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Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Francisco Fairén Garbi and Yolanda Solís Corrales v. Honduras
Doc. Type:	Judgment (Merits)
Decided by:	President: Rafael Nieto-Navia; Vice-President: Hector Gros-Espiell; Judges: Rodolfo E. Piza E.; Thomas Buergenthal; Pedro Nikken; Hector Fix-Zamudio; Rigoberto Espinal-Irias
Dated:	15 March 1989
Citation:	Fairen-Garbi v. Honduras, Judgment (IACtHR, 15 Mar. 1989)
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In the Fairén Garbi and Solís Corrales case,

The Inter-American Court of Human Rights delivers the following judgment pursuant to Article 44 (1) of its Rules of Procedure (hereinafter "the Rules of Procedure") in the instant case submitted by the Inter-American Commission on Human Rights against the State of Honduras.

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted the instant case to the Inter-American Court of Human Rights (hereinafter "the Court") on April 24, 1986. It originated in a petition (No. 7951) against the State of Honduras (hereinafter "Honduras" or "the Government"), which the Secretariat of the Commission received on January 14, 1982.

2. In submitting the case, the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention in the case of Francisco Fairén Garbi y Yolanda Solís Corrales. In addition, the Commission asked the Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party or parties."

3. The petition filed with the Commission alleges that Costa Rican citizens, Francisco Fairén Garbi, a student and public employee, and Yolanda Solís Corrales, a teacher, disappeared in Honduras on December 11, 1981, as they were traveling through that country to México. Honduran officials denied they entered Honduras. Nevertheless, the Government of Nicaragua certified they had left Nicaragua for Honduras at the Las Manos border post, on December 11, 1981, at 4:00 p.m. It later submitted photocopies of the immigration cards in the handwriting of the travelers.

4. According to the record the Commission forwarded to the Court:

a) the Government of Honduras, by document of January 24, 1982, and its Ambassador in Costa Rica, in a paid advertisement in the Costa Rican newspaper "La Nación," announced that Francisco Fairén Garbi and Yolanda Solís Corrales had "at no time entered the territory of the Republic of Honduras." On February 19, 1982, citing the investigations of the Ministry of Foreign Affairs of her country, the Honduran Ambassador to Costa Rica made the same statement to the petitioner;

b) on February 11, 1982, the Secretary General of Immigration of Honduras certified that Yolanda Solís Corrales, proceeding from Nicaragua in a "private vehicle," did enter Honduran territory at Las Manos border post on December 12, 1981; that "there is no record of Francisco Fairén having entered our country; nor is there any record of the departure of either of the Costa Ricans;"

c) on March 10, 1982, the Minister of Foreign Relations of Honduras informed his Costa Rican counterpart that Francisco Fairén Garbi and Yolanda Solís Corrales had entered Honduran territory from Nicaragua, at Las Manos on December 11, 1981, and left for Guatemala at El Florido the following day. The same information had been given to the Commission on March 8, 1982;

d) on January 14, 1982, the Guatemalan Consul in San José, Costa Rica, certified that Francisco Fairén Garbi and Yolanda Solís Corrales did not enter or leave Guatemala between December 8 and 12, 1981. On February 3, at the request of the petitioner, the Office of Immigration certified that Yolanda Solís Corrales "entered the country on December 12, 1981, at the border post of El Florido, Camotán, Chiquimula, under passport No. P-1-419-121-78;" that Francisco Fairén Garbi "entered the country from Honduras, on December 12, 1981, at the border post of El Florido, Camotán, Chiquimula, under passport No. P-9-048-377-81;" that Yolanda Solís Corrales "left the country on December 14, 1981, through the Valle Nuevo border post towards El Salvador;" and that Francisco Fairén Garbi "left the country on December 14, 1981 through the Valle Nuevo border post towards El Salvador;"

e) the Department of Motor Vehicles of Costa Rica certified that no driver's license had been issued to Yolanda Solís Corrales;

e) on December 28, 1981, the body of a man was found at the place called La Montañita, near Tegucigalpa;

g) on June 9, 1982, the Government confirmed to the Commission that Francisco Fairén Garbi and Yolanda Solís Corrales left Honduran territory for Guatemala on December 12, 1981, and left Guatemala for El Salvador on December 14, 1981, which was certified by Guatemalan officials.

5. By Resolution 16/84 of October 4, 1984, the Commission declared "that the acts denounced constitute serious violations of the right to life (Art. 4) and the right to personal liberty (Art. 7) of the American Convention" and that the Government "is responsible for the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales."

6. On October 29, 1984, the Government requested reconsideration of Resolution 16/84 on the grounds that the persons who had disappeared had left its territory, presumably for Guatemala; that it would consent to the exhumation of the body found in La Montañita, following the procedure established by the laws of Honduras; and that it had given specific

orders to the authorities to investigate the allegations contained in the petition. The Government also argued that it had established an Investigatory Commission made up of members of the Armed Forces of Honduras (hereinafter "Armed Forces") to ascertain the facts and to establish the appropriate legal responsibilities. It further noted that "with the firm conviction that in this case --as shown in paragraph 10 of the Resolution 16/84-- the remedies provided on the national plane have not been exhausted (it had) decided to forward all the documentation on this deplorable matter to the Investigatory Commission, so it might reopen the investigation and verify the truth of the allegations."

7. On October 17, 1985, the Government gave the Commission the report issue by the Investigatory Commission, according to which "the authorities such as the DNI, Immigration, etc., are not holding these persons and no documentation of those offices has been seen which proves that those foreigners included in the list were captured or entered the country legally."

8. On April 7, 1986, the Government informed the Commission that

despite the efforts of the Investigatory Commission established by Decree 232 of June 14, 1984, no new evidence has been discovered. The information at hand contains no convincing evidence on which to rule on the alleged disappearances with absolute certainty. In view of the impossibility of identifying the persons allegedly responsible, the interested parties were publicly exhorted to make use of the available judicial remedies to bring charges against the public authorities or private parties they deem responsible.

9. By Resolution 23/86 of April 18, 1986, the Commission ratified Resolution 16/84 and referred the matter to the Court.

I.

10. The Court has jurisdiction to hear the instant case. Honduras ratified the Convention on September 8, 1977 and recognized the contentious jurisdiction of the Court, as set out in Article 62 of the Convention, on September 9, 1981. The case was submitted to the Court by the Commission pursuant to Article 61 of the Convention and Article 50 (1) and (2) of the Regulations of the Commission.

II.

11. The instant case was submitted to the Court on April 24, 1986. On May 13, 1986, the Secretariat of the Court transmitted the application to the Government, pursuant to Article 26 (1) of the Rules of Procedure.

12. On July 23, 1986, Judge Jorge R. Hernández Alcerro informed the President of the Court (hereinafter "the President") that, pursuant to Article 19(2) of the Statute of the Court, he had "decided to recuse (him)self from hearing the three cases that . . . were submitted to the Inter-American Court of Human Rights." The President accepted the disqualification and, by note of that same date, informed the Government of its right to appoint a judge ad hoc under Article

10(3) of the Statute. The Government named Rigoberto Espinal Irías to that position by note of August 21, 1986.

13. In a note of July 23, 1986, the President confirmed a preliminary agreement that the Government present its submissions by the end of August 1986. On August 21, 1986, the Government requested the extension of this deadline to November 1986.

14. By his Order of August 29, 1986, having heard the views of the parties, the President set October 31, 1986 as the deadline for the Government's presentation of its submissions. The President also fixed the deadlines of January 15, 1987 for the filing of the Commission's submissions and March 1, 1987 for the Government's response.

15. In its submissions of October 31, 1986, the Government objected to the admissibility of the application filed by the Commission.

16. On December 11, 1986, the President granted the Commission's request for an extension of the deadline for the presentation of its submissions to March 20, 1987 and extended the deadline for the Government's response to May 25, 1987.

17. In his Order of January 30, 1987, the President made clear that the application which gave rise to the instant proceeding should be deemed to be the Memorial provided for in Article 30(3) of the Rules of Procedure. He also specified that the deadline of March 20, 1987 granted to the Commission was the time limit set forth in Article 27(3) of the Rules for the presentation of its observations and conclusions on the preliminary objections raised by the Government. The President, after consulting the parties, ordered a public hearing on June 16, 1987 for the presentation of oral arguments on the preliminary objections and left open the time limits for submissions on the merits, pursuant to the above-mentioned article of the Rules of Procedure.

18. By note of March 13, 1987, the Government informed the Court that because

the Order of January 30, 1987 is not restricted to matters of mere procedure nor to the determination of deadlines, but rather involves the interpretation and classification of the submissions (the Government) considers it advisable, pursuant to Article 25 of the Statute of the Court and Article 44(2) of its Rules of Procedure, for the Court to affirm the terms of the President's Order of January 30, 1987, in order to avoid further confusion between the parties. As these are the first contentious cases submitted to the Court, it is especially important to ensure strict compliance with and the correct application of the procedural rules of the Court.

19. In a motion contained in its observations of March 20, 1987, the Commission asked the President to rescind paragraph 3 of his Order of January 30, 1987 in which he had set the date for the public hearing. The Commission also observed that "in no part of its Memorial had the Government of Honduras presented its objections as preliminary objections." In its note of June 11, 1987, the Government did however refer to its objections as "preliminary objections."

20. By Resolution of June 8, 1987, the Court affirmed the President's Order of January 30, 1987, in its entirety.

21. The hearing on the preliminary objections raised by the Government took place on June 16, 1987. Representatives of the Government and the Commission participated in this hearing.

22. On June 26, 1987, the Court delivered its judgment on the preliminary objections. In this unanimous decision, the Court:

1. Reject(ed) the preliminary objections interposed by the Government of Honduras, except for the issues relating to the exhaustion of the domestic legal remedies, which (were) ordered joined to the merits of the case.

2. Decide(d) to proceed with the consideration of the instant case.

3. Postpone(d) its decision on the costs until such time as it renders judgment on the merits.

(Fairén Garbí and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2).

23. On that same date, the Court adopted the following decision:

1. To instruct the President, in consultation with the parties, to set a deadline no later than August 27, 1987 for the Government to submit its Counter-Memorial on the merits and offer its evidence, with an indication of the facts that each item of evidence is intended to prove. In its offer of proof, the Government should show how, when and under what circumstances it wishes to present the evidence.

2. Within thirty days of the receipt of the submission of the Government, the Commission must ratify in writing the request of proof already made, without prejudice to the possibility of amending or supplementing what has been offered. The Commission should indicate the facts that each item of evidence is intended to prove and how, when and under what circumstances it wishes to present the evidence. As soon as possible after receiving the Government's submission referred to in paragraph one, the Commission may also supplement or amend its offer of proof.

3. To instruct the President, without prejudice to a final decision being taken by the Court, to decide preliminary matters that might arise, to admit or exclude evidence that has been offered or may be offered, to order the filing of expert or other documentary evidence that may be received and, in consultation with the parties, to set the date of the hearing or hearings on the merits at which evidence shall be presented, the testimony of witnesses and any experts shall be received, and at which the final arguments shall be heard.

4. To instruct the President to arrange with the respective authorities for the necessary guarantees of immunity and participation of the Agents and other representatives of the parties, witnesses and experts, and, if necessary, the delegates of the Court.

24. In its submission of July 20, 1987, the Commission ratified and supplemented its request for oral testimony and offered documentary evidence.

25. On August 27, 1987, the Government filed its Counter-Memorial and documentary evidence. It asked that the matter be "dismissed because the allegations were untrue and the Government was not responsible for any of the actions of which it was accused."

26. In his Order of September 1, 1987, the President admitted the testimonial and documentary evidence offered by the Commission. On September 14, 1987 he also admitted the documentary evidence offered by the Government.

27. By communication of September 24, 1987, in response to the request of the Court, the Government of Costa Rica submitted certified copies of the records compiled by the Ministry of Foreign Relations, the Legislative Assembly, and the "Ministerio Público" of that country, on the disappearance in Honduras of Francisco Fairén Garbi and Yolanda Solís Corrales, among others.

28. The Court held hearings on the merits and heard the final arguments of the parties from September 30 to October 7, 1987.

There appeared before the Court

a) for the Government of Honduras:

Edgardo Sevilla Idiáquez, Agent  
Ramón Pérez Zúñiga, Representative  
Juan Arnaldo Hernández, Representative  
Enrique Gómez, Representative  
Rubén Darío Zepeda, Adviser  
Angel Augusto Morales, Adviser  
Olmeda Rivera, Adviser  
Mario Alberto Fortín, Adviser  
Ramón Rufino Mejía, Adviser

b) for the Inter-American Commission on Human Rights:

Gilda M. C. M. de Russomano, President, Delegate  
Edmundo Vargas Carreño, Executive Secretary, Delegate  
Claudio Grossman, Adviser  
Juan Méndez, Adviser  
Hugo Muñoz, Adviser  
José Miguel Vivanco, Adviser

c) Witnesses presented by the Commission to testify as to "whether between the years 1981 and 1984 (the period in which Francisco Fairén Garbi and Yolanda Solís Corrales disappeared) there were numerous cases of persons who were kidnapped and who then disappeared, and whether these actions were imputable to the Armed Forces of Honduras and enjoyed the acquiescence of the Government of Honduras:"

Miguel Angel Pavón Salazar, Alternate Deputy  
Ramón Custodio López, surgeon  
Virgilio Carías, economist  
Inés Consuelo Murillo, student  
Efraín Díaz Arrivillaga, Deputy

Florencio Caballero, former member of the Armed Forces

d) Witnesses presented by the Commission to testify as to "whether between the years 1981 and 1984 effective domestic remedies existed in Honduras to protect those persons who were kidnapped and who then disappeared in actions imputable to the Armed Forces of Honduras:"

Ramón Custodio López, surgeon  
Virgilio Carías, economist  
Milton Jiménez Puerto, lawyer  
Inés Consuelo Murillo, student  
René Velásquez Díaz, lawyer  
César Augusto Murillo, lawyer  
José Gonzalo Flores Trejo, shoemaker

e) Witnesses presented by the Commission to testify on specific facts related to this case:

Elizabeth Odio Benito, former Minister of Justice of Costa Rica  
Antonio Carrillo Montes, former Consul General of Costa Rica in Honduras

29. Despite the summons by the Court, the following witnesses offered by the Commission failed to appear at these hearings:

Bernd Niehaus, former Minister of Foreign Relations of Costa Rica  
Antonio Menjibar, a Salvadoran detained in Honduras  
Leónidas Torres Arias, former member of the Honduran military  
José María Palacios, attorney  
Mauricio Villeda Bermúdez, attorney  
Linda Rivera de Toro, the judge who carried out the writ of habeas corpus on behalf of Francisco Fairén Garbi and Yolanda Solís Corrales  
Linda Drucker, journalist  
Israel Morales Chinchilla, Chief Inspector of Immigration of Guatemala  
Jorge Solares Zavala, Immigration Inspector of Guatemala  
Mario Méndez Ruiz, Immigration Inspector of Guatemala  
Fernando Antonio López Santizo, former Assistant Director of Immigration of Guatemala  
Carlos Augusto López Santizo, former Consul General of Guatemala in Costa Rica, who had deceased at the time of the hearings.

Licentiate Linda Rivera de Toro gave sworn testimony before a Notary Public on January 7, and September 28, 1987. By letter of August 25, 1987, Dr. Bernd Niehaus ratified his "statements made about this case before the Special Investigatory Commission of the Legislative Assembly of Costa Rica."

30. After having heard the witnesses, the Court directed the submission of additional evidence to assist it in its deliberations. Its Order of October 7, 1987 reads as follows:

A. Documentary Evidence

1. To request the Inter-American Commission on Human Rights to submit the original immigration cards and the automobile entry permit granted by the governments of Guatemala, Honduras and Nicaragua.
2. To request the Government of Honduras to provide the organizational chart showing the structure of Battalion 316 and its position within the Armed Forces of Honduras.
3. To request Dr. Carlos E. Colombari Armijo, the dentist of Francisco Fairén Garbi, to furnish the certified dental records, and to ask the Government of Costa Rica for a copy of the personal data contained on the passport application. Clyde Collins Snow, Ph.D., the forensic pathologist offered by the Commission, or any other that it may call, shall submit an opinion on the autopsy (of the cadaver found at La Montañita), on the basis of the information obtained. The Inter-American Commission on Human Rights shall cover the costs.
4. To request the Honduran Bar Association to explain the legal procedure for exhumation in that country and to give its opinion on the right of a foreigner to request an exhumation.

B. Testimony

1. To call as a witness Mr. Francisco Fairén Almengor (the father of Francisco Fairén Garbi).
2. To call the following Guatemalan citizens as witnesses: Jorge Solares Zavala, Mario Méndez Ruiz, Mario Ramírez and Fernando A. López Santizo (Immigration officials).
3. To call as witnesses, Marco Tulio Regalado and Alexander Hernández, members of the Armed Forces of Honduras.

C. To Reiterate a Request:

1. To the Government of Honduras regarding the location of the body found at (the place known as) La Montañita.

31. By the same Order, the Court set December 15, 1987 as the deadline for the submission of documentary evidence and decided to hear the oral testimony at its January 1988 session.

32. In response to that Order, on December 14, 1987 the Government: a) with respect to the organizational structure of Battalion 316, requested that the Court receive the testimony of its Commandant in a closed hearing "because of strict security reasons of the State of Honduras" and b) requested that the Court hear the testimony of Alexander Hernández and Marco Tulio Regalado "in the Republic of Honduras, in a manner to be decided by the Court and in a closed hearing to be set at an opportune time because of security reasons and because both persons are on active duty in the Armed Forces of Honduras." Likewise, on December 22, 1987, it submitted the opinion requested of the Honduras Bar Association (*infra*, 55).

33. By note of December 24, 1987, the Commission objected to hearing the testimony of members of the Honduran military in closed session. This position was reiterated by note of January 11, 1988.

34. On the latter date, the Court decided to receive the testimony of the members of the Honduran military at a closed hearing at the seat of the Court in the presence of the parties.

35. Pursuant to its Order of October 7, 1987 and its decision of January 11, 1988, the Court in an audience of January 19, 1988 heard the testimony of Francisco Fairén Almengor. The following Guatemalan witnesses did not appear: Israel Morales Chinchilla (summoned to testify by Resolution of January 11, 1988), Jorge Solares Zavala, Mario Méndez Ruiz, Mario Ramírez and Fernando A. López Santizo (summoned to testify by Decision of October 7, 1987). According to the Commission, those witnesses could not be found, except for Mr. López Santizo, who on October 2, 1987, sent the Court a statement on his role in this case as Assistant Director of Immigration of Guatemala.

36. The Court also held a closed hearing on January 20, 1988 in San José, to which both parties attended, at which it received the testimony of persons who identified themselves as Lieutenant Colonel Alexander Hernández and Lieutenant Marco Tulio Regalado Hernández. The Court also heard the testimony of Colonel Roberto Núñez Montes, Head of the Intelligence Services of Honduras.

37. On January 19, 1988, the Commission, sua sponte and "determined to place all available evidence at the disposition of the Court," submitted receipt No. 318558. The receipt had a signature at the bottom reading "Francisco Fairén G.," and showed that a 1971 Opel automobile, Costa Rican license plate No. 39991 entered Guatemala at the border check point of El Florido on December 12, 1981. The receipt was submitted with the expert opinion of David P. Grimes, which points out some differences between the signature on the receipt and originals or photocopies of the signature of Francisco Fairén Garbi. The opinion concludes that "it will be necessary to examine additional current signatures," before expressing a final opinion.

38. By resolution of January 22, 1988, the Court authorized the President "in consultation with the Permanent Commission, to appoint one or more handwriting experts to determine the authenticity of the signature that reads 'Francisco Fairén' on the receipt" in question. The President of the Court appointed Dr. Dimas Oliveros Sifontes, a Venezuelan handwriting expert, to submit his opinion.

39. On March 2, 1988, the Minister of Internal Affairs of Guatemala informed the Court that, following an investigation carried out under its auspices and another by representatives of the Inter-American Commission on Human Rights, the government "is unable to certify that Francisco Fairén Garbi and Yolanda Solís Corrales entered and departed from Guatemala in the month of December, 1981, as it had reported by note of October 6, 1987. Moreover, the Government of Guatemala is now of the opinion. . . (that) they never entered Guatemala, and that the report of 1982 is the correct one." The note emphasizes that "the lists of entries into the country through the border post of El Florido for the month of December, 1981, were not found among the records of the Division of Inspection of the Office of Immigration of Guatemala," and that "although the names of Francisco Fairén Garbi and Yolanda Solís Corrales appear on the lists of departures at the check point of Valle Nuevo for December 14, 1981, that list appears to be signed by Oscar Gonzalo Orellana Chacón, although the signature corresponds to that of José Víctor García Aguilar." Finally, the Government states that "therefore, the Government of

Guatemala respectfully asks the illustrious Court to please consider that the current official opinion of the Government of Guatemala on this matter is that Francisco Fairén Garbi and Yolanda Solís Corrales never entered its territory" (underlinings in the original).

40. On May 31, 1988, the Government of Honduras submitted its response to the communication of the Minister of Internal Affairs of Guatemala, in which it adduced that the certification granted by the Office of Immigration of Guatemala on February 3, 1982, "cannot be rescinded by a mere opinion although it is the opinion of a government official."

41. On July 13, 1988, the Commission submitted that the communication of the Minister of Internal Affairs of Guatemala "constitutes the final and definitive reply of that illustrious government to the Court's inquiry . . . (which is) the result of an exhaustive investigation."

42. In that submission, the Commission also made some "final observations" regarding the instant case. By decision of July 14, 1988, the President refuse to admit those "observations" because they were untimely and because "reopening the period for submissions would violate the procedure opportunely established and, moreover, would seriously affect the procedural equilibrium and equality of the parties."

43. On July 28, 1988, the Court decided to request the Government of El Salvador to certify "whether in December, 1981, Costa Rican citizens needed a visa to enter that country" and "whether Francisco Fairén Garbi and Yolanda Solís Corrales had a visa that would allow them to enter El Salvador in December, 1981."

44. On September 21, 1988, the Government of El Salvador informed the Court "that in the month of December, 1981, Costa Rican citizens did not need a visa to enter our country" and that it found no record of the entry of Francisco Fairén Garbi or Yolanda Solís Corrales at the border posts of Las Chinamas (Valle Nuevo), Hachadura, San Cristóbal, or Anguiatu between December 1 and 21 of 1981.

45. The handwriting expert appointed by the President presented his report on August 12, 1988. He concluded that the signature on receipt No. 318558 which reads "Francisco Fairén G." is genuine.

46. In its submission of December 5, 1988, the Commission presented its observations on the expert opinion, stating that "the exposition of the expert, Oliveros, is clearly insufficient to support the conclusion of his report." Moreover, it submitted an affidavit in which Fausto Reyes Caballero affirms he belonged to Battalion 316 in San Pedro Sula and that the falsification of public documents and signatures was one of its activities.

47. The following non-governmental organizations submitted amicus curiae brief to the Court: Amnesty International, Asociación Centroamericana de Familiares de Detenidos-Desaparecidos, Association of the Bar of the City of New York, Lawyers Committee for Human Rights and Minnesota Lawyers International Human Rights Committee.

III.

48. Regarding the procedures related to the exhumation of a body found at the place called La Montañita (supra 4.f) and 6), the Consul General of Costa Rica in Tegucigalpa, Honduras, reported to his government on January 29, 1981, that "if the relatives wish to exhume the body, an attorney with a power of attorney would have to present the request to the First Criminal Court, and it would be advisable to bring a medical record, especially dental records." By note of its Minister of Foreign Relations, Bernd Niehaus, dated February 17, 1982, the Government of Costa Rica asked the Government of Honduras to have the Judge of the First Criminal Court of Tegucigalpa authorize the exhumation of the body the autopsy refers to (infra 49) and to allow a Costa Rican forensic specialist and dentist to participate in the exhumation. On February 22, 1982, the Government of Honduras responded to the Government of Costa Rica that its note has been "transmitted to the President of the Supreme Court of Honduras, so that he could make an appropriate ruling in accordance with the law." On April 6, 1982, through the Honduran Embassy in San José, Costa Rica, Foreign Minister Niehaus reiterated the request for an immediate exhumation of the body found at La Montañita. By communication of October 29, 1984, the Foreign Ministry of Honduras informed the Commission that its government "is agreeable to the exhumation, following the procedure provided by the substantive and other norms of Honduran law." While affirming that no court had received a request for exhumation, it accepted that, should the body be exhumed, a Costa Rican forensic examiner could participate in the exhumation.

49. In its submission of March 20, 1987, the Commission asked the Court to request the Government to submit a copy of the autopsy report on the body found at La Montañita. In responding to the President's decision of September 1, 1987, the Government forwarded a copy on January 18, 1988, which corresponds to one sent by the Commission, *motu proprio*, on August 19, 1987.

50. On July 14 and 20, 1987, the Commission asked for the exhumation of the body found at La Montañita. In its submission of August 19, 1987, it informed the Court that, despite the "countless steps taken, it was impossible (for the Commission) to determine where the body was buried," and reiterated the request.

51. By decision of September 1, 1987, the Court, resolved:

To suspend the exhumation of the body of "La Montañita" offered in evidence by the Commission, given the Commission's letter of August 19, 1987, to the President of the Court, unless the Court decides it should proceed, in which case, the Commission should promptly submit a documented rationale regarding the need of that evidence for the just resolution of the instant case, together with all other elements of proof it considers useful.

On August 28, 1987, the Court had already asked the Government to inform it where the body was buried, and the order for discovery of October 7, 1987, reiterated that request.

52. On August 27, 1987, the Government submitted a copy of official letter No. 3065 of the Supreme Court, dated December 23, 1983, according to which the First and Second Criminal

Courts of Tegucigalpa reported that no one had requested the exhumation of a body which "it is presumed" could be that of Francisco Fairén Garbi.

53. By submission of November 3, 1987, the Commission offered a report prepared by the Argentina Team of Forensic Anthropology on the autopsy report of the body found at La Montañita. According to the Commission, "the exhumation of the body found at 'La Montañita' is essential." It reiterated that "the cooperation of the Government of Honduras is necessary to carry out the exhumation, and that the Government must first determine the precise place the body was buried."

54. On December 14, 1987, the Government submitted a copy of the "Record of the Examination of an Unidentified Cadaver" of December 8, 1981. At this time Francisco Fairén Garbi had not entered Honduran territory. It also submitted a statement of December 12, 1987, issued by the Director of the Medical-Legal Office of the Supreme Court, which said "to the present date, NO relative of Francisco Fairén Garbi or Yolanda Solís Corrales has asked this office to exhume any cadaver" (upper case of the original). On January 18, 1988, it submitted a copy of the same statement.

55. According to an opinion of December 14, 1987, submitted at the request of the Court by the Honduran Bar Association, the request for exhumation of a cadaver "does not require any formality at all, or even the appointment of a legal representative," eventhough a "court order" and "express permission of the health authorities" is needed. It adds that "the relatives, the judicial authority, the state attorney or any party who can show a legitimate interest," even a foreigner, can request an exhumation.

56. On December 17, 1987, the Government submitted a medical-legal opinion signed by Dr. Dennis A. Castro Bobadilla, in which he criticizes the opinion of the Argentine Team of Forensic Anthropology calling it "not serious, unscientific, based upon suppositions, illogical, and even irresponsible, in that it shows an evident bias in pretending that the victim was subject to some type of torture of execution." Dr. Castro Bobadilla added that "based upon the data of the autopsy, it can be affirmed that the death was homicide" (sic) and that "exhumation is recommended in order to determine identity and if possible the cause of death." On January 11, 1988, the Commission expressed "its most absolute rejection of the unfortunate concepts" contained in the report of Dr. Castro Bobadilla.

57. On December 24, 1987, the Commission asked the Court to insist that the Government identify the location of the burial site of the body found at La Montañita. The President did so by communication of January 8, 1988.

58. On January 13, 1988, in accord with the provisions of the general discovery order of October 7, 1987, the Commission submitted Autopsy Report No. 259 of December 29, 1981, which took into account the dental records of Francisco Fairén Garbi prepared by Dr. Clyde Collins Snow. It enclosed another report prepared by the Argentine Team of Forensic Anthropology. Neither is conclusive because of the sparse information contained in the autopsy report.

59. On January 20, 1989, the Court entered an order by which it:

1. Urges the Government of Honduras to provide the Court with the information to which this Order refers. (The location of the cadaver found at La Montañita).
2. Requires the Government of Honduras that it order and carry out the exhumation and identification of the body found in the place known as La Montañita on December 28, 1981, the autopsy of which was conducted the day after (Autopsy No. 259.81). The Government is given thirty days as of today to comply with this Order. At the end of that period, it shall inform the Court of the final results thereof.
3. The President shall appoint such persons as he deems suitable to attend and, given the case, to participate in the exhumation and identification of the body. These persons shall present separate reports to the Court.

60. On February 17, 1989, the Government informed the Court that

members of the Inter-Institutional Commission of Human Rights went to the cemetery where the remains of the cadaver corresponding to Autopsy Report 259-81 were buried in 1981, and were able to observe that, unfortunately, because of the ravages of nature and the passage of time there have been cave-ins and landslides throughout this zone, which were made worse by the recent hurricane known as Gilbert, and it is now impossible to find the exact place where that body was buried. As illustration and proof, we attach newspaper clippings and photos of the area.

61. On March 10, 1989, in response to the Government's report, the Commission asserted that

the main question is to determine whether in response to the petitions of the father of Francisco Fairén, the Government of Costa Rica, and of the Commission, the Government of Honduras took the necessary steps to clarify the situation of the cadaver found at "La Montañita," considering that its failure to carry out those measures and its minimal cooperation serves to establish the direct responsibility of the Honduran Government in this matter.

IV.

62. By note of November 4, 1987, addressed to the President of the Court, the Commission asked the Court to take provisional measures under Article 63 (2) of the Convention in view of the threats against the witnesses Milton Jiménez Puerto and Ramón Custodio López. Upon forwarding this information to the Government of Honduras, the President stated that he "does not have enough proof to ascertain which persons or entities might be responsible for the threats, but he strongly wishes to request that the Government of Honduras take all measures necessary to guarantee the safety of the lives and property of Milton Jiménez and Ramón Custodio and the property of the Committee for the Defense of Human Rights in Honduras (CODEH). . . ." The President also stated that he was prepared to consult with the Permanent Commission of the Court and, if necessary, to convoke the Court for an emergency meeting "for taking the appropriate measures, if that abnormal situation continues." By communications of November 11 and 18, 1987, the Agent of the Government informed the Court that the Honduran

government would guarantee Ramón Custodio and Milton Jiménez "the respect of their physical and moral integrity. . . and the faithful compliance with the Convention."

63. By note of January 11, 1988, the Commission informed the Court of the death of José Isaías Vilorio, which occurred on January 5, 1988 at 7:15 a.m. The Court had summoned him to appear as a witness on January 18, 1988. He was killed "on a public thoroughfare in Colonia San Miguel, Comayagüela, Tegucigalpa, by a group of armed men who placed the insignia of a Honduran guerrilla movement known as Cinchonero on his body and fled in a vehicle at high speed."

64. On January 15, 1988, the Court was informed of the assassinations of Moisés Landaverde and Miguel Angel Pavón which had occurred the previous evening in San Pedro Sula. Mr. Pavón had testified before the Court on September 30, 1987 as a witness in this case. Also on January 15, the Court adopted the following provisional measures under Article 63 (2) of the Convention:

1. That the Government of Honduras adopt, without delay, such measures as are necessary to prevent further infringements on the basic rights of those who have appeared or have been summoned to so before this Court in the "Velásquez Rodríguez," "Fairén Garbi and Solís Corrales" and "Godínez Cruz" cases, in strict compliance with the obligation of respect for and observance of human rights, under the terms of Article 1 (1) of the Convention.
2. That the Government of Honduras also employ all means within its power to investigate these reprehensible crimes, to identify the perpetrators and to impose the punishment provided for by the domestic law of Honduras.

65. After it has adopted the above Order of January 15, the Court received a request from the Commission, dated the same day, that the Court take the necessary measures to protect the integrity and security of those persons who had appeared or would appear before the Court.

66. On January 18, 1988, the Commission asked the Court to adopt the following complementary provisional measures:

1. That the Government of Honduras inform the Court, within 15 days, of the specific measures it has adopted to protect the physical integrity of witnesses who testified before the Court as well as those persons in any way involved in these proceedings, such as representatives of human rights organizations.
2. That the Government of Honduras report, within that same period, on the judicial investigations of the assassinations of José Isaías Vilorio, Miguel Angel Pavón and Moisés Landaverde.
3. That the Government of Honduras provide the Court, within that same period, the public statements made regarding the aforementioned assassinations and indicate where those statements appeared.
4. That the Government of Honduras inform the Court, within the same period, on the criminal investigations of threats against Ramón Custodio and Milton Jiménez, who are witnesses in this case.

5. That it inform the Court whether it has ordered police protection to ensure the personal integrity of the witnesses who have testified and the protection of the property of CODEH.

6. That the Court request the Government of Honduras to send it immediately a copy of the autopsies and ballistic tests carried out regarding the assassinations of Messrs. Vilorio, Pavón and Landaverde.

67. That same day the Government submitted a copy of the death certificate and the autopsy report of José Isaías Vilorio, both dated January 5, 1988.

68. On January 18, 1988, the Court decided, by a vote of six to one, to hear the parties in a public session the following day regarding the measures requested by the Commission. After the hearing, taking into account "Articles 63 (2), 33 and 62 (3) of the American Convention on Human Rights, Articles 1 and 2 of the Statute of the Court and Article 23 of its Rules of Procedure and its character as a judicial body and the powers which derive therefrom," the Court unanimously decided, by Order of January 19, 1988, on the following additional provisional measures:

1. That the Government of Honduras, within a period of two weeks, inform this Court on the following points:

a. The measures that have been adopted or will be adopted to protect the physical integrity of, and to avoid irreparable harm to, those witnesses who have testified or have been summoned to do so in these cases.

b. The judicial investigations that have been or will be undertaken with respect to threats against the aforementioned individuals.

c. The investigations of the assassinations, including forensic reports, and the actions that are proposed to be taken within the judicial system of Honduras to punish those responsible.

2. That the Government of Honduras adopt concrete measures to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention.

This decision was delivered to the parties in Court.

69. Pursuant to the Court's decision of January 19, 1988, the Government submitted the following documents on February 3, 1988:

1. A copy of the autopsy report on the death of Professor Miguel Angel Pavón Salazar, certified by the Third Criminal Court of San Pedro Sula, Department of Cortés, on January 27, 1988 and prepared by forensic specialist Rolando Tábor, of that same Court.

2. A copy of the autopsy report on the death of Professor Moisés Landaverde Recarte, certified by the above Court on the same date and prepared by the same forensic specialist.

3. A copy of a statement made by Dr. Rolando Tábor, forensic specialist, as part of the inquiry undertaken by the above Court into the deaths of Miguel Angel Pavón and Moisés Landaverde Recarte, and certified by that Court on January 27, 1988.

...

4. A copy of the inquiry into threats against the lives of Ramón Custodio and Milton Jiménez, conducted by the First Criminal Court of Tegucigalpa, Central District, and certified by that Court on February 2, 1988.

In the same submission, the Government stated that:

The content of the above documents shows that the Government of Honduras has initiated a judicial inquiry into the assassinations of Miguel Angel Pavón Salazar and Moisés Landaverde Recarte, under the procedures provided for by Honduran law.

Those same documents show, moreover, that the projectiles were not removed from the bodies for ballistic study because of the opposition of family members, which is why no ballistic report was submitted as requested.

70. The Government also requested an extension of the deadline ordered above "because, for justifiable reasons, it has been impossible to obtain some of the information." Upon instructions from the President, the Secretariat informed the Government on the following day that it was not possible to extend the deadlines because it had been set by the full Court.

71. By communication of March 10, 1988, the Inter-Institutional Commission of Human Rights of Honduras, a governmental body, made several observations regarding the Court's decision of January 15, 1988. "On the threats that have been made against some witnesses," it reported that Ramón Custodio "refused to bring a complaint before the proper courts and that the First Criminal Court of Tegucigalpa, Department of Morazán, had initiated an inquiry to determine whether there were threats, intimidations, conspiracies, etc. against the lives of Dr. Custodio and Milton Jiménez, and had duly summoned them to testify and to submit any evidence," but they failed to appear. It added that no Honduran official "has attempted to intimidate, threaten or restrict the liberty of any of the persons who testified before the Court. . . who enjoy the same guarantees as other citizens."

72. On March 23, 1988 the Government submitted the following documents:

1. Copies of the autopsies performed on the bodies of Miguel Angel Pavón and Moisés Landaverde, certified by the Secretary of the Third Criminal Court of the Judicial District of San Pedro Sula.

2. The ballistic report on the shrapnel removed from the bodies of those persons, signed by the Director of the Medical-Legal Department of the Supreme Court of Justice.

73. On October 25, 1988, the Agent submitted newspaper articles published in Honduras on October 20 containing statements of Héctor Orlando Vásquez, former President of the San Pedro Sula branch of the Committee for the Defense of Human Rights in Honduras (CODEH), according to which the Government had no responsibility in the deaths of Miguel Angel Pavón

Salazar, Moisés Landaverde Recarte and others. The Inter-Institutional Commission of Human Rights of Honduras, in a document of the same date, asserted that this confirmed the "well-founded suspicions that these murders and alleged disappearances are only an escalation in the attempts of anti-democratic sectors to destabilize the legally constituted system of our country."

74. On January 24, 1989, the President repeated the request to the Government that it inform the Court as soon as possible regarding:

1. The current state of the judicial inquiry into the assassinations of witnesses, José Isaías Vilorio, which took place on January 5, 1988, and of Miguel Angel Pavón Salazar, which occurred on January 14, 1988, "so that those responsible may be punished" (decisions of January 15 and 19, 1988).
2. The specific measures taken by the Government of Honduras "to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention." (Decision of January 19, 1988).

No answer to this communication has been received.

V.

75. The Government raised several preliminary objections that the Court ruled upon in its Judgment of June 26, 1987 (supra 15-22). There the Court ordered the joining of the merits and the preliminary objection regarding the failure to exhaust domestic remedies, and gave the Government and the Commission another opportunity to "substantiate their contentions" on the matter (Fairén Garbi and Solís Corrales Case, Preliminary Objections, supra 22, para. 89).

76. The Court will first rule upon this preliminary objection. In doing so, it will make use of all the evidence before it, including that presented during the proceedings on the merits.

77. The Commission presented witnesses and documentary evidence on this point. The Government, in turn, submitted some documentary evidence, including examples of writs of habeas corpus successfully brought on behalf of some individuals (infra 123 (d)). The Government also stated that this remedy requires identification of the place of detention and of the authority under which the person is detained.

78. In addition to the writ of habeas corpus, the Government mentioned various remedies that might possibly be invoked, such as appeal, cassation, extraordinary writ of amparo, *ad effectum videndi*, criminal complaints against those ultimately responsible and a presumptive finding of death.

79. The Commission argued that the remedies mentioned by the Government were ineffective because of the internal conditions in the country during that period. It presented documentation of three writs of habeas corpus brought on behalf of Francisco Fairén Garbi and Yolanda Solís Corrales did not produce results. It also cited a criminal complaint that failed to

lead to the identification and punishment of those responsible. In the Commission's opinion, those legal proceedings exhausted domestic remedies as required by Article 46 (1) (a) of the Convention.

80. The Court will first consider the legal arguments relevant to the question of exhaustion of domestic remedies and then apply them to the case.

81. Article 46 (1) (a) of the Convention provides that, in order for a petition or communication lodged with the Commission in accordance with Articles 44 or 45 to be admissible, it is necessary

that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.

82. The same article, in the second paragraph, provides that this requirement shall not be applicable when

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

83. In its Judgment of June 26, 1987, the Court decided, *inter alia*, that "the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective" (Fairén Garbí and Solís Corrales Case, Preliminary Objections, *supra* 22, para. 87).

84. Concerning the burden of proof, the Court did not go beyond the conclusion cited in the preceding paragraph. The Court now affirms that if a State which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46 (2). It must not be rashly presumed that a State Party to the Convention has failed to comply with its obligation to provide effective domestic remedies.

85. The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction (American Convention, Preamble).

86. It is a legal duty of the States to provide such remedies, as this Court indicated in its Judgment of June 26, 1987, when it stated:

The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties

have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1) (Fairén Garbí and Solís Corrales Case, Preliminary Objections, *supra* 22, para. 90).

87. Article 46 (1) (a) of the Convention speaks of "generally recognized principles of international law." Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46 (2).

88. Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty.

89. Likewise, the Government alleged on various opportunities that the interested parties must request the exhumation of the cadaver found at La Montañita before the First Criminal Court of Tegucigalpa, which is in charge of the proceedings arising from the discovery of several bodies at that location. In this regard, the Court believes that a timely exhumation could have rendered important evidence, but it is not a remedy which, under Article 46 (1) (a) of the Convention, guarantees the human rights of a person presumably disappeared.

90. Of the remedies cited by the Government, habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty. The other remedies cited by the Government are either for reviewing a decision within an inchoate proceeding (such as those of appeal or cassation) or are addressed to other objectives. If, however, as the Government has stated, the writ of habeas corpus requires the identification of the place of detention and the authority ordering the detention, it would not be adequate for finding a person clandestinely held by State officials, since in such cases there is only hearsay evidence of the detention, and the whereabouts of the victim is unknown.

91. A remedy must also be effective --that is, capable of producing the result for which it was designed. Procedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied.

92. On the other hand, contrary to the Commission's argument, the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion.

93. It is a different matter, however, when it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality. The exceptions of Article 46 (2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case.

94. In the Government's opinion, a writ of habeas corpus does not exhaust the remedies of the Honduran legal system because there are other remedies, both ordinary and extraordinary, such as appeal, cassation, and extraordinary writ of amparo, as well as the civil remedy of a presumptive finding of death. In addition, in criminal procedures parties may use whatever evidence they choose. With respect to the cases of disappearances mentioned by the Commission, the Government stated that it had initiated some investigations and had opened others on the basis of complaints, and that the proceedings remain pending until those presumed responsible, either as principals or accomplices, are identified or apprehended.

95. In its conclusions, the Government stated that some writs of habeas corpus were granted from 1981 to 1984, which would prove that this remedy was not ineffective during that period. It submitted various documents to support its argument.

96. In response, the Commission argued that the practice of disappearances made exhaustion of domestic remedies impossible because such remedies were ineffective in correcting abuses imputed to the authorities or in causing kidnapped persons to reappear.

97. The Commission maintained that, in cases of disappearances, the fact that a writ of habeas corpus or amparo has been brought without success is sufficient to support a finding of exhaustion of domestic remedies as long as the person does not appear, because that is the most appropriate remedy in such a situation. It emphasized that neither writs of habeas corpus nor a criminal complaint were effective in the case of Francisco Fairén Garbí and Yolanda Solís Corrales. The Commission maintained that exhaustion should not be understood to require mechanical attempts at formal procedures; but rather to require a case-by-case analysis of the reasonable possibility of obtaining a remedy.

98. The record contains testimony of members of the Legislative Assembly of Honduras, Honduran lawyers, persons who were at one time disappeared, and relatives of disappeared persons, which purports to show that in the period in which the events took place, the legal remedies in Honduras were ineffective in obtaining the liberty of victims of a practice of enforced or involuntary disappearances (hereinafter "disappearance" or "disappearances"), ordered or tolerated by the Government. The record also contains dozens of newspaper clippings which allude to the same practice. According to that evidence, from 1981 to 1984 more than one hundred persons were illegally detained, many of whom never reappeared, and, in general, the legal remedies which the Government claimed were available to the victims were ineffective.

99. That evidence also shows that some individuals were captured and detained without due process and subsequently reappeared. However, in some of those cases, the reappearances were not the result of any of the legal remedies which, according to the Government, would have been effective, but rather the result of other circumstances, such as the intervention of diplomatic missions or actions of human rights organizations.

100. The evidence offered shows that certain lawyers who filed writs of habeas corpus were intimidated, that those who were responsible for executing the writs were frequently prevented from entering or inspecting the places of detention, and that occasional criminal complaints against military or police officials were ineffective, either because certain procedural steps were not taken or because the complaints were dismissed without further proceedings.

101. The Government had the opportunity to call its own witnesses to refute the evidence presented by the Commission, but failed to do so. Although the Government's attorneys contested some of the points urged by the Commission, they did not offer convincing evidence to support their arguments. The Court summoned as witnesses some members of the armed forces mentioned during the proceeding, but their testimony was insufficient to overcome the weight of the evidence offered by the Commission to show that the judicial and governmental authorities did not act with due diligence in cases of disappearances. The instant case is such an example.

102. The testimony and other evidence received and not refuted leads to the conclusion that, during the period under consideration, although there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities.

103. According to testimony given by Licentiate Linda Rivera de Toro before a notary public on January 7, 1987, "in the last months of 1981 and the first of the following year," a writ of habeas corpus was brought in behalf of Francisco Fairén Garbi and Yolanda Solís Corrales, and she was the judge appointed to carry out the investigation. She went to the customs post of Las Manos, on the border with Nicaragua, where she saw from the records that Francisco Fairén Garbi and Yolanda Solís Corrales had entered Honduran territory in a vehicle described in those records. Subsequently, and while preparing a dissertation on habeas corpus, she searched for the record and report on that case in the archives of the Supreme Court and was unable to find them.

104. Francisco Fairén Almengor, father of the person disappeared, testified he did not initiate judicial proceedings because he had been told the writs of habeas corpus were ineffective and had been advised it was better to create "international pressure" (testimony of Francisco Fairén Almengor. Also testimony of Elizabeth Odio Benito).

105. Based upon his knowledge of the conditions in Honduras in that period, the former Consul General of Costa Rica in Honduras testified that the intervention of an ordinary judge would have had very little result in obtaining the freedom of a political detainee in the hands of the military. He also mentioned that the steps to exhume a body could not be taken by the

Consulate of the Embassy, but only by the Ministry of Foreign Relations of Costa Rica (testimony of Antonio Carrillo Montes).

106. In its submission of October 31, 1986, the Government alleged that, despite having urged the father of Francisco Fairén Garbi to take advantage of "the ordinary judicial remedies," no steps were taken to exhaust them before presenting the case to the Commission, as the Commission admitted in Resolution 16/84. It added, moreover, that the Commission's allegation in Resolution 23/86, that the petitioner had no access to the domestic remedies or was impeded from exhausting them, was for the purpose of shifting the burden of proof from the petitioner to Honduras. The Government argued that the Commission deprived it of an important means of defense by admitting the petition without requiring the prior exhaustion of internal remedies.

107. The Government also maintained that the bringing of a writ of habeas corpus in behalf of Francisco Fairén Garbi and Yolanda Solís Corrales did not prove the exhaustion of domestic remedies. According to the Government, the proceeding was atypical in that it was carried out at a border post rather than in a jail or place of detention. Under those circumstances, it concluded, the Commission should not have admitted the petition, and was even less justified in submitting the case to the Court.

108. During the hearings on preliminary objections, the Commission argued that the exception to the rule of prior exhaustion found in Article 46 (2) of the Convention were applicable because due process did not exist in Honduras at that time. Access to internal remedies in cases of disappearances was impeded, and the remedies invoked in similar cases, without exception, had been unjustifiably delayed.

109. Given the special circumstances of this case, it is not necessary to determine whether steps were taken to exhaust the internal remedies of Honduras. In ruling on this point, the Court notes, first, that the Government did not contest admissibility by objecting to the failure to exhaust internal remedies when it received formal notice of the petition. Neither did it respond to the Commission's request for information. That fact, alone, is sufficient to overrule the objection, for the rule of prior exhaustion is a prerequisite established in favor of the State, which may waive its right, even tacitly, and this occurs, *inter alia*, when it is not timely invoked.

110. On the other hand, it must be kept in mind that, as a norm of international law and the logical correlative of the obligation to exhaust internal remedies, the rule is not applicable when there are no remedies. This principle is especially relevant in the instant case, in light of the repeated official statement that Francisco Fairén Garbi and Yolanda Solís Corrales were not in Honduran territory, either because they had never entered, or having entered, had left for Guatemala after a brief period in transit. Those statements were both formal and official and came from the highest authorities --the Ministry of Foreign Relations and the Embassy in Costa Rica. The Court notes that, in this fact situation, when the Government affirms it has carried out a careful investigation, leading to the conclusion that a person allegedly disappeared is not in its territory and has never been in its custody, the Government may be said to have recognized that there are no internal remedies.

111. Therefore, the Court rejects the objection of the Government of Honduras that internal remedies were not exhausted.

## VI.

112. For oral and documentary evidence offered by the Commission to prove that in Honduras, from 1981 through 1984, there were numerous cases of persons kidnapped and made to disappear, that the Armed Forces were responsible for these actions, and the judicial remedies of Honduras were ineffective in protecting human rights, especially the rights to life and the liberty and integrity of the person of those disappeared, the Court refers to the Velásquez Rodríguez (Judgment of July 29, 1988. Series C. No. 4, para. 82 et seq.) and Godínez Cruz judgments (Judgment of January 20, 1989. Series C. No. 5, para. 89 et seq.). The Court now considers the specific evidence of the Fairén Garbi and Solís Corrales Case.

113. According to his testimony, Francisco Fairén Almengor, father of the disappeared person, decided to travel to Honduras after a person claiming to be the chauffeur of the Honduran Embassy in San José showed him a photograph from "La Tribuna" newspaper of Honduras of a body found at the place called La Montañita. In the chauffeur's opinion, the body in the photo bore a strong resemblance to the witness' son. At the morgue of Tegucigalpa, Mr. Fairén was told the body had been buried in the city cemetery. Some women from the area of La Montañita told him and Antonio Carrillo Montes, then Consul General of Costa Rica in Honduras, several bodies had been found in that place, and they showed him a ravine of some 70 meters deep where, according to them, the bodies had been tossed (testimony of Francisco Fairén Almengor).

114. The Minister of Justice of Costa Rica at the time of the events reported she had received a group of persons, including the father of Francisco Fairén Garbi and the mother of Yolanda Solís Corrales, who informed her of the disappearance of their children in Honduras and requested her help. The witness said she helped by making inquiries of the Government of Honduras, which proved unfruitful, and by obtaining from Nicaragua the certification and photocopy of the immigration cards (testimony of Elizabeth Odio Benito).

115. A witness who was Consul General of Costa Rica in Honduras at that time told the Court that during the term of his appointment he heard of the disappearance of three Costa Ricans in Honduras: Francisco Fairén Garbi, Yolanda Solís Corrales and Eduardo Blanco. He added that an official of the Office of Immigration told him they were prisoners in El Manchén. The witness said he had accompanied Mr. Francisco Fairén Almengor while the latter was in Honduras (testimony of Antonio Carrillo Montes).

116. The Government of Nicaragua certified that Francisco Fairén Garbi and Yolanda Solís Corrales entered Honduras from Nicaragua by automobile at the Las Manos border post on December 11, 1981. It also sent certified photographs of the immigration cards. Having maintained various points of view, Honduras accepted that fact but pointed out that, because of the hour of entry (4:30 p.m.), it was noted in the immigration statistics as the following day.

117. The Commission submitted receipt No. 318558, dated in El Florido on December 12, 1981. At the bottom of the receipt appears the signature "Francisco Fairén G." and it shows a

temporary tourist entry into Guatemala of a "wine-beige" colored, Opel automobile with Costa Rican license plate 39991. In his opinion of August 12, 1988, the expert appointed by the President concludes that the signature of Francisco Fairén Garbi is genuine.

118. By letter of March 2, 1988, the Ministry of Internal Affairs of Guatemala informed the Court that, in the "opinion" of that government, Francisco Fairén Garbi and Yolanda Solís Corrales "never entered Guatemala," but it points out both names were on the departure lists of the Valle Nuevo border post (Las Chinamas) for December 14, 1981. The Guatemalan government says "that list appears to be signed by Oscar Gonzalo Orellana Chacón, although the signature corresponds to that of José Víctor García Aguilar," but it does not say whether it considers them genuine.

119. The Government of Costa Rica forwarded to the Court certified case file No. 9243 which contains a report signed on June 14, 1982, by Ricardo Granados, Head of the Criminal Section of the Office of Judicial Investigations (OIJ) of Costa Rica. The report is addressed to the Head of the "Ministerio Público" of that country and concerns the investigation requested regarding the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales. According to that report, in a search of the home of Mario Alberto Monge Fernández, who had apparently seen them on the day of their departure, the investigator found documents and other papers which suggested Francisco Fairén Garbi and Yolanda Solís Corrales had probably taken medical supplies to El Salvador and Guatemala, in which case their destination would not have been Mexico. Nevertheless, witnesses Francisco Fairén Almengor, Elizabeth Odio, and Antonio Carrillo affirmed that neither Francisco Fairén Garbi nor Yolanda Solís Corrales were political activists (testimony of Francisco Fairén Almengor, Elizabeth Odio, and Antonio Carrillo). The Commission also maintained that they had no political background which could have aroused the suspicion of the Government of Honduras.

120. Witness Florencio Caballero affirmed, initially, that he had no knowledge of the case of the Costa Rican citizens Francisco Fairén Garbi and Yolanda Solís Corrales, although, later, in another part of his testimony, he said he remembered the name Francisco Fairén Garbi from a Battalion 316 list of persons kidnapped (testimony of Florencio Caballero).

## VII.

121. The testimony and documentary evidence, corroborated by press clippings, presented by the Commission, tend to show:

- a. That there existed in Honduras from 1981 to 1984 a systematic and selective practice of disappearances, carried out with the assistance or tolerance of the government;
- b. That Francisco Fairén Garbi and Yolanda Solís Corrales were presumably victims of that practice;
- c. That in the period in which those acts occurred, the legal remedies available in Honduras were not appropriate or effective to guarantee his rights to life, liberty and personal integrity.

122. The Commission offered the testimony of Guatemalan citizens Israel Morales Chinchilla, Jorge Solares Zavala, Mario Méndez Ruiz, and Fernando A. López Santizo to prove that

Francisco Fairén Garbi and Yolanda Solís Corrales did not leave Honduras, or to cast doubt upon the veracity of the certificates Guatemala issued concerning their entry into its territory. According to the Commission, those witnesses did not appear, either because they could not be found or because of personal reasons.

123. The Government, in turn, submitted documents and based its argument on the testimony of three members of the Honduran Armed Forces, two of whom were summoned by the Court because they had been identified in the proceedings as directly involved in the general practice referred to. This evidence may be summarized as follows:

- a. The testimony purports to explain the organization and functioning of the security forces accused of carrying out the specific acts and denies any knowledge of or personal involvement in the acts of the officers who testified;
- b. Some documents purport to show that no civil suit had been brought to establish a presumption of the death of Francisco Fairén Garbi and Yolanda Solís Corrales;
- c. Various certificates, to show that Francisco Fairén Garbi and Yolanda Solís Corrales entered Honduras and left for Guatemala on the following day through the customs post at El Florido, and, subsequently, left Guatemala through the Valle Nuevo border post for El Salvador;
- d. Other documents purport to prove that the Supreme Court of Honduras received and acted upon some writs of habeas corpus and that some of those writs resulted in the release of the persons on whose behalf they were brought.

124. At its request, the Court obtained:

- a) An expert opinion on the signature "Francisco Fairén G." found on the receipt for the entry of a vehicle into Guatemala, which the Commission submitted to the Court "in order to help to establish the facts" (supra 37);
- b) A certificate of the Government of El Salvador concerning the prerequisites in December, 1981, for a Costa Rican to enter El Salvador and stating whether Francisco Fairén Garbi and Yolanda Solís Corrales had entered that country in that time period (supra 43 and 44);
- c) A statement of October 2, 1987, of the Government of Guatemala, which reiterates that Francisco Fairén Garbi and Yolanda Solís Corrales entered Guatemala from Honduras on December 12, 1981, through the El Florido border post, and left for El Salvador on December 14, 1981, through the Valle Nuevo border post (supra 4. d)).

## VIII.

125. Before weighing the evidence, the Court must address some questions regarding the burden of proof and the general criteria considered in its evaluation and finding of the facts in the instant proceeding.

126. Because the Commission is accusing the Government of the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales, it, in principle, should bear the burden of proving the facts underlying its petition.

127. The Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove that an individual has been disappeared.

128. The Government did not object to the Commission's approach. Nevertheless, it argued that neither the existence of a practice of disappearances in Honduras nor the participation of Honduran officials in the alleged disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales had been proven.

129. The Court finds no reason to consider the Commission's argument inadmissible. If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this.

130. The Court must determine what the standards of proof should be in the instant case. Neither the Convention, the Statute of the Court nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment (cfr. *Corfu Channel, Merits, Judgment*, I.C.J. Reports 1949; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, paras. 29-30 and 59-60).

131. The standards of proof are less formal in an international legal proceeding than in a domestic one. The latter recognize different burdens of proof, depending upon the nature, character and seriousness of the case.

132. The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner.

133. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts.

134. Since the Court is an international tribunal, it has its own specialized procedures. All the elements of domestic legal procedures are therefore not automatically applicable.

135. The above principle is generally valid in international proceedings, but is particularly applicable in human rights cases.

136. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.

## IX.

137. Although the Commission questioned the veracity of the Honduran and Guatemalan certificates and documents submitted to prove the travel of Francisco Fairén Garbi and Yolanda Solís Corrales from Honduras to Guatemala, it did not offer any evidence in support of its position.

138. The expert appointed by the President found the signature "Francisco Fairén G." on the entry receipt of December 12, 1981, to be genuine.

139. During the hearings, the Government objected, under Article 37 of the Rules of Procedure, to the testimony of witnesses called by the Commission. By decision of October 6, 1987, the Court rejected the challenge, holding as follows:

b. The objection refers to circumstances under which, according to the Government, the testimony of these witnesses might not be objective.

c. It is within the Court's discretion, when rendering judgment, to weigh the evidence.

d. A violation of the human rights set out in the Convention is established by facts found by the Court, not by the method of proof.

f. When testimony is questioned, the challenging party has the burden of refuting that testimony.

140. During cross-examination, the Government's attorneys attempted to show that some witnesses were not impartial because of ideological reasons, origin or nationality, family relations, or a desire to discredit Honduras. They even insinuated that testifying against the State in these proceedings was disloyal to the nation. Likewise, they cited criminal records or pending charges to show that some witnesses were not competent to testify.

141. It is true, of course, that certain factors may clearly influence a witness' truthfulness. However, the Government did not present any concrete evidence to show that the witnesses had not told the truth, but rather limited itself to making general observations regarding their alleged incompetency or lack of impartiality. This is insufficient to rebut testimony which is fundamentally consistent with that of other witnesses. The Court cannot ignore such testimony.

142. Moreover, some of the Government's arguments are unfounded within the context of human rights law. The insinuation that persons who, for any reason, resort to the Inter-American system for the protection of human rights are disloyal to their country is unacceptable and cannot

constitute a basis for any penalty or negative consequence. Human rights are higher values that "are not derived from the fact that (an individual) is a national of a certain state, but are based upon attributes of his human personality" (American Declaration of the Rights and Duties of Man, Whereas clauses, and American Convention, Preamble). Contrary to the above insinuations, international systems for the protection of human rights are based on the premise that the State is at the service of the community and not the reverse. It is violations of human rights that are subject to punishment: this can never be true for resorting to those systems or for contributing to the application of the law by them.

143. Neither is it sustainable that having a criminal record or charges pending is sufficient in and of itself to find that a witness is not competent to testify in Court. As the Court ruled, in its decision of October 6, 1987, in the instant case,

under the American Convention on Human Rights, it is impermissible to deny a witness, a priori, the possibility of testifying to facts relevant to a matter before the Court, even if he has an interest in that proceeding, because he has been prosecuted or even convicted under internal laws.

144. By communication of March 2, 1988, the Ministry of Internal Affairs of Guatemala corrected a previous answer regarding the immigration records of Francisco Fairén Garbi and Yolanda Solís Corrales. Although it is true that the communication does not come from the Ministry of Foreign Relations, there is no reason not to consider it official. It so happens, however, that the information submitted is contradictory. While it categorically affirms that neither of the Costa Ricans entered Guatemala, it offers no explanation for the two previous certificates which state the contrary; it also recognizes that the names Francisco Fairén Garbi and Yolanda Solís Corrales appear in the list of departures toward El Salvador, and does not explain how such an aberrant event could occur if those persons never entered Guatemala. Although it makes garbled statements about the signatures on those lists, it does not question their authenticity (supra 39).

145. Many of the press clippings offered by the Commission cannot be considered as documentary evidence as such. However, many of them contain public and well-known facts which, as such, do not require proof; others are of evidentiary value, as has been recognized in international jurisprudence (Military and Paramilitary Activities in and against Nicaragua, supra 130, paras. 62-64), insofar as they textually reproduce public statements, especially those of high-ranking members of the Armed Forces, of the Government, or even of the Supreme Court of Honduras, such as some of those made by the President of the latter. Finally, others are important as a whole insofar as they corroborate testimony regarding the responsibility of the Honduran military and police for disappearances.

X.

146. In the *Velásquez Rodríguez and Godínez Cruz* judgments (supra 112, paras. 149-158 and 157-167, respectively), the Court defined the legal nature of disappearances and the elements which characterize that phenomenon; it analyzed how international law at the universal and the regional level, has faced the question; and it identified the norms of the Convention violated by

the practice of forced or involuntary disappearances. Without repeating those developments in toto, the Court will summarize its opinion in that regard.

147. The phenomenon of involuntary disappearances is a complex form of violation of human rights that must be understood and faced as an integral problem. It is a multiple and continuing violation of many rights recognized by the Convention, which the States Parties are obligated to respect and guarantee.

148. The forced disappearance of a person is a case of arbitrary deprivation of liberty which also violates the right of every person to be taken without delay before a judge and to bring the appropriate remedies to ascertain the legality of the measures taken. In this sense, it is a violation of Article 7 of the Convention.

149. Prolonged and coercive isolation is, by nature, cruel and inhuman treatment, harmful to the mental and moral integrity of the person and the right to dignity inherent to the human being. Thus, it also violates Article 5 of the Convention.

150. The practice of forced disappearances has often implied the secret execution of prisoners, without a trial, and the hiding of their bodies. That violation of the right to life infringes on Article 4 of the Convention.

151. This practice is a radical departure from the Pact of San José because it implies the crass abandonment of the values that emanate from human dignity and of the fundamental principles on which the inter-American system and the Convention are based.

152. The existence of this practice presupposes renunciation of the duty to organize the state apparatus in such a manner as to guarantee the rights recognized by the Convention. Actions calculated to bring about involuntary disappearances, to tolerate them, to avoid adequate investigation, or the punishment, as the case may be, of those responsible, constitute the violation of the duty to respect the rights recognized by the Convention and to guarantee their free and full exercise (Art. 1 (1)). The court refers, in this regard, to the two judgments previously cited (Velásquez Rodríguez Case, supra 112, paras 159-181, Godínez Cruz Case, supra 112, paras. 168-191).

## XI.

153. The Court now turns to the relevant facts that it finds to have been proven. They are as follows:

- a. During the period 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras, and many were never heard from again (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).
- b. Those disappearances followed a similar pattern. The victims were first followed and kept under surveillance and then kidnapped by force, often in broad daylight and in public places, by armed men in civilian clothes and disguises, who acted with apparent impunity and who used vehicles without any official identification, with tinted windows and with false license

plates or no plates (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

c. It was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

d. The disappearances were carried out in a systematic manner, regarding which the Court considers the following circumstances particularly relevant:

i. The victims were usually persons whom Honduran officials considered dangerous to State security (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Inés Consuelo Murillo, José Gonzalo Flores Trejo, Zenaida Velásquez, César Augusto Murillo and press clippings). In addition, the victims had usually been under surveillance for long period of time (testimony of Ramón Custodio López and Florencio Caballero);

ii. The arms employed were reserved for the official use of the military and police, and the vehicles used had tinted glass, which requires special official authorization. In some cases, Government agents carried out the detentions openly and without any pretense or disguise; in others, government agents had cleared the areas where the kidnappings were to take place and, on at least one occasion, when government agents stopped the kidnappers they were allowed to continue freely on their way after showing their identification (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Florencio Caballero);

iii. The kidnappers blindfolded the victims, took them to secret, unofficial detention centers and moved them from one center to another. They interrogated the victims and subjected them to cruel and humiliating treatment and torture. Some were ultimately murdered and their bodies were buried in clandestine cemeteries (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Florencio Caballero, René Velásquez Díaz, Inés Consuelo Murillo and José Gonzalo Flores Trejo);

iv. When queried by relatives, lawyers and persons or entities interested in the protection of human rights, or by judges charged with executing writs of habeas corpus, the authorities systematically denied any knowledge of the detentions or the whereabouts or fate of the victims. That attitude was seen even in the cases of persons who later reappeared in the hands of the same authorities who had systematically denied holding them or knowing their fate (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings);

v. Military and police officials as well as those from the Executive and Judicial Branches either denied the disappearances or were incapable of preventing or investigating them, punishing those responsible, or helping those interested discover the whereabouts and fate of the victims or the location of their remains. The investigative committees created by the Government and the Armed Forces did not produce any results. The judicial proceedings brought were processed slowly with a clear lack of interest and some were ultimately dismissed (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings).

154. Francisco Fairén Garbi and Yolanda Solís Corrales entered Honduran territory at the Las Manos border post, in the Department of El Paraíso, on December 11, 1981. That is the last reliable information on their whereabouts. Despite initial contradictions, Honduran authorities subsequently admitted that the two disappeared persons had entered their territory (Report of the Government of March 8, 1982, on the certificate of the Secretary General of Immigration of Honduras, February 11, 1982).

155. There are many contradictions regarding the presence of Francisco Fairén Garbi and Yolanda Solís Corrales in Honduras and their departure from Honduras territory. Initially, the Government of Honduras and Guatemala denied those persons had crossed the border between the two countries. Then they affirmed they had entered Guatemala on December 12, 1981, and Guatemalan authorities added that they had left for El Salvador on December 14 of the same year. The Government of Guatemala ratified the latter version on October 6, 1987, but was later contradicted in part by its Minister of Internal Affairs in a communication of March 2, 1988. The Minister denied they had entered Guatemala, but admitted their names appeared in the immigration lists of departures for El Salvador on December 14, 1981. It also made garbled statements concerning the signatures on those lists. Considered together, those facts are equivocal, but their investigation and clarification are hindered by the fact, among others, that Guatemala and El Salvador are not parties to the case.

156. On the other hand, the Court notes that some evidence tends to show that the two Costa Ricans may have continued their trip from Honduras to Guatemala, and possibly, to El Salvador. That evidence is the following:

- a) According to information furnished by a Costa Rican official to the "Ministerio Público" of his country, the destination of the travelers could have been Guatemala.
- b) Within the contradictions already emphasized, the version most insistently maintained by the Guatemalan authorities has been to recognize the Costa Ricans' entry into that country. That was so certified over a period of years and by two successive governments. The recent denial, on the other hand, does not explain the reason for the earlier position, nor how they could have left Guatemala for El Salvador when they allegedly did not enter Guatemala.
- c) There is an automobile entry receipt, from Honduras to Guatemala, with the signature of Francisco Fairén Garbi, submitted to the Court by the Commission who is the plaintiff, declared genuine in the handwriting expert's report of August 12, 1988.

157. There are many insurmountable difficulties of proof in establishing whether these disappearances occurred in Honduras and whether that State is legally responsible. As the Court has already said, it has been fully shown that, in Honduras in the period in which those events occurred, there was a repressive practice of forced disappearances for political motives. That practice is a violation of the Convention and could serve as a principal element, together with other corroborative evidence, to create a legal presumption that certain persons were the victims of that practice. However, in the absence of other evidence, whether circumstantial or indirect, the practice of disappearances is insufficient to prove that a person whose whereabouts is unknown was the victim of that practice.

158. There is insufficient evidence to relate the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales to the governmental practice of disappearances. There is no evidence that Honduran authorities had them under surveillance or suspicion of being dangerous persons, nor that were arrested or kidnapped in Honduran territory. That one of them --Francisco Fairén Garbi-- could have been in a secret detention center, is mentioned in the deposition of a witness who first affirmed he had no knowledge of the case. When questioned again, he appeared to recall having seen the name of Francisco Fairén on a list of disappeared persons under detention (testimony of Florencio Caballero). Other similar information was a mere reference and very circumstantial (testimony of Antonio Carrillo Montes).

159. Although the Government of Honduras has incurred in many contradictions, the failure to investigate this case, which it explains by virtue of the Guatemalan certificate that those disappeared had entered in its territory, is insufficient --in the absence of other evidence-- to create a legal presumption that the Honduran Government is responsible for those disappearances.

160. The lack of diligence, approaching obstructionism, in not responding to repeated requests from the Government of Costa Rica, from the father of one of the victims, the Commission or the Court, regarding the location and exhumation of the "cadaver of La Montañita," made the discovery of that body impossible and could support a presumption of government responsibility (Order of January 20, 1989). Nevertheless, in view of the other evidence, that presumption alone does not authorize, and even less requires, a finding that Honduras is responsible for the disappearance of Francisco Fairén Garbi. The Court recognizes, of course, that had the body been found and identified as that of Francisco Fairén Garbi, it would have been a significant contribution to the establishment of the truth. The Government's action deprived the Court of that possibility. It must, however, be recognized that had the cadaver been exhumed and shown not to be that of Francisco Fairén Garbi, that alone would not have been sufficient to absolve Honduras of all responsibility in his disappearance. Because that presumption would not resolve the many contradictions arising from probative elements which point in a different direction, the Court cannot rest its decision solely upon the presumption.

161. Article 1 (1) of the Convention obligates the States Parties to "respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . ." The Court does not now consider it necessary to analyze the meaning of the expression "subject to their jurisdiction." That is unnecessary to decide the instant case because it has not been proven that the State of Honduras used its power to violate the rights of Francisco Fairén Garbi and Yolanda Solís Corrales. Although this proceeding has proven the existence of a practice of disappearances carried out or tolerated by Honduran authorities between the years 1981 and 1984, it has not been proven that the disappearances in the instant case occurred within the framework of that practice, or is otherwise imputable to the State of Honduras.

## XII.

162. With no pleading to support an award of costs, it is not proper for the Court to rule on them (Art. 45 (1), Rules of Procedure).

XIII.

163. THEREFORE,

THE COURT,

unanimously

1. Rejects the preliminary objection interposed by the Government of Honduras alleging the inadmissibility of the case for the failure to exhaust domestic legal remedies.

unanimously

2. Declares that in the instant case it has not been proven that Honduras is responsible for the disappearances of Francisco Fairén Garbi and Yolanda Solís Corrales.

unanimously

3. Does not find it necessary to render a decision concerning costs.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this fifteenth day of March, 1989.

Rafael Nieto-Navia  
President

Héctor Gros-Espiell  
Rodolfo E. Piza E.  
Thomas Buergenthal  
Pedro Nikken  
Héctor Fix-Zamudio  
Rigoberto Espinal-Irías

Charles Moyer  
Secretary