24; Report No. 56/96, Case 9120 (Guatemala), par. 28.

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#### D. State Compliance with the Commission's Recommendations

##### 1. Investigation and Sanction

127. In relation to the Commission's recommendation regarding the investigation of the case and the sanction of those responsible for committing the violations, the State made an important announcement in its response to Report 29/92. The State informed the Commission that, on August 4, 1997 the only defendant formally charged in the case, César Orozco Gómez, was convicted. He was sentenced to 42 years of prison and assessed a fine of 150 minimum wage units.

128. The Commission considers that this conviction constitutes an important step in complying with the recommendation of the Commission regarding investigations and sanctions. The Commission considers, nonetheless, that the Colombian State has not fully complied with the recommendation of the Commission on this point for several reasons.

129. First, according to information in the record, Lieutenant César Orozco Gómez was not held in detention at the time of his trial despite the existence of a warrant ordering his arrest. In fact, Lieutenant César Orozco Gómez was never detained in connection with this case. The State has not provided any information indicating that he has been arrested more recently. There is thus no indication that he is actually serving the sentence issued against him. As the Commission noted in its Article 50 report, a warrant for Lieutenant César Orozco Gómez's arrest was issued while he still served as a National Police officer. However, that warrant was eventually revoked.

The Colombian courts did not issue another arrest warrant against him until long after he was dismissed from police service, making his arrest much more difficult at this time.

130. Second, the State has informed the Commission that Lieutenant César Orozco Gómez was convicted for committing the crime of kidnapping. The Commission established already in Report 29/97 that a conviction for the crime of kidnapping could not reflect adequately the seriousness and the nature of the human rights violations committed in this disappearance case.

131. Third, the Commission noted in its Article 50 report that the State had not thoroughly investigated all those individuals against whom there existed serious indicia of responsibility in this case. The State has not provided any information indicating that further serious investigations have been carried out as against other individuals possibly involved in the disappearance of Tarcisio Medina Charry.

## 2. Reparation

132. As to the Commission's recommendation regarding the reparation of the violations, the State has not provided any information which would demonstrate compliance with this recommendation. The State informs the Commission, in its response to Report 29/97, that there has been no change in status regarding the compensation of Mr. Medina's family members. At the time of the adoption of Report 29/97, there existed a decision issued on October 3, 1995 by the Administrative Tribunal of Huila, ordering monetary compensation. That decision was on appeal to the Council of State, Third Chamber ("Consejo de Estado, Sección Tercera"). According to the State's response, that tribunal has still not yet issued a decision on the appeal, although more than two years have lapsed since the original decision ordering compensation. As a consequence, the family members of Mr. Medina have not yet received any monetary compensation.

133. As to the Commission's recommendation to locate Mr. Medina's remains, the State acknowledges the right of the family members and the duty of the State in this regard. The Commission considers that this recognition by the State is extremely important. The State did not provide any information, however, which would indicate that the State had made serious efforts to carry out its obligation.

## 3. Adoption or Modification of Legislation

134. Finally, the Commission recommended that the Colombian State adopt or modify necessary legislation so as to provide for the prevention of forced disappearances, for the protection of disappeared persons and for the adequate investigation of disappearance cases, including the appropriate sanction of those responsible. In its response to Report 29/92, the State noted that the Executive has presented to the Congress a draft law which would establish the crime of forced disappearance in the domestic legal regime. At this time, that legislation has not been adopted by the Congress. However, the State indicates that it is expected that this legislation will be adopted this year. The Commission will continue to observe carefully the developments which take place in relation with this draft legislation.

Based on the foregoing:

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

CONCLUDES:

135. That the Colombian State is responsible for violations of the human rights of Tarcisio Medina Charry and his family to juridical personality (Article 3), life (Article 4), humane treatment (Article 5), personal liberty (Article 7), a fair trial (Article 8), freedom of thought and expression (Article 13) and judicial protection (Article 25), and has failed to uphold its obligations established in Articles 1 and 2 of the Convention.

RECOMMENDS:

136. That the Colombian State undertake a serious, impartial and effective investigation of the facts denounced so that the circumstances of and the responsibility for the violations found may be fully detailed in an officially sanctioned accounts of the disappearance of Tarcisio Medina Charry and so that all of the individuals responsible for the violations may be submitted to the appropriate judicial processes and may be sanctioned, where appropriate.

137. That the Colombian State adopt measures to make full reparation for the violations found, including taking steps to locate the remains of Tarcisio Medina Charry, making the arrangements necessary to facilitate the wishes of his family as to an appropriate final resting place, and providing adequate and fair monetary compensation to his family members.

138. That the Colombian State adopt or modify necessary legislation so as to provide for the prevention of forced disappearances, for the protection of disappeared persons and for the adequate investigation of disappearance cases, including the appropriate sanction of those responsible.

## VI. PUBLICATION

139. In conformity with Article 51(1) and (2) of the American Convention, the Commission transmitted Report No. 3/98, adopted in the present case, to the Colombian State on February 23, 1998. The Commission granted the State a one-month period to adopt the necessary measures to comply with the foregoing recommendations and to resolve the situation under analysis.

140. The Commission received the response of the Colombian State to Report No. 3/98 on March 25, 1998. The Commission transmitted the pertinent parts of the State's response to the petitioners on March 31, 1998.

141. In its communication, the State informed the Commission, for the first time, that the Council of State issued its decision in the contentious-administrative proceeding on June 26, 1997. The Council of State affirmed the decision of the Administrative Tribunal for Huila, ordering the payment of \$26,663.800 to the victim's family members. The State clarified, in addition, that the National Police had already ordered that payment take place. The Commission



thus considers that the Colombian State has complied with its recommendation to provide monetary compensation to the victim's family members.

142. The Colombian State does not provide any additional new information regarding the adoption of measures in order to comply with the recommendations of the Commission. In fact, as regards the criminal proceeding, the State expressly confirms that the arrest of the only persons responsible for the violations who has been convicted has not been carried out.

## VII. FINAL ANALYSIS AND CONCLUSIONS

143. For these reasons, the Commission decides that the State has not taken all of the appropriate measures to comply with the recommendations set forth in this report.

144. Based on the foregoing and pursuant to Article 51(3) of the American Convention and Article 48 of the Commission's Regulations, the Commission decides to reiterate the conclusions and recommendations contained in Report No. 3/98, with the following change to Recommendation B:

B. That the Colombian State adopt measures to make full reparation for the violations found, including taking steps to locate the remains of Tarcisio Medina Charry, making the arrangements necessary to facilitate the wishes of his family as to an appropriate final resting place.

In addition, the Commission decides to make this report public and to include it in the Commission's Annual Report to the General Assembly of the OAS.