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First Vice-Chairman: Dr. Helio Bicudo;
Second-Vice Chairman: Dean Claudio Grossman;
Members: Dr. Jean Joseph Exume, Dr. Alvaro Tirado Mejia.
Dated: 21 December 1999
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I. SUMMARY

1. On March 7, 1994, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a communication denouncing the October 19, 1993 disappearance of Francisco Guarcas Cipriano, a member of the Mutual Support Group (Grupo de Apoyo Mutuo (hereinafter "GAM")) and a native of the Cantón Semejá in Chichicastenango. The petitioners, the GAM and the Center for Justice and International Law (CEJIL), reported that a GAM member had seen Mr. Guarcas the day of his disappearance, at approximately 20:00 hours, near the bus terminal in Zone 4 of Guatemala City, accompanied by four men--collaborators in the Civil Self-Defense Patrols (hereinafter "PAC's") and members of the G-2 branch of Army intelligence. The petitioners alleged that the men had tricked Mr. Guarcas into going with them by inviting him to a party. The victim had neither been seen nor heard from since that time. At the time of his disappearance, Mr. Guarcas was 38 years old and the father of seven children.

2. The petitioners reported that, just days before his disappearance, Mr. Guarcas had decided to renounce his service in the PAC's, and had thereafter received numerous threats. Other members of the community who had renounced service in the local PAC's had reportedly been visited by members of the armed forces who pressured them to return to PAC service. The petitioners alleged that Mr. Guarcas was disappeared by Miguel Xiloj Mejía, a member of the PAC's and the G-2 intelligence service of the armed forces who operated in the Cantón of Semejá monitoring the local population and obliging them to perform PAC service.

3. Family members searched for Mr. Guarcas in hospitals and in various detention centers, without any success. The petitioners submitted copies of: a writ of exhibición personal [a form of habeas corpus], dated October 29, 1993, filed on behalf of Mr. Guarcas before the First Court of First Instance, Criminal Branch, by the GAM, registered as received by the Secretariat of the

Supreme Court of Justice; a writ of habeas corpus, dated November 3, 1993, filed before the Second Judge of First Criminal Instance, and registered as received; and a complaint dated November 4, 1993, filed by the victim's son with the Office of the Ombudsman for Human Rights.

4. The petitioners submitted that the Republic of Guatemala (hereinafter “the State of Guatemala,” “State,” or “Guatemala”) is responsible for the disappearance of Francisco Guarcas Cipriano, and for its failure to respond with appropriate measures to investigate and establish his whereabouts, and to submit those responsible to the corresponding measures of prosecution and punishment, in violation of Articles 4, 5, 7, 8, 16, 25 and 1(1) of the American Convention.

5. The Commission dealt with the admissibility of the present case in Report 22/98, approved on March 2, 1998.[FN1] The petitioners had argued that the remedy most pertinent in the case of a forced disappearance, the writ of exhibición personal, had been invoked and exhausted without achieving the required results. While the State had not controverted that Mr. Guarcas had been disappeared, it had argued that: its authorities had properly processed the writs of habeas corpus filed; the petitioners had failed to exhaust the available remedy of averiguación; and that, following a period of inactivity, its authorities were continuing to effectuate the measures of investigation available under the law.

[FN1] Report 22/98 was published in Annual Report of the IACHR 1997, OEA/Ser.L/V/II.98, Doc. 7 rev., April 13, 1998, at p. 128.

6. The Commission analyzed the information before it in relation to the requirements of admissibility in the individual case system, and determined that

For the purposes of admissibility ... the petitioners invoked and exhausted the appropriate domestic remedy [habeas corpus] designed to correspond to an alleged forced disappearance. The Commission will turn to the substantive considerations with respect to the adequacy and timeliness of the measures of investigation undertaken in this case in its decision on the merits.[FN2]

The Commission transmitted Report 22/98 declaring the case admissible to the parties on March 13, 1998, and placed itself at their disposal for the purpose of seeking a friendly settlement if the parties wished to avail themselves of that procedure. As indicated in section IV.A, *infra*, the parties did not accept this procedure.

[FN2] *Id.*, at para. 33.

7. On the basis of the analysis set forth in the present report, the Commission decided that the State of Guatemala is responsible for violations of the rights to life, humane treatment, personal liberty, and recognition as a person before the law, as well as to judicial guarantees and

protection, established in Articles 4, 5, 7, 3, 8 and 25 of the American Convention on Human Rights with respect to the forced disappearance of Francisco Guarcas Cipriano, as well as for having failed to uphold its Article 1(1) obligation to respect and ensure those rights under the Convention. As a consequence, the Commission recommended that the State carry out a complete, impartial and effective investigation to determine the circumstances of the forced disappearance of Francisco Guarcas Cipriano and to sanction those responsible in accordance with domestic law, and that it adopt the measures necessary to ensure that the victim's family members receive fair and prompt reparation for the violations established.

II. PROCESSING BEFORE THE COMMISSION

8. The proceedings before the Commission prior to the March 2, 1998 adoption of Report 22/98 are recounted therein and need not be repeated here. Pursuant to that decision, and prior to the transmission of that report to the parties, the State submitted a brief response to the petitioners' filing of January 8, 1998, indicating that the First Court of First Criminal Instance, Narcoactivity and Crimes against the Environment (hereinafter "First Court of First Criminal Instance") had ordered the detention of the accused, Miguel Xiloj Mejía, who had subsequently been ordered released due to "lack of merit" by the Sixth Court of First Criminal Instance, Narcoactivity and Crimes against the Environment (hereinafter "Sixth Court of First Criminal Instance"). The State reported that measures had been taken to join criminal processes 2335-94 and 486-94, and reiterated its arguments that domestic remedies had yet to be exhausted. This information was transmitted to the petitioners with observations requested within 30 days.

9. In a note of April 14, 1998, the State reported that, pursuant to its investigations, more than one person had been identified as bearing the name of the victim. Because the judicial processes initiated by the victim's family did not identify him with sufficient precision, it was continuing efforts to clarify his identity. The State indicated that, as domestic remedies had not been exhausted, it could not state a position with respect to the friendly settlement procedure. This information was transmitted to the petitioners on April 24, 1998, with observations requested within 30 days.

10. On June 10, 1998, the petitioners requested additional time to provide observations. On June 18, 1998, they submitted those observations, reiterating their position that domestic remedies had been exhausted to the extent required, summarizing their arguments on the merits of the case, and annexing a copy of the birth certificate of the victim. This information was transmitted to the State on July 30, 1998, with observations requested within 30 days.

11. By means of a note of August 31, 1998, the State submitted brief observations on the status of the domestic proceedings, noting that these had not established the responsibility of any of its agents for the disappearance of the victim. This information was transmitted to the petitioners on September 30, 1998, with observations requested within 30 days.

12. On November 7, 1998, the petitioners submitted their final observations, which were transmitted to the State on January 26, 1999, with any response or additional information requested within 30 days.

III. THE POSITIONS OF THE PARTIES

A. The position of the petitioners

13. The petitioners contend that the State of Guatemala is responsible for the October 19, 1993 disappearance of Francisco Guarcas Cipriano, as well as for its failure to respond with appropriate measures to investigate and establish his whereabouts or fate, and submit those responsible to the corresponding measures of prosecution and punishment, in violation of Articles 4, 5, 7, 8, 16, 25 and 1(1) of the American Convention. They allege that Mr. Guarcas was disappeared shortly after renouncing service in the PACs. They note the role of the PACs during the period in question, and the reprisals suffered by those who opposed or refused to participate in them. They cite the findings of the Inter-American Court of Human Rights in the case of *Blake v. Guatemala* (cited *infra*) in support of the position that PAC members acted as State agents. Witnesses had attested that the victim had been threatened by members of the PACs as a result of renouncing his service, and because of his affiliation with the GAM, and that he had last been seen in the company of PAC members. The petitioners allege that one of those accused, Miguel Xiloj Mejía, was a PAC member and member of Army intelligence. They contend that, because the victim was disappeared due to his decision to renounce PAC service, the State is responsible for the violation of Mr. Guarcas' right to association.

14. The petitioners argue that, even had the intervention of State agents not been demonstrated in his disappearance, the State is responsible for having failed to investigate, prosecute and punish those responsible for Mr. Guarcas' disappearance. They maintain that the State failed to undertake an effective investigation designed to establish what happened to Mr. Guarcas. They contend that the habeas corpus writs filed by the family on behalf of the victim, on October 29, 1993, November 3, 1993, and June 23, 1997 were ineffective. They further indicate that the victim's family had denounced the disappearance before the First Court of First Instance of Criminal Sentencing on June 20, 1994, before the Public Ministry on September 12, 1994, and before the Ombudsman for Human Rights on November 4, 1993 and June 1, 1995, without having obtained any positive results. They maintain that, once the initial writ of habeas corpus had been unsuccessful, the Public Ministry and judiciary were charged with undertaking an investigation *de oficio*, a duty they had failed to discharge. As a result of these deficiencies in the administration of justice, the petitioners contend that the family members of the victim have been denied their right to justice under Articles 8(1) and 25 of the American Convention. With respect to the question raised by the State as to the victim's identity, the petitioners submitted a copy of his birth certificate and indicated that this had clearly been available to the State through its own records.

15. The petitioners indicate that, because the State failed to guarantee the effective enjoyment of the foregoing rights, it is in breach of its Article 1(1) undertakings. They maintain that the responsibility of the State for these violations requires measures of reparation, including just indemnification, as well as the continuation of the criminal investigation so that those responsible will be punished.

B. The position of the State

16. The State maintains that the petitioners have failed to exhaust available domestic remedies, and that its relevant authorities continue to effectuate the measures of investigation available under the law. In terms of the measures effectuated, the State indicates that in the spring of 1996 several declarations were taken. On September 10, 1996, the First Court of First Criminal Instance ordered accused Miguel Xiloj Mejía to appear to provide a declaration, and subsequently ordered him arrested on October 3 and December 16, 1997. The matter was then reportedly transferred to the Sixth Court of First Instance. The State's reports indicate that, when questioned, the accused denied any involvement in the disappearance of Mr. Guarcas, and that, at some time prior to January 29, 1998, the Sixth Court of First Instance had ordered the accused released for "lack of merit." The State reported in its April 14, 1998 filing that its records identified three persons as bearing the name of the victim, and that, as neither of the two criminal processes initiated by the Guarcas family had identified the victim with sufficient precision, its authorities were continuing efforts to definitively establish his identity.

17. The State contends that it has taken measures to make the criminal investigation process more efficient by seeking the joinder of the two processes initiated by the victim's family members. On December 18, 1997, the Sixth Court of First Criminal Instance reportedly ordered the joinder of process 486-94 before the First Court of First Criminal Instance to process 2335-94. In its final submission, the State indicated that the measures to make that joinder effective were pending, as were measures to continue the investigation.

18. With respect to both the exhaustion and the efficacy of domestic remedies, the State maintains that the family members of the victim exercised their right to invoke domestic remedies without hindrance, and the nature of the outcome as negative or positive did not discount the validity of the procedures. The authorities had processed the writs as required, and received the necessary collaboration from the functionaries concerned. Further, the State argued that the petitioners should have invoked the recourse of averiguación. While acknowledging that criminal process 486-94 had been subject to a period of inactivity from September 13, 1996 until September 23, 1997, the State indicates that this was addressed as required by domestic law. On September 25, 1997, the Presidency of the Judicial Organism had ordered the pertinent official to appear for a hearing to establish responsibility for the period of inactivity, and the process had been reactivated with a second citation to the accused to appear before the Court to provide his declaration.

19. The State emphasizes that neither of the two criminal processes initiated by the victim's family have established the responsibility of State agents as the material or intellectual authors of the disappearance of Mr. Guarcas.

IV. ANALYSIS

A. Preliminary considerations with respect to procedure

20. As a preliminary matter, the Commission notes that both parties were notified of its disposition to facilitate a friendly settlement should they wish to invoke that procedure. By means of its note of April 14, 1998, the State indicated that it did not consider it pertinent to accept or reject the procedure at that time, and, given the lack of any subsequent action, the Commission considers that this is equivalent to a rejection. In their filing of June 18, 1998, the

petitioners noted the State's rejection of the Commission's offer of facilitation, declined to initiate this process, and requested that the latter advance in the preparation of a report pursuant to Article 50 of the American Convention. As the parties were given the opportunity to avail themselves of the settlement procedure established in Article 48(1)(f) of the Convention and declined to accept it, the Commission now proceeds to its analysis of the merits of the case.

21. With respect to the State's continuing position, subsequent to the adoption of the decision on admissibility set forth in report 22/98, that domestic remedies have not been exhausted as required, the Commission observes that, while it is necessarily competent to reassess questions of admissibility in the course of proceedings before it to the extent that new facts or arguments come to light, such consideration is not required in the instant case as the positions of the parties were fully addressed in Report 22/98. The State has presented no new facts or arguments affecting that analysis. To the extent that the arguments of the State in this regard bear on the substantive questions of access to justice and due process, they will be taken into account in the analysis of the merits which follows.

B. Preliminary considerations with respect to the facts

22. The starting point for the Commission's analysis of the facts is that Francisco Guarcas Cipriano has not been seen or heard from since October 19, 1993. The parties now appear to be in accordance as to the identity of the victim. While the State had indicated concern with respect to establishing which of three individuals bearing the name of the victim was in fact the victim, in an April 1998 communication, the petitioners produced a copy of birth certificate N° 053057, from the civil registry in Chichicastenango, pertaining to Francisco Guarcas Cipriano, born in Semajá on February 1, 1956. The petitioners indicated that this information had been available through the State's files, and the State submitted no further observations with respect to this question. The petitioners maintain, and the State has never controverted that Francisco Guarcas Cipriano was disappeared on the date in question, and neither his whereabouts nor his fate have been officially established.

23. The record presents the evidence required to establish that Mr. Guarcas was disappeared by State agents. The denunciations referred to in the case file indicate that the last person to see Mr. Guarcas on the day of his disappearance stated that he had been in the company of four PAC members and G-2 collaborators. The petitioners allege that: Mr. Guarcas was disappeared in retaliation for having renounced his PAC service some days earlier; that members of the PAC's and military threatened those who opposed the PACs or refused to perform service within the PACs; that the PAC's of Semajá operated with the support of the Army General Command of military zone 20; and that PAC member and G-2 operative Miguel Xiloj Mejía had been implicated as responsible for the disappearance. These allegations have not been controverted by the State with other information.

24. As noted by the petitioners, the First Report of the Director of the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights (hereinafter "MINUGUA"), referred to Mr. Guarcas' disappearance. Although the disappearance of the victim predated the verification period, the Mission noted the nature of a disappearance as a continuing violation, and explained

that it would report on cases such as this where there were indications that the victim might still be alive. Having recounted the basic facts, the report noted that, pursuant to a December 1994 announcement by the GAM that the victim was still alive, "his relatives, who are also members of the GAM, were repeatedly intimidated, subjected to death threats and accused of being guerillas by members of the CVDC for the Semejá II district of Chichicastenango, in Quiché." [FN3]

[FN3] MINUGUA Report, A/49/856, para. 61.

25. The Commission's analysis of the facts of the present case cannot be divorced from their context. The Commission, MINUGUA, and other entities reported during the period in question on a pattern of reprisals visited on persons who opposed PAC activity or resisted serving in their local PACs. At the time under study, PAC service, which had originally been compulsory, was putatively voluntary. [FN4] However, reports from the period indicate that 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. [FN5] These reports further indicate that such crimes were not met with the measures of prevention or response required of the State. [FN6] As such reports indicate, and as the Inter-American Court has confirmed, those who served in the PAC's were acting as agents of the State of Guatemala. [FN7]

[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." IACHR, 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 officially disbanded in mid-1996.

[FN5] See e.g., Chapter IV, Annual Report of the IACHR 1994, OEA/Ser.L/V/II.88, Doc. 9 rev., Feb. 17, 1995, at 191-92; Fourth Report, *supra*, pp. 53-61; MINUGUA, First Report, *supra*, paras. 35-36; MINUGUA, Second Report, A/49/929, Aug. 1995, paras. 192, 194; Report of the United Nations Independent Expert on Human Rights in Guatemala, Mónica Pinto, Dec. 20, 1994, para. 187; RFK Memorial Center for Human Rights, Institutional Violence: Civil Patrols in Guatemala, 1993-1994 (1994).

[FN6] *Id.*

[FN7] IACtHR, Blake Case, Sentence of January 24, 1998 (Merits), paras. 52.p, 75-78. "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 1996, 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.

26. The record of the instant case presents a situation fully consistent with the foregoing pattern. Denunciations filed in the course of the domestic proceedings and before the Commission indicate that PAC members threatened the victim prior to his disappearance for having renounced his PAC service, and threatened his family afterwards. That record also reflects that the victim was last seen in the company of PAC members, one of whom was subsequently accused in connection with the case. As the Inter-American Court indicated in the Velásquez Rodríguez Case, "If it can be shown that there was an official practice of disappearances ... carried out by the Government or at least tolerated by it, and if the disappearance of [the victim] can be linked to that practice," the allegations will have been proven "so long as the evidence presented on both points meets the standard of proof required in cases such as this." [FN8] The State has neither accepted nor rejected the version of events denounced by the petitioners. Nor has it provided information to substantiate a thorough and effective investigation of the events denounced, either in the course of the proceedings before the Guatemalan judiciary or before this Commission. The petitioners have thus presented indicia of PAC involvement in the disappearance of Mr. Guarcas, which is corroborated by and consistent with a pattern documented by the Commission and other sources, and the State has provided no elements of proof to the contrary. On the basis of all the indicia on record, the Commission concludes that Francisco Guarcas Cipriano was deprived of his liberty and disappeared by State agents.

[FN8] See, Velásquez Rodríguez Case (Merits), Sentence of July 29, 1988, Ser. C No. 4, para. 126.

27. The crime of disappearance was described 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). [FN9] 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." [FN10]

[FN9] See, Velásquez Rodríguez Case (Merits), supra, paras. 149-58; Godínez Cruz Case (Merits), Sentence of January 20, 1989, Ser. C No. 5, paras. 157-66; Fairén Garbi and Solís Corrales Case (Merits), Sentence of March 15, 1989, Ser. C No. 6, 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.

[FN10] IACtHR, Velásquez Rodríguez Case (Merits), supra, paras. 155, 181.

C. The right to personal liberty

28. 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 Francisco Guarcas Cipriano was abducted and deprived of his liberty by State agents.

29. 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. 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." [FN11]

[FN11] IACtHR, 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. "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." IACHR, 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.

D. The right to be treated humanely

30. 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 Francisco Guarcas Cipriano was abducted on October 19, 1993. The petitioners, and subsequently MINUGUA, reported indications that he may have been alive as of December of 1994. While it is impossible to verify precisely how long Mr. Guarcas might have been held by his captors, it may be presumed under the circumstances that the treatment he was accorded contravened the standards of Article 5 of the Convention.

31. 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. [FN12] 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.

[FN12] See, IACtHR, Blake Case, *supra*, para. 114.

E. The right to life

32. 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..."[FN13] The parties are in accordance that Francisco Guarcas Cipriano remains disappeared. While Guatemalan authorities were on notice that the victim had last been seen accompanied by State agents, the record contains no substantive information as to the results of official efforts to investigate his fate. Under such circumstances, the burden of proof necessarily rests with the State, which must rebut the presumption established--of its responsibility--with other information.[FN14]

[FN13] Velásquez Rodríguez Case (Merits), *supra*, para. 157.

[FN14] See, IACtHR, 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; Report 11/98, Case 10.606, Samuel de la Cruz Gómez, published in Annual Report of the IACHR 1997, OEA/Ser.L/V/II.98, Doc. & rev., April 13, 1998, p. 619, at para. 48.

33. While the State has reported on the existence of judicial processes initiated by the family members of the victim, it has provided no substantive information whatsoever as to the results of any measures of investigation into the whereabouts or fate of the victim. Consequently, considering: 1) the fact that Francisco Guarcas Cipriano was reportedly last seen in the company of State agents; 2) that the State 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 five years have passed since he was last seen or heard from, it may be presumed that he was in fact deprived of his right to life, arbitrarily and illegally, by agents of the Guatemalan State.

F. The right to judicial protection and to be heard in accordance with due process

34. Under the American Convention on Human Rights, when a protected right or freedom has been infringed, 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.[FN15] 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.

[FN15] Velásquez Rodríguez Case (Merits), *supra*, paras. 166, 172, 176-84.

35. 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.[FN16] 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." [FN17] 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).[FN18]

[FN16] See generally, Reports 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.

[FN17] Velásquez Rodríguez Case (Merits), *supra*, para. 166.

[FN18] Velásquez Rodríguez Case (Preliminary Exceptions), *supra*, para. 91.

36. This obligation is met not through measures of form but of substance. States Parties are required to take affirmative steps to ensure that the rights under the Convention are enforced.[FN19] 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." [FN20] 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.

[FN19] Velásquez Rodríguez Case (Merits), *supra*, para. 167.

[FN20] IACtHR, 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.

37. Accordingly, the response of the State to the disappearance of Francisco Guarcas Cipriano 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 compel an urgent official response in the case of an illegal detention. This simple and prompt recourse contemplated in Article 25 constitutes one of the pillars, not only of the system, but of the rule of law in a democratic society, and plays an integral role in protecting the most fundamental individual rights and freedoms.[FN21] In the instant case, however, the several writs of habeas corpus filed on behalf of Mr. Guarcas were not met with an effective response. While the State argued that its authorities processed the writs as required, there is simply no substantive information in the record reflecting that an investigation designed to establish the victim's whereabouts or fate was ever carried out.

[FN21] See, IACtHR, Castillo Páez Case, Sentence of November 3, 1997, Ser. C No. 34, paras. 82-83; Suárez Rosero Case, Sentence of November 12, 1997, Ser. C No. 35, para. 65.

38. The State maintains that the criminal process which remains pending provides an effective remedy to the victim's family. Again, the record of the present case contains no substantive information reflecting a serious or effective effort to investigate the fate of the victim, or to investigate those responsible for his disappearance. The Commission observes with dismay that the State raised questions with respect to the identity of the victim for the first time in its submission of April 14, 1998. These questions were posed pursuant to the filing by Mr. Guarcas' family of three writs of habeas corpus and two criminal complaints. Further, even the brief references in the record to steps taken in the criminal investigation show that process to have been ineffective and subject to undue delay. On August 26, 1996, for example, the State reported the taking of several declarations, including from the victim's father and another family member attesting, inter alia, that the former had been offered money by the principal accused to stop pursuing his son's disappearance. The record reflects no effort to investigate the allegations of the declarants, which were specific and consistent with each other.

39. With respect to the question of delay, the State's submissions indicate that multiple citations and arrest orders were issued over the course of more than a year before the authorities detained the principal accused, but the record provides no explanation for the non-execution of the first order or the subsequent delay. The State itself acknowledged in its October 15, 1997 submission that criminal process 486-94 had been inactive between September 13, 1996 and September 23, 1997, but asserted that this deficiency had been addressed, as a hearing had been ordered by the Presidency of the Judicial Organism to establish responsibility for that delay. The record fails, however, to include information as to whether such a hearing was carried out or to what effect. Nor has the State provided information to explain why, notwithstanding the passage of over five years, its criminal investigation has failed to produce any substantive results.

40. Because the State failed to respond to the disappearance of Francisco Guarcas Cipriano as required, his family has been denied justice. The victim's family had a right to know the truth about what happened to him.[FN22] They were also entitled to use that information to vindicate 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."[FN23] In the instant case it is clear, over five years after the victim's disappearance, 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.

[FN22] See, e.g., Annual Report of the IACHR 1985-86, OEA/Ser.L/V/II.68 doc. 8 rev. 1, 26 Sept. 1986, "Areas in which steps need to be taken..." at p. 193.

[FN23] Velásquez Rodríguez Case (Merits), supra, para. 174.

G. The right to recognition as a person under the law and other rights

41. Mr. Guarcas 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. For the victim, the consequence of an enforced disappearance is to be denied the most basic rights deemed to inhere in the very fact of being human. The Commission observes, pursuant to the principle of *jura novit curia* that 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." [FN24]

[FN24] 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.

42. The petitioners invoked the right to freedom of association set forth in Article 16 of the Convention in their submission of July 17, 1997, but did not set forth with specificity the factual and legal foundation for the violation alleged with reference to the circumstances of the victim. That being so and in light of the other violations established, the Commission finds it unnecessary to analyze this contention further.

H. The obligation of the State to respect and guarantee individual rights

43. 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.

44. The concept of rights and guarantees "cannot be divorced from the system of values and principles that inspire it." [FN25] Within the Inter-American system, the interrelated violations

that constitute a disappearance have been subjected to special condemnation.[FN26] 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.[FN27]

[FN25] OC-8/87, *supra*, at para. 26.

[FN26] 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).

[FN27] Velásquez Rodríguez Case (Merits), *supra*, para 158.

45. 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." [FN28]Based on the record and its foregoing analysis, the Commission concludes that Francisco Guarcas Cipriano was disappeared by State agents, and that the relevant authorities failed to mount an effective response.

[FN28] *Id.*, paras. 170, 166.

46. 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.[FN29]

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.

[FN29] *Id.* para 166.

V. ACTIONS SUBSEQUENT TO REPORT N° 33/99

47. Pursuant to the terms of Article 50 of the Convention, the Commission adopted Report N° 33/99 on March 9, 1999, during its 102nd Regular Session. The Report set forth the Commission's conclusion that the State of Guatemala bears responsibility in the case of the forced disappearance of Francisco Guarcas Cipriano for violations of the rights to recognition as a person before the law, 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, and for having failed to uphold its Article 1(1) obligation to respect and ensure those rights. Accordingly, the Commission recommended that the State carry out a "complete, impartial and effective investigation" in order to establish the fate of the victim and sanction those responsible, and that it adopt the measures necessary to ensure that the victim's family receives fair and prompt reparation for those violations. The Report was transmitted to the State of Guatemala on April 8, 1999. Pursuant to the terms set forth, the State was given two months from the date of receipt to comply with the recommendations issued and report to the Commission on the measures taken. By a note of the same date, the Commission informed the petitioners that a report on the case had been adopted pursuant to the terms of Article 50 and transmitted to the State.

48. Subsequent to the adoption of that report, but prior to its transmission, on March 12, 1999, the Commission received an additional submission from the State responding to the former's November 7, 1998 request for observations. This filing, received beyond the time period that had been provided in that request, repeated the position of the State that domestic remedies had not been exhausted, and that its judiciary remained seized of the matter.

49. On March 23, 1999, the petitioners submitted a request that an additional organization, the Center of Ethnic Communities Runujel Junám [Centro de Comunidades Étnicas Runujel Junám] (CERJ), be added to the case as co-petitioner, in view of its participation in pursuing justice in the case. The Commission informed the petitioners that this request had been accepted in a note of May 18, 1999.

50. The State submitted its response to Report N° 33/99 by note dated June 3, 1999. With respect to the first recommendation concerning the obligation to investigate in order to determine the circumstances of the violations and establish the corresponding responsibility, the State indicated that, as its submissions showed, it had carried out an impartial investigation. The fact that this had not produced positive results did not imply any responsibility on its part. The principal accused had been charged, but the relevant judicial authority had determined there was insufficient proof of his responsibility. Further, the State objected to the use of the term "forced disappearance" in the recommendations, given that it had not been possible to date to judicially determine that State agents had participated in the disappearance of the victim.

51. With respect to the second recommendation concerning the obligation of the State to repair the consequences of the violations, the State indicated that, as it had not been possible to date to judicially establish the responsibility of State agents, there existed no judicial resolution ordering the payment of a civil indemnity in the case. The State indicated that, nonetheless, for humanitarian reasons, the case will be included within the government reparations programs for victims of human rights violations during the armed conflict.

52. Having reviewed the information provided by the State, the Commission finds it pertinent to offer the following observations. First, with respect to the State's affirmation that it had demonstrated that its authorities carried out an impartial investigation, and that the lack of positive results implied no responsibility on its part, the Commission reiterates that the record fails to substantiate that effective measures of investigation were taken either with respect to the fate of the victim or the corresponding responsibility for his disappearance. In this regard, among the points referred to in paragraphs 32-33, 37-40 and 46, *supra*, the Commission emphasized the essential nature of the protection the remedy of habeas corpus is required to afford, and the lack of any information to substantiate that the writs presented with respect to the victim were processed with the required due diligence. Further, with respect to the judicial investigation process reportedly still pending, the Commission indicated that the obligation to clarify the facts and corresponding responsibility depended not on measures of form but of substance. The State failed to show that it had effectively investigated either aspect of the case, or to explain why, notwithstanding the passage of over five years, that process had failed to produce any substantive results. The information before the Commission with respect to that judicial process demonstrates little more than that it has been subject to procedural irregularities, and undue and unexplained delay. The State did not address these deficiencies set forth in Report N° 33/99 in its response.

53. Second, with respect to the obligation to repair the violations established, the Commission considers that the commitment of the State to include the case of Mr. Guarcas within the programs that are to be implemented to redress the human rights violations committed during the armed conflict is a positive step. However, the recommendation issued required that measures of reparation designed to redress the violations established in Report N° 33/96 be adopted within two months. In this regard, on the one hand, it is not clear that the inclusion of the case of Mr. Guarcas within the programs referred to will provide for the effective reparation of the violations established by this Commission. On the other hand, and in any case, the State has not complied with the recommendation in the time period that was established, nor has it indicated when the measures contemplated will be implemented. The foregoing issues notwithstanding, the Commission has taken note of this official commitment expressed by the State, and hopes that it will be complied with as soon as possible.

54. Additionally, the Commission finds it pertinent to clarify that the obligation to repair the consequences of these violations is not contingent on the establishment of criminal responsibility by the Guatemalan judiciary as contended by the State. That obligation is a consequence of the establishment of the State's responsibility for the violations set forth in this report.

55. Finally, a State Party to the Convention is obliged to take reasonable measures both to prevent human right violations, and to respond effectively to those that occur. The Commission emphasizes that ensuring the efficacy of the protections provided by the Convention requires that any claim of violation be subject to an investigation effectuated pursuant to the standards of due diligence. In the present case, due investigation of the habeas corpus writs was required as a means of safeguarding Mr. Guarcas' liberty, as well as his physical integrity and very life. Due investigation of his fate, and the corresponding responsibility was required to respond to the violations, and to enable his family to vindicate their right to justice. The Commission has established that Francisco Guarcas Cipriano was disappeared by State agents and died while in

their custody. The State has not adequately investigated the facts or located the remains of Mr. Guarcas, thereby perpetuating the violation of the right of his family to know the truth about what happened to him. The State of Guatemala failed to fulfill its duty of prevention and protection in this case. Its international responsibility for the violations established will continue until the measures the Commission has recommended have been fully discharged.

VI. CONCLUSIONS

56. On the basis of the foregoing analysis and conclusions, the Commission finds that the recommendations issued in Report 33/99 have not been complied with, and therefore reiterates its conclusion that the State of Guatemala is responsible for violations of the rights to recognition as a person before the law, 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 Francisco Guarcas Cipriano. The State is accordingly responsible for having failed to uphold its Article 1(1) obligation to respect and ensure those rights under the Convention.

VII. RECOMMENDATIONS

57. On the basis of the analysis and conclusions set forth in the present Report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

To reiterate its recommendations to the State of Guatemala that it:

1. Carry out a complete, impartial and effective investigation to determine the circumstances of the forced disappearance of Francisco Guarcas Cipriano and to sanction those responsible in accordance with domestic law.
2. Adopt the measures necessary to ensure that the family members of Mr. Guarcas receive fair and prompt reparation for the violations here established.

VIII. PUBLICATION

58. On October 22, 1999, the Commission transmitted report N° 108/99, the text of which is found above, to the State of Guatemala and the petitioners, in accordance with Article 51(2) of the American Convention. Further, the Commission set a deadline of one month for the State to comply with the foregoing recommendations. On November 23, 1999, the State sent a communication, received on November 29, 1999, in which it reiterated the information presented in its response to report N° 33/99 pertaining to the present case, which has already been analyzed supra.

59. In accordance with Article 51(3) of the American Convention, in this stage of the process the Commission shall confine itself to assessing the measures taken by the Guatemalan State to comply with the recommendations made and remedy the situation under review.

60. As will be noted, the new information given by the State with respect to the measures taken by it to comply with the recommendations formulated by the Commission in report N° 108/99 does not contain any new concrete information. This information was received extemporaneously.

61. On the basis of the foregoing considerations and in accordance with Articles 51(3) of the Convention and 48 of its Regulations, the Commission decides to reiterate the conclusions and recommendations contained in paragraphs 56 and 57 above, to publish this report, and to include it in its Annual Report to the General Assembly of the OAS. In compliance with its mandate, the Commission will continue to evaluate the measures taken by the Guatemalan State with respect to the recommendations cited until the State has fully complied with them.

Approved on the 21 day of the month of December, 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice-Chairman; Claudio Grossman, Second Vice-Chairman; and Commissioners Alvaro Tirado Mejía and Jean Joseph Exumé.