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First Vice Chairman: Robert K. Goldman;
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I. BACKGROUND

The Facts Alleged

1. On July 20, 1990, the Inter-American Commission on Human Rights ("Commission") received a communication denouncing the July 12, 1990 abduction and disappearance of Samuel de la Cruz Gómez in Guatemala. The petitioners indicated that Mr. de la Cruz, a member of the Council of Ethnic Communities Runujel Junam [Consejo de Comunidades Etnicas Runujel Junam (CERJ)], had been detained and disappeared from the Cantón Chimatzaz, Municipality of Zacualpa, Department of El Quiché, by men dressed in civilian clothing who were linked to the security forces of the State of the Republic of Guatemala ("State" or "Guatemalan State"). A writ of exhibición personal (a form of habeas corpus) had been filed on behalf of Mr. de la Cruz before the judiciary of Santa Cruz del Quiché.

2. In a subsequent submission of August 10, 1994, the petitioners amplified their allegations. They reported that prior to the disappearance, on June 27, 1990, 45 soldiers had appeared at the home of Samuel de la Cruz and asked him to guide them to a nearby road. If he declined, they allegedly warned, he would be considered subversive. He refused, and the soldiers reportedly threatened to return the next day and kill him.

3. On July 12, 1990, at 3:00 a.m., some 15 heavily armed men kidnapped Mr. de la Cruz (31 years old), along with his brother Génaro (16 years old), from their home. The victims, with their hands tied behind their backs, were taken on foot in the direction of San Andrés Sacjabaja. Génaro was released a short time later. Samuel de la Cruz Gómez has not been seen or heard from since that day. A group of some 35 neighbors pursued the kidnappers. The petitioners reported that neighbor Ciriaco García de la Cruz recognized one of the kidnappers as Ernesto

Eduardo Arévalo Ramos, and called out to him to ask where they were taking Samuel. The armed men then fired on the pursuers, injuring Mr. García and Celestina de León García.

4. The petitioners reported that some of those in pursuit stopped to take the injured to the hospital. This group reportedly encountered some 22 soldiers nearby, armed and dressed in camouflage. They told the soldiers about the kidnapping and requested help. The petitioners reported that the soldiers pretended to fire at the kidnappers, but only fired in the air. The witnesses reported seeing the soldiers and kidnappers meet up, and disappear from view. An hour later, all of them emerged dressed in military clothing. Later that same day, during the late afternoon of July 12, 1990, a number of residents saw Ernesto Arévalo Ramos walking along a street in Zacualpa. They captured him and turned him over to the police.

Judicial Proceedings Initiated in Relation to the Disappearance of Samuel de la Cruz Gómez

5. The submissions of the parties indicate that, on July 12, 1990, criminal process 83-90 was initiated against Ernesto Arévalo Ramos in connection with the kidnapping of Samuel de la Cruz Gómez. On October 25, 1991, the First Court of First Criminal Instance of El Quiché issued a decision absolving the accused on the basis that there was insufficient evidence for a conviction. The prosecutor appealed this decision before the Ninth Chamber of the Court of Appeals. On January 25, 1992, the Court of Appeals issued its decision affirming the finding of the court below.

II. PROCESSING BEFORE THE COMMISSION

6. The Commission opened Case 10.606 on August 15, 1990 and transmitted the pertinent parts of the petition to the Government of Guatemala on August 17, 1990, with a response requested within 90 days.

7. The Government responded by means of a note dated January 22, 1991, indicating that the First Court of First Criminal Instance of El Quiché was currently processing criminal case No. 83-90, in which Ernesto Arévalo Ramos stood accused of the kidnapping of Mr. de la Cruz. Given the pendency of these judicial proceedings, the Government asserted that the petition should be deemed inadmissible. This information was transmitted to the petitioners on January 29, 1991, with observations requested within 30 days. This request was reiterated on June 15, 1992.

8. In a note of March 9, 1994, the Commission requested that the Government provide updated information on the status of the proceedings in criminal process 83-90 against Ernesto Arévalo Ramos before the First Court of First Criminal Instance of El Quiché. A response was requested as soon as possible, in order to allow the Commission to consider the case during its next period of sessions.

9. By note of May 27, 1994, the Government informed the Commission that, on October 25, 1991, the First Court of First Criminal Instance had issued a decision absolving the accused on the basis of insufficient proof. The Public Ministry had appealed this decision, and on January 25, 1992, the Ninth Chamber of the Court of Appeals had issued its decision affirming the

finding below. Mr. Arévalo Ramos had been released, and the criminal process had been concluded. This information was transmitted to the petitioners on June 6, 1994, with observations requested within 45 days.

10. On July 12, 1994, the Commission received a communication from the petitioners naming a co-petitioner in the case.

11. In a note of August 10, 1994, the petitioners amplified their factual allegations (see section I above) and provided observations in response to the May 27, 1994 submission of the Government. The petitioners characterized the case as part of a pattern of state violence against human rights defenders in general, and against members of the CERJ in particular, during the period in question. They asserted that the lack of official response to the disappearance of Samuel de la Cruz Gómez reflected a pattern of impunity in cases involving members of the military and civil self-defense patrols. The Government had failed to effectively investigate the one person accused, and taken no action to investigate the dozens of other individuals involved in the disappearance. The pertinent parts of that communication were transmitted to the Government on August 18, 1994, with a request that any information on the case be submitted within 30 days.

12. At the request of the petitioners, the Commission convened a hearing on this case during its 87th period of sessions, at which time the Government filed a report recounting the developments set forth in its May 27, 1994 submission. This report was formally transmitted to the petitioners on September 22, 1994, with any observations requested within 45 days.

13. The response of the petitioners, dated November 21, 1994, was transmitted to the Government in a note dated November 22, 1994. Additionally, the Commission indicated that it was placing itself at the disposal of the parties for the purpose of facilitating a friendly settlement, should the parties wish to engage in this process contemplated in Article 48 of the American Convention. This disposition was subsequently communicated to the petitioners.

14. On January 5, 1995, the Government submitted reports dated December 22 and 29, 1994 in response to the petitioners' November 21, 1994 submission. With respect to the friendly settlement process, the Government indicated its view that this should only be offered where the circumstances demonstrated it to be appropriate. It was not appropriate in the present case, the Government asserted, because its relevant authorities had complied with due process, and were continuing to seek clarification of the events. The Government noted that, on July 1 of the previous year, it had implemented a new Code of Criminal Procedure in order to combat impunity and ensure its citizens access to criminal justice. With respect to the exhaustion of domestic remedies, the Government asserted that the First Court of First Instance de Sentencia continued to be seized of criminal process 83-90, the investigation had not been closed, and the matter remained pending. These reports were transmitted to the petitioners, with any observations requested within 45 days.

15. On March 15, 1995, the petitioners submitted observations to both reports. They indicated that, in view of the Government's rejection of the friendly settlement procedure, and the fact that the case involved a forced disappearance, they too would be unable to accept that

procedure. Further, they pointed out that the Government had asserted contradictory positions with respect to the question of the exhaustion of domestic remedies. In its May 27, 1994 submission the Government had reported that criminal process 83-90 had been decided at first instance, affirmed on appeal, and closed. It now asserted that the process remained pending before the First Court of First Criminal Instance. The pertinent parts of this communication were transmitted to the Government in a note dated March 21, 1995, with the submission of any further information requested within 45 days.

16. On May 11, 1995, the petitioners submitted additional information, arguing that the criminal process against Ernesto Arévalo Ramos had served to ensure his impunity, despite the fact that various witnesses had identified him as one of the kidnappers of Mr. de la Cruz. Witness Francisco Riz Luis had attested that Arévalo had been among the kidnappers, and gave the order to shoot at those in pursuit. Witness Ana Luis de León had attested that she had been told Arévalo was among the kidnappers. The petitioners asserted that the judge of first instance dismissed the declarations of these and other witnesses arbitrarily, for formalistic reasons. The court's rejection of probative evidence without any reasoned basis, the petitioners argued, resulted in an arbitrary decision in violation of the principles of due process. This submission was transmitted to the Government in a note of May 18, 1995, with any response requested within 60 days. The petitioners subsequently supplied copies of declarations made in criminal process 83-90 by Francisco Riz Luis, Ignacia de la Cruz Gómez, Encarnación Luis de la Cruz, Ana Luis de León, Isaias de la Cruz, Santos Gómez, Génaro de la Cruz Gómez and Ciriaco García de la Cruz.

17. In a note of July 20, 1995, the Government responded by affirming that, under Guatemalan law, the judiciary has the exclusive competence to evaluate evidence offered at the appropriate procedural stage, and to issue the corresponding decision, as had been done in the present case. These observations were transmitted to the petitioners for their observations within 45 days.

18. On September 6, 1995, the petitioners submitted their response, reiterating that the State had failed to adequately investigate the crimes denounced. The domestic proceedings had produced an arbitrary decision in process 83-90, the matter had been archived since 1992, no action had been taken to investigate and punish the other perpetrators, and no effort had been made to clarify the fate of Mr. de la Cruz. The pertinent parts of this communication were transmitted to the Government in a note of September 12, 1995, with any observations requested within 30 days.

19. The Government submitted its observations to the foregoing communication in a note of October 13, 1995. The Government recounted the sequence of domestic proceedings, and stated that no recourses or notifications remained pending. It reiterated that the relevant procedures had been strictly complied with, and that the subjects involved had enjoyed a full opportunity to present arguments and evidence. The Government asserted that the petitioners had failed to collaborate and produce evidence in the domestic proceedings as required by law, choosing instead to resort to a petition process on the international plane. As a result, it argued, the case should be archived. This communication was transmitted to the petitioners, following a period of delay due to a filing discrepancy, in a note of June 20, 1996.

20. On August 12, 1996, the petitioners submitted observations to the foregoing submission. They rejected the assertion that they had failed to collaborate or produce evidence in the domestic proceedings, indicating that they had supplied all the information available to them. They affirmed that the family members of the victim had resorted to international mechanisms due to the impossibility of obtaining justice at the domestic level. The petitioners emphasized that the State could not rest on the defense that the victim's representatives had failed to produce certain proof when that evidence could only be obtained with the cooperation of the State. This submission was communicated to the Government by means of a note dated August 21, 1996, with all further information concerning the case requested within 60 days.

21. The Government submitted additional observations on October 23, 1996, arguing that the judiciary had fully discharged its duty in processing the case, and citing the decision of the Inter-American Court in the Velásquez Rodríguez Case for the proposition that the duty to investigate is one of means rather than result. The investigation of the present case was carried out seriously, and produced a substantiated judicial process. The courts of first instance and appeal had evaluated the evidence with the requisite independence required by law, and the petitioners had enjoyed the opportunity to challenge those proceedings. Having noted that the party claiming non-exhaustion of domestic remedies bears the burden of identifying available remedies to the Commission, the Government listed the following as available with respect to a decision at second instance: a) cassation; b) amparo; c) an extraordinary constitutional remedy of amparo. This, the Government argued, demonstrates that the petitioners failed to exhaust domestic remedies. This submission was transmitted to the petitioners on October 28, 1996, with any observations requested within 45 days.

22. Observations were received from the petitioners on April 8, 1997. The petitioners again described the context of the case and violations against human rights defenders at the time in question. They emphasized that the victim's family had sought judicial protection through the Guatemalan courts. However, the writ of habeas corpus had failed to produce any result, and the courts had denied them due process in criminal action 83-90. The petitioners maintained that domestic remedies had proven illusory, both because of the lack of effort to undertake a serious investigation and because of the deficiencies in the judicial proceedings. Finally, the petitioners reiterated their arguments that the forced disappearance of Samuel de la Cruz Gómez took place at a time when this was a practice of the security forces -- one which was left unchallenged by the judiciary. The petitioners cited recent reports from the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA) to support their contention that impunity persists for human rights violations carried out by state agents. This submission was transmitted to the Government in a note of April 9, 1997, with a request for any pertinent information within 30 days. No further submissions have been received.

III. THE POSITIONS OF THE PARTIES

A. Position of the Petitioners

23. The petitioners allege that Samuel de la Cruz Gómez was forcibly disappeared by state agents on July 12, 1990, and that the State has failed to investigate and clarify his fate, prosecute and punish those responsible, and provide reparation to the victim's family. They report that the writ of habeas corpus filed on behalf of the victim produced no results. Further, they contend that criminal process 83-90 initiated with respect to the kidnapping of Samuel de la Cruz Gómez was flawed by grave irregularities with respect to the collection and evaluation of witness testimony, resulting in an arbitrary decision in violation of the principles of due process. They contend that these irregularities were compounded by the decision on appeal. In view of the failure of the State to undertake a responsive investigation and the irregular and arbitrary judicial process, the petitioners assert that the domestic remedies invoked proved to be illusory. Consequently, the petitioners maintain that the State is responsible for violations of Articles 1.1, 4, 5.1, 7, 8 and 25 of the American Convention.

B. Position of the State

24. The Government of Guatemala has never contested the facts alleged by the petitioners with respect to the forced disappearance of Samuel de la Cruz Gómez, or that he has neither been seen nor heard from since his July 12, 1990 abduction. Rather, the Government maintains that its domestic judicial processes responded as required and provided due process with respect to the crimes at issue. In certain submissions, the Government has argued that the case is inadmissible because the petitioners failed to fully exhaust available domestic remedies. In other submissions, it has posited that domestic remedies were invoked and brought to their final conclusion, with criminal process 83-90 having been processed and decided in compliance with Guatemalan law and due process.

25. The Government maintains that the obligation of the State to investigate human rights violations is one of means rather than results. Judicial officials opened criminal process 83-90 in order to investigate and resolve the kidnapping of Samuel de la Cruz Gómez. The individual accused of the crime was absolved by the First Court of First Criminal Instance of Santa Cruz del Quiché on the basis of insufficient proof. That decision was challenged by the prosecutor, and confirmed by the Ninth Chamber of the Court of Appeals. The Government asserts that criminal process 83-90 was dealt with in accordance with applicable norms, the courts of first instance and appeal properly evaluated the evidence with the independence required by law, and the petitioners enjoyed an ample opportunity to present their arguments and challenges. The Government contends that Case 10.606 is inadmissible and should be archived.

IV. CONSIDERATIONS WITH RESPECT TO ADMISSIBILITY

26. Because of the close linkage between the violations denounced and the question of exceptions to the exhaustion of domestic remedies (see Velásquez Rodríguez Case, Judgment of June 26, 1987, Ser. C No. 1, paras. 91, 93), and in view of considerations relative to delay, and the rejection of the friendly settlement procedure, the Commission has decided to issue the present decision on admissibility concurrently with that on the merits of the case.

27. The Commission is competent to examine the subject matter of this complaint, as it concerns alleged violations of Articles 1, 4, 5, 7, 8 and 25 of the American Convention. The

Republic of Guatemala deposited its ratification of the American Convention on May 25, 1978, and the Convention entered into force for all parties on July 18, 1978.

28. The petition includes the information required by Article 32 of the Commission's Regulations, and meets the conditions set forth in Article 46.1.c of the American Convention and Article 39 of the Commission's Regulations, as it is neither pending settlement in another international inter-governmental proceeding, nor essentially duplicative of a petition pending or previously considered by the Commission. The petition was timely filed, as required by Article 46.1.b, given that the central events denounced took place on June 27 and July 12, 1990, and the petition was submitted on July 20, 1990.

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

30. The record indicates that the family's responses to the disappearance of Samuel de la Cruz included the prompt filing of a writ of habeas corpus, and the invocation of criminal proceedings. Criminal process 83-90 was initiated on July 12, 1990, pursuant to the filing of a complaint by the Chief of the Substation of the National Police of Zacualpa against Ernesto Arévalo Ramos, for the crime of kidnapping, before the Court of Peace of the Municipality of Joyabaj, El Quiché. The mother of the victim, Santos Gómez acted as the principal private accuser in the case. On October 25, 1991, the First Court of First Criminal Instance of Santa Cruz del Quiché declared the accused absolved of the charge on the basis that the evidence produced had been insufficient to convict him. This sentence was appealed by the prosecutor, and confirmed on the same basis by the Ninth Chamber of the Court of Appeals in a decision of January 24, 1992.

31. A writ of habeas corpus would normally be the effective "means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty." Caballero Delgado and Santana Case, Preliminary Objections, Judgment of January 21, 1994, Ser. C No. 17, para. 64, citing, Velásquez Rodríguez Case, Judgment of July 29, 1988 (Merits), Ser. C No. 4, para. 65; Godínez Cruz Case, Judgment of January 20, 1989 (Merits), Ser. C. No. 5, para. 68; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989 (Merits), Ser. C No. 6, para. 90. This is necessarily so because cases of forced disappearance "require urgent action by the authorities." Caballero Delgado and Santana Case, *id.* The petitioners reported that the habeas corpus petition filed on behalf of Samuel de la Cruz Gómez produced no results, and the Government has provided no information to the contrary. In general, the writ of habeas corpus is the proper remedy in the case of a forced disappearance, and a petitioner in such a case need not invoke other remedies to meet the standard set in Article 46.1.a. *Id.*, para. 67.

32. In the present case, the Government has argued that criminal process 83-90 offered and provided an effective remedy. Although the filing of a writ of habeas corpus is sufficient to meet the pertinent admissibility requirements in the case of a forced disappearance, the Commission has nonetheless reviewed the criminal process pursued in this case in order to determine whether

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

33. As a procedural matter, the Commission notes that the contradictions in the Government's position with respect to the question of exhaustion,[FN1] and the fact that the latter only identified the specific remedies it contended should have been exhausted some six years after the initiation of proceedings,[FN2] effectively constitute a waiver of that objection to admissibility. Basic principles of international law require that objections regarding the non-exhaustion of domestic remedies be made at an early stage of proceedings, and that the State claiming non-exhaustion prove that effective remedies remain to be exhausted.[FN3]

[FN1] In its January 22, 1991 response, the Government contended that internal remedies had been invoked, the judiciary was seized of case 83-90, and therefore domestic recourses had not been exhausted. In its reports submitted in May and September of 1994, the Government indicated that the accused in criminal process 83-90 had been absolved at first instance and on appeal, and the process had been concluded. In its January 5, 1995 observations, the Government maintained that domestic remedies had not been exhausted, as criminal process 83-90 remained open and the investigation continued. In its July 20, 1995 observations, the Government repeated that process 83-90 had been decided at first instance and affirmed on appeal, and indicated that due process had been complied with and the instances thereof exhausted. In its October 13, 1995 observations, the Government reported that criminal process 83-90 had expired, as no recourse or notification remained pending. It asserted that the petitioners had withheld information in the internal processes, preferring to pursue international remedies. Proof of this, it argued, was the petitioners' failure to make use of the full range of remedies to challenge the sentences of first and second instance in process 83-90.

[FN2] In its final submission of October 23, 1996, the Government indicated the following as the applicable remedies the petitioners had failed to invoke to challenge the decision of the Ninth Chamber of the Court of Appeals: cassation, amparo, or an extraordinary constitutional remedy of amparo.

[FN3] Neira Alegria Case, Preliminary Exceptions, Judgment of December 11, 1991, Ser. C No. 13, para. 30, citing Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 1, para. 88; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 2, para. 87, and Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987, Ser. C No. 3, para. 90. Further, the principle of estoppel prevents a party from adopting a position beneficial to it or detrimental to the other party, and then subsequently adopting the contrary position. Neira Alegria Case, *id.* at para. 29.

34. Even absent those procedural defects, criminal process 83-90 involved the prosecution of a single charge against a single accused. Independently of whether that process was deficient or not, the record before the Commission demonstrates no official effort to investigate the whereabouts or fate of the victim, or to investigate the dozens of other state agents implicated in the disappearance. Consequently, criminal process 83-90 did not provide an available and effective remedy with respect to Mr. de la Cruz' disappearance. The appeal against that decision did not remedy the insufficiency of the scope of criminal process 83-90 from its initiation, nor could a further appeal have done so.

35. As indicated by the foregoing considerations, the present petition fulfills the requirements for admissibility set forth in the American Convention and the Regulations of the Commission.

36. As to Article 48.1.f of the American Convention, which authorizes the Commission to place itself at the disposal of the parties for the purpose of facilitating a possible friendly settlement, the record reflects that the parties were notified of the Commission's disposition to assist them in this regard at the close of 1994, but decided not to avail themselves of this process.

V. CONSIDERATIONS WITH RESPECT TO THE MERITS

37. It is uncontroverted that Samuel de la Cruz Gómez was forced from his home by a group of heavily armed men in the early hours of July 12, 1990, and has neither been seen nor heard from since that time.

38. The petitioners allege that state agents were directly involved in the disappearance. The petitioners reported that Mr. de la Cruz had been threatened with death by a group of soldiers just days before his disappearance, an assertion that is neither supported nor contradicted by other information in the record before the Commission.

39. Information supported and/or corroborated in the record reflects the following: The kidnappers appeared to be carrying Galil rifles. Declaration of Génaro de la Cruz Gómez before the Justice of the Peace of the Criminal Branch, Joyabaj, July 12, 1990, p. 2; Declaration of Ciriaco García de la Cruz before the Second Judge of First Criminal Instance, July 20, 1990 (taken in the Santa Elena National Hospital), p. 2. They spoke Spanish rather than an indigenous language. Declaration of Génaro de la Cruz Gómez, *supra*, p. 3. In the first hours after Mr. de la Cruz was abducted, nearby residents pursued the kidnappers. See, Declaration of Francisco Riz Luis before the Justice of the Peace of the Criminal Branch, Joyabaj, July 13, 1990, p. 3; Declaration of Ana Luis de León before the Justice of the Peace of the Criminal Branch, Joyabaj, August 6, 1990, p. 2; Declaration of Ciriaco García de la Cruz, *supra*, p. 2. Those in pursuit succeeded in nearing the kidnappers, at which time the latter fired on them. Declaration of Francisco Riz Luis, *supra*, p. 3; Declaration of Ciriaco García de la Cruz, *supra*, p. 2. Within minutes, army soldiers arrived on the scene. Declaration of Francisco Riz Luis, *supra*, p. 3. Witnesses reported that the soldiers feigned an exchange of gunfire, but that they were seen to shoot into the air rather than at an intended target. *Id.* Both the kidnappers and the soldiers continued to move on, away from the area. Both groups crossed the river that runs through the area, and the kidnappers then donned military uniforms. Declaration of Ana Luis de León, *supra*, p. 2.

40. The record indicates that there were two sizeable groups of heavily armed men travelling on foot in the same isolated rural area in the early hours of the morning of July 12, 1990, one of which was unequivocally identified by witnesses as pertaining to the armed forces. Proceedings in criminal process 83-90 included a request to the Ministry of Defense for information with respect to the Civilian Self-Defense Patrols (PACs) and military commissioners registered in the area at the time of the facts. There is no indication of any official effort to document or investigate the presence of the soldiers.

41. Samuel de la Cruz Gómez was a member of the CERJ, a non-governmental group established in 1988 to defend human rights and the rights of the Mayan population in particular. The group, initially based in El Quiché, opposed service in the PACs. This service had previously been compulsory, but at the time of the facts under study was putatively voluntary.[FN4] Reports from the relevant period indicate that CERJ resistance to PAC service in the Department of El Quiché was met with threats, intimidation, killings and disappearances carried out by members of the military, military commissioners and PAC members. Further, these reports indicate that these crimes against CERJ members were not met with the measures of prevention or response required of the State.[FN5]

[FN4] The PACs were established at the end of 1981 by the de facto military regime of General Ríos Montt, as part of its policy to exterminate the guerilla movement through the relocation of the indigenous population, and the eradication of "any community or ... person that his government was suspicious of, using methods that violated human rights." Fourth report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.83, Doc. 16 rev., June 1, 1993, at 53. The PACs were initiated in the Department of El Quiché, and expanded to other Departments. Id. At the time in question, they were officially referred to as the Voluntary Committees for Civil Defense (CVDC's), although still commonly known as PAC's. "The PAC's [were] a form of paramilitary entity, and their members act[ed] as state agents." Report No. 32/96, Case 10.553, María Mejía v. Guatemala, in Annual report of the IACHR, OEA/Ser.L/V/II.95, Doc. 7 rev., March 14, 1997, at para. 57. Guatemalan law provided that they were coordinated by the National Defense Ministry. See, Law 19-86, January 7, 1986. The PAC's were officially disbanded in mid-1996.

[FN5] In mid-1991, at the Commission's request, the Inter-American Court of Human Rights ordered that provisional measures be taken by the Government of Guatemala to protect the lives and security of a number of CERJ members, and persons involved in the investigation of PAC members for, inter alia, the killing of 6 CERJ members from El Quiché between October of 1990 and April of 1991. The attacks centered around Chunimá, near Santa Cruz del Quiché. See, Resolution of the President of the Inter-American Court of Human Rights of July 15, 1991, Resolution of the Inter-American Court of August 1, 1991. See generally, Annual Report of the IACHR 1990-91, OEA/Ser.L/V/II.79 rev. 1, Doc. 12, 22 February 1991, at 447-449 (reporting that IACHR received complaints in 1990 involving the killing of seven CERJ members by state agents and/or persons acting in concert with them); Annual Report of the IACHR 1991, OEA/Ser.L/V/II.81 rev. 1, Doc. 6, 14 February 1992, at 206-208 (reporting acts of persecution, intimidation and reprisal against CERJ members and other human rights activists in El Quiché in 1991). See also, Americas Watch, Persecuting Human Rights Monitors: The CERJ in Guatemala,

1-36, and Amnesty International, Guatemala: Human Rights Violations under the Civilian Government, 24-26 (1989) (reporting threats, intimidation, disappearances and killings of CERJ members in Department of El Quiche).

42. The Government has neither contested the facts denounced by the petitioners nor provided any information to contradict them. Its submissions have referred to criminal process 83-90 and the processing thereof.[FN6] On the basis of the allegations and the indicia on record, the Commission concludes that Samuel de la Cruz Gómez was deprived of his liberty and disappeared by state agents. This disappearance has never been acknowledged, and no further information has come to light with respect to the whereabouts or fate of the victim.

[FN6] See Velásquez Rodríguez (Merits), supra, para. 138 (indicating that silence of accused may be interpreted as an acknowledgment of the truth of allegations, as long as a finding to the contrary is not compelled by the record or the law).

43. The crime of disappearance was typified by the Inter-American Court of Human Rights in the Velásquez Rodríguez Case, and later codified in the Inter-American Convention on Forced Disappearance of Persons (which Guatemala has signed but not ratified).[FN7] The enforced disappearance of human beings, where an individual is taken into custody and the authorities deny this fact in order to conceal responsibility, "is a multiple and continuous violation of many rights under the Convention." Velásquez Rodríguez Case (Merits), supra, paras. 155, 181.

[FN7] See, id., paras. 149-58; Godínez Cruz Case (Merits), supra paras. 157-66; Fairén Garbí and Solís Corrales Case (Merits), supra, paras. 146-52. See also, e.g., Annual Report of the IACHR 1980-81, OEA/Ser. L/V/II.54, doc. 9 rev. 1, 16 Oct. 1981, at 113-14. Article 2 of the Inter-American Convention on Forced Disappearance of Persons defines a disappearance as: ...the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

The Right to Personal Liberty

44. Any lawful deprivation of liberty must issue from and be executed by a competent authority, and must be effectuated in accordance with the substantive and procedural requirements of domestic law as well as of the American Convention. A disappearance stands in direct opposition to such requirements, and outside the boundaries of the rule of law. The Commission has concluded on the basis of the totality of the information before it that Samuel de la Cruz Gómez was abducted and deprived of his liberty by state agents.

45. An individual who is disappeared is also deprived of the right to be taken without delay before a judge and to invoke the appropriate procedures to obtain a review of the legality of the detention, in further violation of the provisions of Article 7 of the American Convention. See Velásquez Rodríguez Case (Merits), *supra*, para. 155. The right to petition for a determination of the legality of detention is the fundamental guarantee of a detainee's constitutional and human rights in the case of a deprivation of liberty by state agents. "[H]abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment." (Advisory Opinion OC-8/87, of January 30, 1987, "Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)," Ser. A No. 8, para. 35.)[FN8]

[FN8] "If those in charge need not produce the prisoner posthaste they can use brutal methods with impunity, for the purposes of either interrogation or intimidation." Report on the Situation of Human Rights in Bolivia, OEA/Ser.L/V/II.53, doc. 6, 1 July 1981, p. 41-42., at p. 42.

The Right to be Treated Humanely

46. A disappearance constitutes an implicit violation of Article 5 due to the nature of the crime. The victim is forcibly abducted, detained under clandestine conditions, and held incommunicado, cut off from contact with the outside world and any form of aid or protection. This alone would necessarily produce great anxiety and suffering. The record reflects that Samuel de la Cruz Gómez was forced from his home by heavily armed men who arrived in the early hours of the morning, while the family was sleeping, and broke down the front door. The kidnappers threatened other family members, and beat the victim's brother and sister. See Declaration of Génaro de la Cruz Gómez, *supra*, p. 2; Declaration of Santos Gómez before the Justice of the Peace of the Criminal Branch, Joyabaj, August 6, 1990, p. 2-3; Declaration of Ana Luis de León, *supra*, p. 1-2; Declaration of Ignacia de la Cruz Gómez before the Justice of the Peace of the Criminal Branch, Joyabaj, July 13, 1990, p. 2. They tied the victim's hands behind his back and took him away, on foot, in the direction of San Andrés Sacjajaja. Area residents who pursued the kidnappers spotted the victim with them several hours later. Declaration of Ciriaco García de la Cruz, *supra*, p. 2; Declaration of Ana Luis de León, *supra*, p. 2. While there is no information in the record as to the period for which he was held before presumably having been killed, the treatment he was accorded during those first hours contravened the standard of Article 5 of the Convention.

47. In addition to the harm posed to the victim's physical and mental integrity, a disappearance by its nature causes great anxiety and suffering for the victim's loved ones. The victim's family is unable to come to his aid, unable to clarify his fate, and unable to find any sense of closure with respect to the victim's fate. The passage of time gives rise to a presumption that the victim was killed, but family members have no means to locate the remains or to provide a proper burial.

The Right to Life

48. As established by the Inter-American Court, "The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention..." Velásquez Rodríguez Case (Merits), *supra*, para. 157. Samuel de la Cruz Gómez remains disappeared. The Government has never denied that Mr. de la Cruz was abducted on July 12, 1990, and has not been seen or heard from again. While Guatemalan authorities were on notice that he had been seen by witnesses in the custody of state agents, there is no indication of official efforts to investigate his fate. Under such circumstances, the burden of proof naturally and necessarily rests with the State. See, Case of Neira Alegria and Others, Judgment of January 19, 1995, Ser. C No. 20, paras. 60, 65.; citing, Velásquez Rodríguez Case (Merits), *supra*, paras. 135-36, Godínez Cruz Case, (Merits), *supra*, paras. 141-42.

49. The Government of Guatemala has produced no evidence of an investigation into the whereabouts or fate of Samuel de la Cruz Gómez, and has failed to discharge its burden of proof. Consequently, considering: 1) the fact that Samuel de la Cruz Gómez was last seen in the custody of state agents; 2) that the Government acknowledges that he remains disappeared; 3) that a disappearance not only constitutes an arbitrary deprivation of liberty but also poses serious danger to the personal integrity, security and even the life of the victim; and, 4) that over seven years have passed since he was last seen or heard from, it may be presumed that Samuel de la Cruz Gómez was in fact deprived of his right to life, arbitrarily and illegally, by agents of the Guatemalan State.

The Right to Judicial Protection and to be Heard in Accordance with Due Process

50. Under the American Convention on Human Rights, when a protected right or freedom has been infringed upon, the State is obliged to respond *sua sponte* with certain measures of investigation, actions to sanction and punish the perpetrators, and steps to ensure access to compensation. Velásquez Rodríguez Case (Merits), *supra*, paras. 166, 172, 176-84. At the same time, the victim has a direct right to seek judicial protection and redress. The act of enforced disappearance, where an individual is held incommunicado and the authorities conceal the fact of custody, places the individual concerned outside of the protection of the law. This renders the detainee unable to access the right to file a writ of habeas corpus, the remedy through which judicial protection is normally made available to address an illegal detention.

51. As the victim of a disappearance is unable to seek judicial vindication, the right to seek that recourse necessarily devolves to the victim's family members. The Commission has established that victims and/or their relatives have a right to a judicial investigation by a criminal court designed to establish and sanction responsibility for human rights violations. See generally, Reports Numbers 28/92 (Argentina) and 29/92 (Uruguay) in Annual Report of the IACHR 1992-93, OEA/Ser.L/V/II.83, Doc. 14 corr. 1, March 12, 1993, at 49-51, 161-165. This flows from the obligation of the State to "use all the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction [in order] to identify those responsible." Velásquez Rodríguez Case (Merits), *supra*, para. 166. Under the Convention:

State 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).

Velásquez Rodríguez Case (Preliminary Exceptions), *supra*, para. 91.

52. A State Party's obligation to provide effective judicial remedies is not fulfilled simply by the existence of courts, or even by the ability to resort to the courts. Rather, States Parties must take affirmative steps to ensure that the rights under the Convention are enforced. Velásquez Rodríguez Case (Merits), *supra*, para. 167. The remedies provided for by the State must therefore be "truly effective in establishing whether there has been a violation of human rights and in providing redress." Advisory Opinion 9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Ser. A No. 9, para 24. See also, Velásquez Rodríguez Case (Preliminary Objections), *supra*, para 91. The ability to vindicate a right through judicial recourse under the Guatemalan system presupposes that a competent court will be willing and able to draw upon the capacity of the State to provide the required measures of investigation.

53. Accordingly, the response of the State to the disappearance of Samuel de la Cruz Gómez must be analyzed in terms of whether it established that there had been a violation of the victim's rights and provided corresponding redress. The writ of habeas corpus is theoretically designed to impel an urgent response in the case of an illegal detention. However, according to the record before the Commission, the writ of habeas corpus filed on behalf of Mr. de la Cruz produced no results. There is no indication of an investigation designed to establish the victim's whereabouts.

54. The Government maintains that criminal process 83-90 provided an effective remedy to the victim's family. The decision of the First Court of First Criminal Instance of October 25, 1991 indicates that criminal process 83-90 involved the investigation and prosecution of one individual, Ernesto Arévalo Ramos, for the crime of kidnapping. The process evidently did not include any efforts to investigate the whereabouts or fate of the victim. Nor is there any indication in the record of meaningful efforts to investigate the dozens of other actors reported by eyewitnesses to have been involved in the disappearance. Although the Government indicated in various communications that it had briefed the Commission on the actions it had taken to investigate and clarify the facts, in actuality, the record before the Commission only contains references to the limited proceedings in criminal process 83-90. Accordingly, regardless of whether the decision in criminal process 83-90 was arbitrary or not, it did not provide a sufficient basis to establish or remedy the disappearance of Samuel de la Cruz Gómez.

55. Because the scope of criminal process 83-90 and its investigation were so manifestly inadequate, the Commission does not find it necessary to enter into a prolonged analysis of the decisions issued in the case. However, it cannot fail to observe that the court responsible for determining the facts, the First Court of First Criminal Instance, dismissed the testimony of every witness against the accused. Of these witnesses, five were dismissed on the basis that they had an interest in the outcome of the case. Santos Gómez, Ana Luis de León and Ignacia de la Cruz

Gómez, the mother, partner and sister of the victim, had witnessed the kidnapping and had exercised their right of private accusation. The brother of the victim, Génaro de la Cruz Gómez, had been abducted by the kidnappers along with Samuel and later released. Ciriaco García de la Cruz, a neighbor of the victim, had been shot by the kidnappers during pursuit. The remainder of the witness testimonies were dismissed on the basis that they offered nothing probative with respect to the facts of the kidnapping. These included Francisco Riz Luis, who testified to having pursued the kidnappers, identified the accused as having been among them, and recounted the actions of the soldiers. An "arbitrary" judicial act is one that "violates in a serious way a legal rule or ... is devoid of all serious justification." ECtHR, *Belgian Vagrancy Cases*, 46 I.L.R. 337, 413-14. In the present instance, the First Court of First Criminal Instance laid no factual or legal foundation to support its conclusion that these witnesses should not be heard, and the Ninth Chamber of the Court of Appeals affirmed that decision without further inquiry. A judicial interpretation which prevents those exercising the right of private accusation from being heard without justification, and rejects the presentation of apparently probative evidence without explanation runs counter to basic principles of due process recognized in Article 8 of the Convention.

56. Because the State failed to respond to the disappearance of Samuel de la Cruz Gómez as required, his family has been denied justice. The victim's family had a right to know the truth about what happened to him. See, e.g., Annual Report of the IACHR 1985-86, OEA/Ser.L/V/II.68 doc. 8 rev. 1, 26 Sept. 1986., at 193. They were also entitled to use that information to vitiate their right as successors to seek reparation from the State. The State of Guatemala was required to "use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure ... adequate compensation." *Velásquez Rodríguez Case (Merits)*, supra, para. 174. In the instant case it is clear, over seven years after the disappearance of the victim, that the Guatemalan State failed to honor its obligation to provide simple, swift and effective legal recourse to the victim's family, so that their rights might be vindicated.

The Right to Recognition as a Person under the Law

57. Mr. de la Cruz was forcibly disappeared by state agents, a multiple and continuing violation of the American Convention on Human Rights. The objective of those who perpetrate a disappearance is to operate beyond the margins of the law, to conceal all evidence of their crimes, and to escape any sanction. When a disappearance is carried out, the fundamental protections established by law are circumvented and the victim is left defenseless. For the victim, the consequence of an enforced disappearance is to be denied every essential right deemed to inhere in the very fact of being human. In this way, the act of enforced disappearance violates the right of the individual under Article 3 of the American Convention "to recognition as a person before the law." [FN9]

[FN9] See, Article 1.2, Declaration on the Protection of All Persons from Enforced Disappearance, characterizing an enforced disappearance as placing the victim: "outside the protection of the law ... inflict[ing] severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a

person before the law..." GA Res. 47/133 of 18 Dec. 1992. See generally, Inter-American Convention on the Forced Disappearance of Persons, *supra*.

The Obligation of the State to Respect and Guarantee Individual Rights

58. The violations at issue in the instant case demonstrate that the State of Guatemala has failed to uphold the undertaking set forth in Article 1.1 of the American Convention on Human Rights to respect the rights recognized therein and to ensure to all persons subject to its jurisdiction the free and full exercise of those rights.

59. The concept of rights and guarantees "cannot be divorced from the system of values and principles that inspire it." OC-8/87, *supra*, at para. 26. Within the Inter-American system, the interrelated violations that constitute a disappearance have been subjected to special condemnation.[FN10] The Inter-American Court has emphasized that: "The practice of disappearances, in addition to directly violating many provisions of the Convention ... 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." Velásquez Rodríguez Case (Merits), *supra*, para 158. At the time in question, disappearances constituted a practice of state agents in Guatemala, and that practice was not challenged or met with an adequate response on the part of the State or its judiciary. See e.g., Annual Report of the IACHR 1989-90, OEA/Ser.L/V/II. rev. 1, Doc. 7, 17 May 1990, at 150, 153-54; Annual Report of the IACHR 1990-91, *supra*, at 445, 448-50; Annual Report of the IACHR 1991, *supra*, at 206.

[FN10] The practice of disappearances has been characterized by the OAS General Assembly as "an affront to the conscience of the Hemisphere" and "a crime against humanity." General Assembly Resolution 666 (XIII-0/83).

60. The first obligation of any State party to the American Convention is to respect the rights and freedoms set forth therein. "[U]nder international law a 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." Velásquez Rodríguez Case (Merits), *supra*, paras. 170, 166. Based on the record and its foregoing analysis, the Commission concludes that Samuel de la Cruz Gómez was disappeared by state agents, and that the relevant authorities failed to mount an effective response. The acts and omissions of the agents involved give rise to direct responsibility on the part of the State.

61. The second obligation of the State is to guarantee the free and full exercise of the rights recognized by the Convention. As the Inter-American Court has established, this

implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the

States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation of human rights.

Id. para 166. In the case of a forced disappearance, the State has the duty to determine the fate of the victim, submit those responsible to appropriate prosecution and punishment, and indemnify the victim's family members. The foregoing analysis demonstrates that the State of Guatemala has failed to guarantee the rights of the victim and his family.

VI. CONSIDERATIONS WITH RESPECT TO THE OBSERVATIONS OF THE STATE

62. The Commission approved Report No. 35/97 on the present case during its 97th regular period of sessions, pursuant to Article 50 of the Convention. That report, containing the recommendations of the Commission, was transmitted to the Government of Guatemala by note of November 21, 1997, requesting that the latter report on the measures it had adopted to comply with the recommendations and remedy the situation examined within a period of two months.

63. In a note of January 22, 1998, the Government of Guatemala provided its response to Report 35/97, indicating in the first place that the Presidential Coordinating Commission for Executive Policy in Human Rights Matters had requested the Attorney General of the Republic to issue instructions to the District Prosecutor in El Quiché "to reactivate the investigation of the case of the disappearance" of Mr. Gómez. In response, the Attorney General reported that he had instructed the Office concerned to the effect that it shall continue with the corresponding investigations. The Government reported that the criminal process initiated against Ernesto Arévalo was at this point *res judicata*, given that the court had absolved the accused on the basis of a lack of sufficient proof, and that finding had been confirmed on appeal. The Government reiterated that "internal legal remedies have not been exhausted in the present case; additionally ... in the first days of January of 1998, the case was assigned to attorney Marco Emilio Minera de León, Auxiliary Prosecutor of El Quiché." [The Commission observes that, apart from the process initiated against Ernesto Arévalo which the Government affirms is *res judicata*, the record contains no *indicia* of action taken to investigate the fate of the victim or other intellectual and material authors.] In conclusion, the Government added that, "furthermore, it is necessary to underline that in the present case the involvement of state agents has not been proven."

64. The Commission considers that the response of the State has not demonstrated compliance with the recommendations directed toward remedying the situation examined. Rather, the state limited itself to reporting that the recommendations had been transmitted to the Attorney General, and that its "competent organs would ... continue with the investigation tending toward the identification and adjudication of those responsible...." The Guatemala State cannot evade its international responsibility nor the necessity to comply with those recommendations by arguing that an investigation of the case remains pending. The facts at issue occurred more than seven years ago. The Commission has not been informed of any results or any significant advances in the investigation. In the present case, the Guatemalan State has not undertaken a serious and effective investigation, a point which the Commission underlined in its Article 50 report. In fact, the information placed before the Commission and analyzed in the present report demonstrates precisely the contrary.

65. The Commission considers it advisable to reiterate to the State of Guatemala that, in the case of a disappearance, the State is obliged to establish the fate of the victim, submit those responsible to appropriate prosecution and punishment, and compensate the victim's family members. The Commission found that Samuel de la Cruz Gómez was disappeared and evidently died in the custody of State agents. The State has not adequately investigated the facts not located the remains of Mr. Gómez, thereby perpetuating the violation of the right of his family members to know the truth.

VII. CONCLUSIONS

66. On the basis of the record in this case and its foregoing analysis, the Commission decides that the State of Guatemala is responsible for violations of the rights to juridical personality, to life, to humane treatment, to personal liberty, and to judicial guarantees and protection, established in Articles 3, 4, 5, 7, 8 and 25 of the American Convention on Human Rights with respect to the forced disappearance of Samuel de la Cruz Gómez. The State is accordingly responsible for having failed to uphold its Article 1 obligation to respect and ensure those rights under the Convention.

VIII. RECOMMENDATIONS

67. The Commission therefore recommends:

- a. That the State of Guatemala carry out a serious, impartial and effective investigation of: the facts, so that they may be detailed in an official report; the circumstances that led to the disappearance of Samuel de la Cruz Gómez and his whereabouts; and the responsibility for the violations detailed in this report;
- b. That the State take the measures necessary to submit the individuals apparently involved in the violations at issue to the appropriate judicial processes and corresponding legal sanctions;
- c. That the State redress the consequences of the violations, including through the location of the victim's remains, the facilitation of the wishes his family may have with respect to an appropriate final resting place, and the payment of a compensatory indemnification to the family members harmed as a result of the foregoing violations.

IX. PUBLICATION

68. On March 6, 1998, the Commission transmitted Report No. 11/98, adopted with respect to the present case on the basis of Article 51.1 and .2 of the American Convention, to the State of Guatemala. The Commission extended to the State the period of one month to adopt the measures necessary to comply with the recommendations formulated above, and thereby remedy the situation examined. Given that the State of Guatemala did not submit information within the time period provided, and recalling its response to Report 35/97, the Commission decides that the State failed to adopt the measures necessary to comply with the recommendations set forth in the present report.

69. By virtue of the foregoing considerations, and in accordance with the provisions of Article 51.3 of the American Convention and Article 48 of its Regulations, the Commission decides to reiterate the conclusions and recommendations set forth in sections VII and VIII, supra, publish the present report, and include it in its Annual Report to the General Assembly of the OAS.